



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

CASE NO: 2026-030642

In the matter between:

NEDBANK LIMITED

Applicant

and

**BARRS PHARMACEUTICALS (PTY) LTD
(IN BUSINESS RESCUE)**

First Respondent

BARRY CLAUDE URBAN N.O.

Second Respondent

AELIN SOUTH AFRICA (PTY) LTD

Third Respondent

HETERO DRUGS SOUTH AFRICA (PTY) LTD

Fourth Respondent

**ALL AFFECTED PERSONS OF BARRS
PHARMACEUTICALS (PTY) LTD
(IN BUSINESS RESCUE)**

Fifth Respondent

Coram: Holderness J

Heard: 9 March 2026

Delivered: 27 March 2026

JUDGMENT

HOLDERNESS J

[1] Underpinning one of the central bases upon which the applicant seeks relief in this matter is the provision in section 134(3) of the Companies Act 71 of 2008 (the Act) which stipulates *inter alia* that once a company has commenced with business rescue proceedings, the business rescue practitioner may only dispose of property over which a creditor has security or title interest, with the consent of such creditor.

[2] The court is seized with Part B of an application in terms of which the applicant, Nedbank Limited (Nedbank or the applicant), seeks to:

(1) Set aside the result of the vote of the meeting held on 28 January 2026 in terms of section 151 of the Act (the section 151 meeting) at which the business rescue plan proposed by the second respondent, Mr. Barry Claude Urban N.O the appointed business rescue practitioner for the second respondent, Barrs Pharmaceuticals (Pty) Ltd (in business rescue) (Barrs or the company), was purportedly adopted.

(2) Set aside the business rescue plan adopted at the section 151 meeting

[3] Only the second respondent, Mr. Barry Claude Urban N.O (the respondent or the practitioner) opposes the relief sought.

[4] Barrs is wholly owned by the embattled Avacare (Pty) Ltd (Avacare). Avacare and Barrs are suppliers of antiretroviral (ARV) drugs, including to the Department of Health.

[5] Avacare was placed in business rescue in early December 2025. The respondent is also the appointed business rescue practitioner for Avacare.

[6] The issues which fall to be determined are whether:

(a) The plan was adopted on the strength of votes that were irregularly and unlawfully recorded, in particular:

- (i) The voting interest attributable to the third respondent, Aelin South Africa (Pty) Ltd (“Aelin”).
- (ii) The proxy vote exercised by the practitioner on behalf of Avacare South Africa (Pty) Ltd (in business rescue) (Avacare) in respect of both creditor claims and its shareholding in Barrs, notwithstanding the cession of those claims and shares to Nedbank.
- (iii) The failure to recognise the full extent of Nedbank’s claims and voting interest.

(b) The plan contravenes the peremptory provisions of sections 134(3) and 136(2) of the Act and is accordingly unlawful.

(c) The plan, once adopted and implemented, will permanently destroy Nedbank’s rights as a secured creditor, in contravention of sections 152(4) and 154(2) of the Act.

[7] A finding in favour of Nedbank on any one of these issues is dispositive of the relief sought for the setting aside of the vote and the adopted plan.

Background facts

[8] In December 2025 Barrs was indebted to Nedbank in a total amount of R47,884,244.38 in respect of eight banking facilities.¹

¹ As reflected in a certificate of balance issued on 15 December 2025.

[9] It is not apparent from the papers when Barrs was placed in business rescue. For present purposes, it is however clear that Nedbank first received notification of Mr. Urban's appointment as business rescue practitioner on 18 December 2025.

[10] On 7 January 2026, Nedbank's attorney of record, Mr. Neil Grundlingh of STBB Attorneys (Mr. Grundlingh) addressed a letter to the practitioner in which he confirmed, *inter alia*, that on 19 December 2025, Nedbank requested a meeting with him. The practitioner declined the request. He informed Nedbank that the first meeting of creditors would be held on 31 December 2025. On the same day, Nedbank provided the practitioner with the particulars of its claims and the securities it held. This was not acknowledged, nor was a follow up email addressed to the practitioner on 30 December 2025.

[11] Nedbank holds the following security for its claims:

- (a) A cession of all present and future debtors of Barrs (the cession of debtors).
- (b) First and second notarial bonds over all movable assets of Barrs up to a value of R15,000,000.00.
- (c) A suretyship executed by Avacare in favour of Nedbank limited to R50,000,000 (the suretyship).
- (d) A subordination of Avacare's claims against Barrs in favour of Nedbank (the subordination agreement).
- (e) A cession of Avacare's shares in favour of Nedbank (the cession of shares).
- (f) Ownership of the equipment which is the subject matter of the instalment sale agreements (the equipment).

[12] The practitioner has admitted that Nedbank's security includes the cession of debtors and the notarial bonds, and that Nedbank owns the equipment.

[13] The first meeting of creditors was held on 31 December 2025. At the meeting, Nedbank raised concerns that its claims have not been formally acknowledged.

[14] On 7 January 2026, Mr. Grundlingh requested the practitioner to confirm that Nedbank's claims had been received, accepted, and were regarded as having been proved. He further requested written determination of Nedbank's claims in terms of section 145(5)(c) of the Act, and particulars of all amounts owing by Barrs to Avacare, and of Barr's debtors which had been ceded to Nedbank.

[15] On 13 January 2026, in response to a request from the practitioner's attorney received on the preceding day, Mr. Grundlingh provided the requested shareholder resolutions and Barr's board resolution

[16] On 13 January 2026, the practitioner circulated the first plan to affected parties and advised that the section 151 meeting to consider the plan would be held electronically on 21 January 2026.

[17] On 19 January 2026, Mr. Grundlingh dispatched a further letter to the practitioner's attorneys expressly recording that Nedbank did not consent to the utilisation of the debtors which had been ceded to it and that the first plan eroded its security and was contrary to section 134(3) of the Act.

[18] Nedbank demanded adherence to section 145(5)(c) of the Act, by the appointment of a suitably qualified independent party to appraise and value Avacare's voting interest and advised that it intended voting qua cessionary in respect of Avacare's claims against Barrs once the appraisal and valuation of the appraisal, and valuation of Avacare's interest had been completed.

[19] Nedbank raised various points at the section 151 meeting, which was then adjourned by the practitioner to 27 January 2026 for the first plan to be revised. The practitioner further adjourned the meeting to 10h00 on 28 January 2026. No reasons were given for the adjournment.

[20] An amended business rescue plan was published by the practitioner on 26 January 2026 (the plan).

[21] The practitioner corrected a material error in the plan pertaining to the alleged book value of the plant and equipment of Barrs. Significantly, the plan included the third respondent, Aelin, as an independent creditor with a claim of R80,000,000.

The purported approval of the amended plan

[22] Nedbank voted against the approval of the plan. Aelin voted in favour of the approval of the plan. The practitioner purported to vote on behalf Avacare in favour of the approval of the plan, notwithstanding Nedbank's contention that it was entitled to exercise Avacare's voting interest and accordingly voted against the approval of the plan.

[23] As the proposed plan would alter the rights of holders of Barrs' securities (by way of the amendment of Barrs' Memorandum and Incorporation and the dilution of Avacare's shareholding), a vote was called for the holders of the company's securities to approve the plan.

[24] Avacare was the sole shareholder of the shares in Barrs. No other securities had been issued by the company. Avacare was thus the only party who could vote on behalf of the holders of the company's securities. It is perhaps for this reason that the practitioner again purported to vote on behalf of Avacare. The plan was consequently declared to have been approved.

[25] Nedbank's stated stance is that the practitioner could not vote on behalf of Avacare as the shareholder in Barrs, as Avacare's shares had been ceded to Nedbank.

The plan

[26] The plan contemplated a dividend of 41.48 cents to secured creditors, of which Nedbank is one.

[27] The plan, which runs to approximately 259 pages, provides *inter alia*, for:

- (a) The cancellation of any contract executed in relation to any kind of security arrangement.
- (b) The compromise of all claims against the company in accordance therewith.
- (c) The rights of all creditors to be confined to the right to claim payment in terms of the plan (a reiteration of section 154(2) of the Act).
- (d) The collection of Barr's debtors by the practitioner and the subsequent payment of the proceeds thereof to all proven creditors on a pro rata basis as an 'agterskot', limited to the amounts actually recovered.

The 27 February 2026 meeting

[28] In a further affidavit admitted into evidence with the leave of the court, such admission not being opposed by Nedbank, Mr. Urban stated that an urgent meeting was held on 27 February 2026 to vote on four distinct amendments to the plan, including the substitution of Aelin with the fourth respondent, Hetero Drugs South Africa (Pty) Ltd (Hetero), and the tender of R32,500,000 as payment to Nedbank.

[29] Mr. Urban averred that the creditors exercised their voting rights at the meeting and that the only amendment which failed to pass the vote by the majority of creditors was for the postponement of the time periods for payment of dividends to creditors as provided for in the plan.

[30] Mr. Urban pointed out that the amendments to the approved plan was passed by a majority vote of the creditors notwithstanding the fact that the Avacare loan account, to which the applicant lays claim in its founding papers, abstained from the voting. From this he concluded that it is clear that the approved plan would likewise have been adopted by a majority vote of the creditors had the Avacare loan account abstained in a similar manner when the plan was voted on and approved.

[31] On 27 February 2026, shortly after the urgent meeting was held, Dolamo J granted an order in terms of Part A of this application, interdicting the continued implementation of the plan.

[32] The practitioner confirmed in the affidavit that almost all of Aelin's post-commencement funding had been returned to it. It must follow that the voting interest should never have been calculated on the basis of the attribution of R80,000, 000 voting interest to Aelin and that arising from this, the calculation thereof was fundamentally incorrect.

[33] Nedbank argued that the failure to pass the amendment relating to the postponement of the payment dates (due to not achieving the required majority) underscores its assertion that the creditors, when properly consulted, do not unanimously support the practitioner's proposals, and further undermines the respondents' repeated assertion that 132 of 134 creditors support the plan without qualification.

[34] Against this backdrop, it is convenient to turn to consider the submissions advanced by Nedbank in support of the relief in Part B.

Nedbank's contentions

Section 134(3) of the Act

[35] Nedbank submits that the adoption of the plan falls to be set aside on the following grounds:

- (a) The plan was adopted on the strength of votes that were irregularly and unlawfully recorded, in particular: (i) the voting interest attributed to Aelin; (ii) the proxy vote exercised by the practitioner on behalf of Avacare in respect of both its creditor claims and its shareholding in Barrs, in the face of the cession of those claims and shares to Nedbank, and (iii) the failure to recognise the full extent of Nedbank's claims and voting interest.
- (b) The plan contravenes the peremptory provisions of sections 134(3) and 136 (2) of the Act and is accordingly unlawful.

- (c) The plan, once adopted and implemented, will permanently destroy Nedbank's rights as a secured creditor, in contravention of sections 152(4) and 154(2) of the Act.²

[36] Nedbank needs only to succeed in respect of these separate and distinct grounds to set aside the plan.

[37] Section 134(3) of the Act provides that:

'If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must—

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly –

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.'

[38] In essence, the plan contemplates a collection of Barrs' debtors for the benefit of all proven creditors of Barrs, who are to be paid an 'initial dividend' from this collection of debtors. The debtors which are not collected initially are treated as 'Excluded Assets.' These Excluded Assets are then ceded to Barrs' creditors and, seemingly immediately thereafter, ceded to the practitioner.

[39] In *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others*³ the court held that a security cession of future book debts is, *ex lege*, complete and

² Section 152(4) provides that: 'A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—

(a) was present at the meeting.

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.'

Section 154(2) provides that: 'If a business rescue plan has been approved and implemented in accordance with this Chapter,

a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.'

effective by mere initial agreement. When the book debts come into existence at a future date then, without any further obligation of the cedent (*Barrs in casu*), they become the property of the cessionary (Nedbank).

[40] Section 136(2A)(c) of the Act expressly provides that if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of section 134 of the Act, with respect to any proposed disposal of property by the company.

[41] Notably, in *Diener N.O. v Minister of Justice and Others*⁴ (*Diener*), the Supreme Court of Appeal (“the SCA”) held:

‘From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance, s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person’s prior consent, unless the proceeds of the disposal ‘would be sufficient to fully discharge the indebtedness protected by that person’s security’; and then the company must pay the person promptly up to the company’s indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others*,⁵ namely that the ‘purpose and context’ of business rescue ‘are not aimed at the destruction of the rights of a secured creditor.’

[42] The applicant cited *National Union of Mine Workers of SA and others v VR Laser Services (Pty) Ltd and Others*⁶ where Vally J, following *Diener*, crystallised the position of secured creditors in terms of section 134(2) of the Act as follows:

‘[36] The provision is robust and firm. Leaving no room for doubt, the legislature has made crystal clear its intention. The security in an asset obtained prior to the

³ *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) paras 42 – 47.

⁴ *Diener N.O. v Minister of Justice and Others* (926/2016) [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) (1 December 2017) para 44.

⁵ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) para 18.

⁶ *National Union of Metalworkers of SA and Others v VR Laser Services (Pty) Ltd and Others* (19419/19) [2020] ZAGPJHC 47; [2020] 2 All SA 536 (GJ) (10 March 2020).

commencement of the BR proceedings can only be removed with the written consent of the creditor holding the security, or if the debt associated with the security is fully liquidated, or the security is replaced in full to the satisfaction of the said creditor. The subsection ensures that as far as the particular encumbered asset is concerned the creditor, in whose favour the encumbrance exists, will not lose the protection granted by the encumbrance without his/her consent or without his/her debt being liquidated. The protection granted to such a creditor is all encompassing, or to put it differently fully proofed against all eventualities. Non-secured creditors whose debts arose pre the commencement of BR proceedings are not so privileged.

[37] The protected and privileged status of the secured creditor is consistent with the common law as it existed before the introduction of BR. BR did not interfere with the common law principle; it simply ensured that the BR process does not dilute or diminish it. Section 134 of the Act simply clothed the existing common law with statutory approval.’ (The court then quoted the passage from *Diener* referred to above.)

Section 136(2) of the Act

[43] Section 136(2) of the Act provides that, during business rescue proceedings, subject to subsection (2A), and despite any provision of an agreement to the contrary, the practitioner may entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an 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 apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

[44] Section 136(2)(b), which requires a court order for the cancellation of an agreement contemplated therein, is peremptory.

[45] The plan provides for the cancellation of these agreements, notwithstanding the fact that the practitioner has failed to apply to court for the cancellation of the instalment sale agreements between Nedbank and Barrs.

[46] Nedbank accordingly submits that the plan falls to be set aside on this basis alone, and that the respondents' contention that Nedbank's right over the equipment is one of ownership, and that a business rescue plan cannot transfer ownership of property is self-defeating.

[47] Mr. Manca SC, who appeared on behalf of Nedbank together with Mr. Jonker, submitted that if the equipment belongs to Nedbank by virtue of the reservation of ownership clause, then the practitioner's intention to use the equipment without effecting payment to Nedbank is all the more egregious.

[48] Nedbank contends that the adoption of the plan at the section 151 meeting was materially tainted by at least three distinct voting irregularities, which independently rendered the adoption unlawful. I turn to deal with each alleged irregularity.

(i) *The Aelin vote*

[49] Aelin's vote as a post-commencement funding (PCF) creditor with a voting interest of R80,000,000 was, according to Nedbank, decisive in securing the plan's adoption.

[50] Nedbank contends that the PCF received from Aelin does not constitute genuine PCF as contemplated in the Act, as in substance the monies were advanced to obtain an equity stake of 78% and that it is accordingly not an independent creditor (as the proposed investment was to obtain a controlling interest in Barrs). R79,500,000 of the PCF from Aelin was 'ringfenced' for an equity investment dependent on the adoption of the plan.

[51] It is common ground that the R80, 000, 000 was not utilised for operations by the practitioner, and that R71, 000, 000 was repaid to Aelin as the creditors (apart from Nedbank and one other) voted to accept the proposal by Hetero.

[52] Section 135(1) of the Act defines PCF as financing provided to fund the company's post-commencement operations. Arising from the foregoing, Nedbank asserts that Aelin's 'legitimate voting interest' was, at most, R500,000.

[53] Nedbank contends that the acceptance of Aelin as an independent PCF creditor (with a claim greater than any of the true independent creditors) clearly demonstrates how voting in business rescue proceedings may be manipulated:

- (a) A third party, such as Aelin, advances funds to a practitioner and concludes a pro-forma post commencement finance agreement with the practitioner.
- (b) The third party acquires a voting right (which is determinative of the voting in the business rescue proceedings), however, the funds are never utilised for post commencement finance nor to acquire equity in the company.
- (c) The funds are then returned to the third party following the conclusion of the business rescue proceedings.

[54] Based on the voting record created by Nedbank's attorneys (as the practitioner refused to provide it with the voting record for 28 January 2026), demonstrates that if Aelin's vote as an independent PCF creditor was discounted (as Nedbank says it should be), 71.28% of independent creditors voted against the approval of the plan. The plan would accordingly not have been approved by more than 50% of the independent creditors as required in terms of section 152(2)(b) of the Act.

(i) *The Avacare vote*

[55] The practitioner purported to vote on behalf of and as the practitioner of Avacare both as creditor (R1248,003,752) and as shareholder under section 152(3)(c)(i) of the Act in circumstances where Avacare had ceded all debts owing to it by Barrs to Nedbank and all present and future claims and all rights against Barrs,

including voting rights, and all shares in Barrs, expressly authorising Nedbank to exercise the voting rights.⁷

[56] Nedbank argued that the effect of the above is that the practitioner's vote *qua* Avacare was invalid.

(ii) *The subordination of the claims*

[57] In terms of the subordination agreement, Avacare subordinated all non-ceded claims in favour of Nedbank and ceded any dividend payable to it under business rescue. Avacare further undertook not to demand payment while Nedbank's claims remained outstanding.

[58] Contractually, the subordination endures until Nedbank is paid in full. Avacare further subordinated all its claims in favour of all creditors, as recorded in Barrs' annual financial statement.

[59] On this further ground Nedbank contends that the voting was materially irregular.

[60] Nedbank asserts that the cumulative effect of the aforementioned irregularities is that the plan was that the votes were not properly recorded and had they been so recorded, the plan would not have been adopted.

The grounds of opposition advanced by the practitioner

[61] Mr. Oosthuizen SC, who appeared on behalf of the practitioner together with Ms. Essa, argued that Nedbank should not be able to overturn the adoption of a plan merely because of a failure by the practitioner to comply with the formalities relating to presentation of the business plan.

[62] In argument, the practitioner emphasised that in deciding whether to grant the relief sought, the court is also enjoined to consider what will happen if the plan is set

⁷ Emphasis added. The cessions were under the suretyship and the cession of shares.

aside and, in particular, whether the suggested course of action will result in the rescue of the business or alternatively in a dividend more favourable than that which would result from liquidation. He submitted that if the creditor seeking the setting aside of the adoption of the plan can show no such benefits, this should constitute a reason for the court refusing to set the plan aside.

[63] In essence, the practitioner contended that a creditor cannot overturn a rescue plan based on last-minute technicalities or factual errors without demonstrating that liquidation would be a better alternative for all stakeholders.

[64] Placing reliance on the judgment of *CSARS v Beginsel NO*,⁸ the practitioner submitted that the court's inquiry must go beyond mere formalities and must balance the rights of all stakeholders. The practitioner asserts that setting aside the plan would likely lead to liquidation, which negates the goal of 'efficient rescue'.⁹

[65] Citing *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Agri Operations Ltd & Others*,¹⁰ the practitioner argued that creditors have a duty to participate in good faith, which it says that Nedbank has failed to do.

[66] The practitioner's counterargument to Nedbank's stance that the plan destroys its rights as a secured creditor is that the adoption of the plan does not strip the court of its power to rule on the legal validity of specific provisions, and that to the extent that a provision violates section 134(3) of the Act, it remains subject to judicial oversight.

[67] Mr. Oosthuizen SC referred the court to the Canadian decision of the Court of Appeal of Quebec in *Quebec Incorporated v Callidus Capital Corporation & Others*¹¹ (*Quebec Incorporated*).

⁸ *CSARS v Beginsel NO* 2013 (1) SA 307 (WCC).

⁹ In terms of Section 7(k) of the Act, to provide for the efficient rescue and recovery of distressed companies in a manner that balances the rights and interests of all stakeholders.

¹⁰ *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Agri Operations Ltd & Others* [2012] ZAGPPHC 359 (16 May 2012) para [22].

¹¹ *Quebec Incorporated v Callidus Capital Corporation & Others* 2020 SCC 10.

[68] The applicable Canadian legislation, the Companies Creditors Arrangement Act, requires a supervising judge to sanction or prohibit various steps in the business rescue process, including the votes of creditors. In *Quebec Incorporated*, the court held that the supervising judge had correctly exercised the discretion to bar a creditor from voting on a plan of arrangement, on the grounds that the creditor's conduct was contrary to "requirements of appropriateness, good faith and due diligence".¹²

[69] Mr. Oosthuizen, whilst acknowledging that this judgment deals with legislative provisions not found in our Companies Act and the powers of a supervising judge, whereas Chapter 6 of our Companies Act contains no equivalent provision, submitted that the view expressed regarding good faith and what would be an appropriate exercise of the creditors' vote are of assistance.

[70] Mr. Oosthuizen argued that the end result is that a court asked to set aside the adoption of a business rescue plan should not confine the enquiry as to whether the formal provisions of sections 150 and 151¹³ are met, but should go further, and enquire what will become of the rescue attempts if the vote is set aside. A creditor seeking to overturn the vote should, at the very least, indicate its intentions at a reconvened meeting of creditors, and show that placing the company in liquidation will be more advantageous to affected persons.

[71] The respondent emphasised that these issues play a particularly important part in the application now before the court, because Nedbank has put up no facts showing that the plan itself is 'without merit, ill-conceived or doomed to failure' and has not disproved the information in the plan showing that concurrent and secured creditors are likely to be better off if the plan is implemented. He stated that this strategy is aimed at dismissing the plan, without having any consideration as to what will then become of the company, its business, its creditors and its employees.

¹² See, in particular, paras 70 – 75.

¹³ In terms of section 150(1) the practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151. Section 151(2) provides that within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.

[72] The respondent asserts that Nedbank's failure to deal with these aspects should result in the dismissal of its application to have the vote and plan adoption set aside.

Statutory framework and discussion

[73] Chapter 6 of the Act is the statutory scheme under which business rescue proceedings operate.

[74] It is undisputed that the plan alters the rights of shareholders. It provides for the company to be recapitalised. The plan expressly provides that adoption of the plan will result in a dilution of the current shareholding in the company, and that the shareholders will accordingly be required to vote on the plan.

[75] Section 133 of the Act provides for a moratorium in respect of legal proceedings against Barrs. Therefore, Nedbank could not take any steps to enforce its claims, including under the instalment sale agreements.

[76] Section 134 of the Act, which is headed 'Protection of property interests', expressly states that subject to subsections (2) and (3) thereof, during a company's business rescue proceedings, the practitioner can only dispose of property over which another person has any security or title interest, if the plan provides that the secured creditor will be paid in full or the creditor consents to the terms of the plan.

[77] It is clear from section 145 of the Act, which provides for participation by creditors, and in particular section 145(4), that chapter 6 recognises different categories of secured versus unsecured creditors.

[78] Section 145(4) and (5) stipulates that:

‘(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests-

(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.

(5) The practitioner of a company must-

(a) determine whether a creditor is independent for the purposes of this Chapter.

(b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4) (b); and

(d) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.’

[79] In terms of section 145(2) of the Act, in addition to the rights set out in subsection (1),¹⁴ each creditor has the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152, and if the proposed business rescue plan is rejected, a further right to propose the development of an alternative plan, in the manner contemplated in section 153, or to present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.

[80] Section 152(2) of the Act provides that the proposed business rescue plan will be approved on a preliminary basis if it was supported by the holders of more than 75% of the creditors’ voting interests that were voted, and the votes in support of the proposed plan included at least 50% of the independent creditors’ voting interests, if any, that were voted. This highlights the importance of how voting interests are to be established in terms of section 145(4) of the Act.

¹⁴ Which provides: (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 proceedings.

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

[81] If shareholders' rights are affected, there must be a meeting of shareholders who must vote to approve the plan.¹⁵

[82] A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and 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.¹⁶

[83] If a business rescue plan has been rejected¹⁷ the practitioner may, *inter alia*, seek a vote of approval from the holders of voting interests to prepare and publish a revised plan.

[84] Should the practitioner does not take such action, any affected person present at the meeting may call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan or apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

[85] Whilst not expressly provided for in the Act, there is no reason to believe that these mechanisms are not also available to the practitioner and creditors if the plan is set aside, as contended on behalf of the applicant.

[86] Section 154(2) of the Act imposes a moratorium, upon the implementation of an approved plan, which precludes a creditor from enforcing any pre-commencement debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.

[87] In *Van Zyl v Auto Commodities (Pty) Ltd*,¹⁸ the SCA reiterated that, as with all statutory provisions, the starting point in regard to section 154(2) of the Act is the

¹⁵ See s 152(3)(b).

¹⁶ S 152(4).

¹⁷ As contemplated in section 152 (3) (a) or (c) (ii) (bb).

¹⁸ [2021] ZASCA 67 para 18 – 22.

words of the section and the meaning that they bear on the application of well-established principles of statutory interpretation. The SCA confirmed that section 154(2) precludes the enforcement by creditors of claims against the company after implementation, save to the extent permitted by the plan.

[88] It is clear that the effect of section 152(2) of the Act, read with section 154(2), is that the implementation of the plan will permanently and irreversibly limit Nedbank's ability to enforce its pre-commencement security beyond what is provided for in the plan.

[89] The creditor payment in the plan for secured creditors is R20,000,000. As highlighted by counsel for Nedbank, once that payment is made and the book debts have been collected and distributed (among all creditors as provided for in the plan), Nedbank's security would have been irremediably dissipated.

[90] Turning now to the *Beginsel* judgment, upon which the respondent placed considerable reliance, which in my view, in the facts and circumstances of this case, is misplaced.

[91] In *Beginsel*, the court found that there had been *substantial compliance* with the formalities of section 150 of the Act.

[92] *In casu*, Nedbank's case is that the voting process was tainted by material irregularities, not mere non-compliance with formalities. It is a matter of substance and not of form.

[93] These significant irregularities include the attribution of the staggering amount of R80,000,000 in voting rights to a party whose legitimate claim appears to be no more than R500,000. This constitutes a fundamental and highly material distortion of the vote.

[94] I agree with Nedbank that the issue in *Beginsel*, namely whether to discontinue business rescue in terms of section 141(2) of the Act, entails different

considerations to those applicable to an application to set aside the adoption of a plan on grounds of voting irregularities and far-reaching statutory contraventions.

[95] A further string to the practitioner's bow is that a court asked to set aside the plan should exercise a 'just and equitable discretion' analogous to that in section 130(5)(a)(ii) of the Act, which deals with the setting aside by the court of the company's resolution under section 129 of the Act (to begin business rescue proceedings), and provides that the court may set aside the resolution if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.

[96] It is plain from a reading of the Act that this discretion is expressly limited to the setting aside of such a resolution as contemplated in section 130.

[97] As contended by Mr Manca SC, there is no equivalent or analogous discretion in section 152, or elsewhere in the Act, that empowers a court to effectively condone the unlawful adoption of a plan because it considers the outcome to be just and equitable.

[98] This court does not have an inherent power to override peremptory statutory requirements, unless the Act specifically grants that power, which, in the circumstances of the present matter, it does not.

[99] Nedbank, referring to *Panamo Properties (Pty) Ltd v Nel N.O and Others*¹⁹ emphasised that the provisions of Chapter 6 must be interpreted purposively, but cannot be used to exploit inconsistencies or to secure an advantage not contemplated by the Act and the broad purpose underpinning it.

[100] The practitioner's reliance on *Quebec Incorporated* is similarly misplaced. As Mr. Oosthuizen SC pointed out, this judgment dealt with legislative provisions in the Canadian Companies' Creditors Arrangements Act, which confer on the supervising judge powers for which there is no equivalent legislative provision in the Act.

¹⁹ 2015 (5) SA 63 (SCA) para 1.

[101] The respondent's criticism of Nedbank's failure to propose an alternative business plan is unpersuasive. If the plan is found to have been unlawfully adopted and is set aside, it is for the practitioner to prepare a revised and statutorily compliant plan, which must then be considered and voted upon in accordance with the applicable statutory precepts.

[102] More specifically, the practitioner's remedy lies in section 153(1)(a) of the Act, in terms of which he may seek a vote of approval from the holders of voting interests to prepare and publish a revised plan. Alternatively, any affected person may make a binding offer to purchase the voting interests of those who opposed the plan.²⁰

[103] The absence of an 'alternative plan' from Nedbank accordingly is not a bar to the relief it seeks.

[104] Lastly, the respondents contended, in response to Nedbank's complaint that its vote was not recognised at the section 151 meeting, that Nedbank should have pursued the remedy under section 130(1)(a)(ii) of the Act.²¹

[105] Section 130(1)(a)(ii) is confined to the period *before* the adoption of a business plan in terms of section 152 of the Act. This temporal limitation is express and unambiguous. The remedy provided for therein ceased to be available to Nedbank after the plan was adopted on 28 January 2026.

[106] The respondent relied on the judgment in *Volkar N.O & Others v Big Sky Trading (Pty) Ltd (in Business Rescue) & Another (Volkar)*.²² However, this judgment is factually distinguishable, as it dealt with the grant of an interlocutory

²⁰ In terms of section 153(1)(b)(ii).

²¹ Section 130(1)(a)(ii) provides that subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

(a) setting aside the resolution, on the grounds that-

(i) there is no reasonable basis for believing that the company is financially distressed.

(ii) there is no reasonable prospect for rescuing the company; or

²² *Volkar N.O & Others v Big Sky Trading (Pty) Ltd (in Business Rescue) & Another* 2025(3) SA 667 (KZNPD).

interdict prohibiting the holding of a section 151 meeting where the business rescue plan (which had not yet been adopted) was to be considered and voted upon.

[107] The *obiter dictum* in *Volkar*,²³ namely that if the meeting proceeded and the plan was adopted; the applicants could have applied to set aside the resolution to commence business rescue as the plan was not validly adopted appears to be inconsistent with the wording and plain reading of section 130(1) of the Act.

[108] The applicant contended, correctly in my view, that to the extent that such observation suggests that section 130(1)(a)(ii) remains available after adoption, it is per incuriam, the court's attention not appearing to have been drawn to the express temporal limitation in section 103(1) of the Act.

[109] In my view, and having carefully considered the submissions advanced, the plan falls to be set aside on each of the discrete grounds relied upon by the Nedbank.

[110] It is manifestly clear that the plan falls foul of section 134(3) of the Act. The practitioner failed to obtain the prior written consent of Nedbank, or to provide security as required.

[111] Mr. Oosthuizen SC fairly conceded that the practitioner has failed to advance any factual basis for the alleged dispute relating to the cession of shares, the suretyship agreement, and the subordination agreement.

[112] In the circumstances, the plan was adopted contrary to the mandatory provisions contained in section 134(3) of the Act and is accordingly unlawful. The court does not have a discretion to cure or excuse the unlawful breach by the practitioner of this peremptory legislative provision. No amount of 'equitable balancing' can cure the unlawfulness of the adopted plan.

[113] If the plan is not set aside, the harm to Nedbank is both real and irreparable. Therefore, on this ground alone, the plan falls to be set aside.

²³ Op cit fn 22 para 48.

[114] Turning now to the voting irregularity issue, on the evidence before me it must be accepted that the purported majority by which the plan was adopted was achieved through irregularly attributed and artificially inflated votes. The practitioner has failed to adequately address the contentions raised by Nedbank in this regard.

[115] For the reasons set out above, the challenges raised in relation to the voting process, the attribution of the R80, 000, 000 voting interest attributed to Aelin and the exercise by the practitioner of Avacare's voting interest must therefore also succeed.

Conclusion

[116] It follows that the applicant is entitled to the relief sought in terms of Part B of the Notice of Motion.

[117] There is no reason why the costs should not follow the result. In light of the complexity of the matter and the importance of the relief sought, I am satisfied that such costs should include the costs of two counsel, such costs to be taxed on Scale C.

Order

[118] The following order is granted:

1. The result of the vote on 28 January 2026 at the meeting held in terms of section 151 of the Companies Act 71 of 2008 at which the business rescue plan was purportedly adopted is set aside.
2. The business rescue plan adopted on 28 January 2026 at the meeting held in terms of section 151 of the Act is set aside.

3. The second respondent is to pay the costs of the application, which costs shall include the costs of two counsel where so employed, such costs of counsel to be taxed on Scale C.

**M HOLDERNESS
JUDGE OF THE HIGH COURT**

Appearances

For applicant: B Manca SC with W Jonker
Instructed by: N Grundlingh Attorneys

For Respondent: A Oosthuizen SC with N Essa
Instructed by: HJW Attorneys

