IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[redacted]E DATE: 21 MAY 2026

CASE NO: 2024/067809

In the matter between:-

COS CONSULT CC	Applicant
and	
BASIL READ LIMITED (in Business Rescue)	First Respondent
JOHN DYMOKE LIGHTFOOT N.O.	Second Respondent
SIVIWE DONGWANA N.O.	Third Respondent
RETIRED JUDGE MEYER JOFFE	Fourth Respondent

JUDGMENT

ALLEN AJ

INTRODUCTION

[1] This is an opposed application to review and set aside the decision by fourth respondent concerning applicant's claims brought against first respondent. Applicant seeks an order in the following terms:

> "1. The findings and conclusions made in paragraph 67 to 73 of the fourth respondent's award, handed down on 29 February 2024 ("the Award") are reviewed and set aside.
>
> 2. That paragraphs 67 to 73 of the Award are replaced with the following:
>
> a. the second and third defendants are to recognise, in accordance with the Plan, the claimant's claims against the first defendant of:
>
> i. R50 836 127.31, together with interest thereon; and
>
> ii. R8 970 000.00, together with interest thereon,
>
> b. it is declared that the claimant has an in-principle entitlement under the Management Agreement, the quantum of which is held over for determination at a later stage, and

c. that claimant's costs in the dispute under section 40 of the business rescue plan are to be paid by the first, second and third defendants jointly and severally, the one paying, the other to be absolved, on the attorney and client scale.

3. The applicant's costs in its review application are to be paid by the first, second and third applicants jointly and severally, the one paying, the others to be absolved, on the attorney and client scale, and

4. Further and/or alternate relief."

BACKGROUND

[2] The first respondent was appointed by Eskom to construct certain portions of the Medupi Power Station in Limpopo, appointed under three contracts. First respondent entered into five contracts with applicant to effectively manage the commercial and contractual aspects of its three contracts with Eskom. The Ash Dumps Management Agreement and the Clarifiers Management Agreement were described as the management agreements. These agreements pertain to the management of the claim compilation and dispute process by applicant on behalf of first respondent in relation to its contracts with Eskom which included the management of claims submitted to first respondent by its various sub-contractors.

[3] The Ash Dumps Services Agreement, the Clarifiers Services Agreement and the Miscellaneous Buildings Services Agreement were described as the services agreements. These agreements required applicant to provide contract specific documentation as well as to attend to site support, to guide and train first respondent's commercial team in the effective management and issue of notices to Eskom as required in the respective main contracts.

[4] On 29 August 2012 applicant and first respondent amended the terms of the services agreements and management agreements and at the hearing agreed that the terms of the aforementioned agreements as well as their respective amendments are not in dispute. The parties also agreed on a structure for payments and "all amounts not finalized in terms of the main contract are to be finalized with the participation and

agreement of COS Consult". The parties further agreed that under the main contracts, there are two means by which the quantum of the contract can be altered that is clause 13 "Variations and Adjustments" and Clause 20 "Claims, Disputes and Arbitration".

[5] Initially applicant was paid by first respondent in terms of each of the agreements and in May 2015 first respondent sought to bring to an end the agreements with applicant on the contention that same had been terminated by mutual agreement between the parties. Applicant disputed this whereafter first respondent issued a summons during August 2015 and the Honourable Retired Judge Cloete resolved at arbitration that the five agreements had not been terminated and remained extant.

[6] First respondent was hereafter placed in business rescue with second and third respondents as the business rescue practitioners (BRPs). Applicant submitted each of its claims in terms of the five agreements.

[7] On 5 July 2018 the BRPs sent a first update to its creditors which, amongst other, read: "*9. However, at this stage, the company cannot commit to a position where it can definitively continue to engage you for the provision of your further services during Business Rescue and as such, such services are currently suspended until further notice from the Business Rescue Practitioners. This position may change once we have clarity on the level of post commencement funding and how it will be allocated to contracts…*" (Own emphasis)

[8] On 24 July 2018 the BRPs confirmed that the supply of goods and services must only take place if specifically authorized in writing by the BRPs. The BRPs at no time engaged with applicant regarding services performed, the manner in which it assisted first respondent in the past, and the continuance to assist during business rescue.

[9] On 27 September 2018 the Business Rescue Plan (the Plan) was adopted by majority vote of creditors. On 21 November 2018 applicant submitted further information in respect of its claims to the BRPs at their request. Applicant hereafter followed up with the BRPs, regularly sent each invoice and tendered to perform its

services as set out in each of the five agreements. On 31 May 2019 the claims were rejected in full without reasons or explanation.

[10] Applicant initiated a dispute in terms of section 40 of the Business Rescue Plan which provides for the determination of disputes in respect of claims by creditors. The fourth respondent, the Honourable Retired Judge Meyer Joffe, was appointed by the parties as the Expert to determine the dispute regarding the claims submitted.

[11] Applicant requested completion certificates from first respondent and a number of "settlement agreements" were produced which, amongst other, contains a performance certificate that first respondent is considered to have completed all obligations in terms of each contract on 30 September 2021 and confirmed the final agreed contract price of R1 874 534 891.61 in full and final settlement of all monies first respondent is entitled to, under or in connection with the ash dumps and dams main contract. The clarifiers settlement agreement records that the completion of the works has been achieved on 4 June 2021 and a formal taking over certificate for all sections was issued on the same day. It also contains a taking over certificate from the engineer which states that the works have been substantially completed in terms of the clarifiers main contract and confirms the final agreed contract price of R208 543 683.01 in full and final settlement of all monies first respondent is entitled to, under or in connection with the clarifiers main contract. The total amount
R 2 083 078 574,62.

[12] No settlement agreement in respect of the miscellaneous buildings main contract was produced by first respondent. No final payment certificates have been produced by first respondent.

[13] According to the agreed facts, what remained in dispute was also detailed in a statement. The statement of agreed facts was placed before the Expert and after the hearing, the Expert rendered his Award on 29 February 2024.

[14] The parties communicated as to the effect of the Award and that certain facts were agreed between the parties prior to the hearing and not confirmed by the Expert.

[15] In light of the response from the BRPs, applicant seeks the portion of the award as set out in paragraphs 67 - 73 of the Award be reviewed and set aside and replaced with a different order.

[16] Applicant contends that the mentioned portion of the Award dismissing the agreed amounts constitutes a gross irregularity and a manifest error that is a reviewable irregularity. The Expert misconstrued the issue that he was called on to decide, had regard to irrelevant considerations and disregarded relevant considerations, in particular that the pre-commencement amount was admitted in the pleadings, in the statement of agreed facts and in the heads of argument filed on behalf of the BRPs. In addition, since there is no connection between the facts and evidence presented and the Expert's finding, the Award is also irrational on this ground.

DISCUSSION

[17] The statement of agreed facts before the Expert consists of some 15 pages of which *inter alia* reads:

"THE ADMITED PORTION OF COS CONSULT'S CLAIM

33. Basil Read initially persisted in its denial of COS Consult's claims. However, in an amendment dated 28 August 2023, the BRPs admitted all of COS Consult's claims to 15 June 2018, the date on which business rescue proceedings commenced.

35. The above amounts (which sum R 50 836 127,31) together with interest thereon, are admitted by the BRPs and shall dealt with in accordance with the provisions of the Plan.

THE DISPUTED PORTION OF COS CONSULT'S CLAIM

36. What remains in dispute is:

36.1. whether COS Consult has an entitlement in principle under the Management Agreements (as pleaded in paragraphs 59 and 78 of the statement of claim); and

36.2. whether COS Consult has any entitlement to any amount which became due in terms of the Service Agreements or the Management Agreements during business rescue proceedings (or after 16 June 2018).

37. COS Consult's remaining claims fall into two categories:

37.1. the amount that is due under the Service Agreements after 16 June 2018; and

37.2. the amount that is due under the Management Agreements after 16 June 2018. In consequence of the agreed separation, the quantum portion of this claim is to stand over for determination at a later point.

The amounts claimed under the Service Agreements post-15 June 2018

38. The capital portion of COS Consult's claims arising after 15 June 2018 is (to end October 2023), R 8 970 000.00 comprised of the following amounts:

38.1. ...

THE ISSUES TO BE DETERMINED

39. In light of the above agreed facts, the arbitrator is to determine whether:

39.1. The BRPs suspended the contracts between Basil Read and COS Consult in terms of section 136(2) of the Companies Act 71 of 2008;

39.2. COS Consult has an entitlement to any amount which became due under the Service Agreements during business rescue proceedings;

39.3. commercial/contractual close out has been proved to have occurred (and if so, on what date);

39.4. COS Consult has an entitlement in principle to any amount under the Management Agreements (paragraphs 59 and 78 of the statement of claim) and, if so, whether it has an entitlement to any amounts which became due under the Management Agreements during business rescue proceedings; and

39.5. either party is liable for the costs of the arbitration that have been incurred thus far and, if so, which party and in what proportion.

41. If it is found that the BRPs did not properly exercise the power granted under section 136(2) of the Companies Act, then:

41.1. the admitted amount of R 50 836 127.31, together with interest thereon, stands to be confirmed as owing by Basil Read to COS Consult and dealt with in accordance with the Plan;

41.2. the amount of R 8 970 000.00, together with interest thereon, stands to be confirmed as owing by Basil Read to COS Consult and dealt with in accordance with the Plan; and

42. If it should be found that COS Consult has an in-principle entitlement to any amount under the Management Agreements and that the BRPs did not properly exercise the power granted under section 136(2) of the Companies Act, then:

42.1. it should be found that COS Consult is entitled to payment under the Management Agreements, which amount is to be held over for determination in due course". (Own emphasis)

[18] On 29 February 2024 the Expert rendered his Award wherein it was *inter alia* said:

"9. CC's counsel set out in their heads of argument what they described as the "undisputed facts". These undisputed facts are gleaned from admissions on the pleadings, Mr Cooke's witness statement and the agreed facts. I can do no better than quote them verbatim:...."

It was further said:

"63. It is clear from the judgment of van der Linde J that the BRP has conferred upon him the power to suspend the obligations of the company in business rescue. Section 136(2)(a) does not confer upon him any rights in regard to the creditor whose reciprocal rights and obligations remain unaffected notwithstanding the exercise of the powers by the BRP provided in section 136(2) of the Act". And:

"64. In the result the notices sent by the BRP did not suspend the claimant's contractual rights". And:

"67. This claim does not take into account the reciprocal nature of the Service Agreements. It is not in dispute that CC did not render any services to BR during the period referred to in the previous paragraph.

68. Whilst CC may have correctly been of the view that the BRPs did not comply with the provisions of section 136(2) of the Act, it must have been apparent to those in control of CC what the intention of the BRPs was. They now seek to benefit from the BRPS' error in the application of the section. They do this knowing full well that CC did not render any services in respect of the amounts claimed. In the circumstances CC is not entitled to claim such payment. Counsel for the BRPs referred to Panama Properties (Pty) Ltd and Another v Nel and Others NNO 2015 (5) 63 ((SCA) where it was held: "Consequently they have given rise to confusion as to their meaning and provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose. This is such a case." Whilst this dictum arose in a different context it is equally applicable in the instant matter.

69. In the circumstances the claim in respect of the Service Agreements falls to be dismissed.

70. As far as the claim in respect of the Management Agreements is concerned CC contends that it is entitled to a substantial portion of each and every claim and variation order covered by the settlement agreements between BR and Eskom. In regard hereto, as with the Service

Agreements CC has provided no services whatsoever to BR under the Management Agreements.

71. In the circumstances the claim in respect of the Management Agreements falls to be dismissed.

72. As far as costs are concerned, the main dispute between the parties was the application of section of 136(2) of the Act. CC was successful in this regard. The BRPs were successful in their opposition to the claims in respect of the Service Agreements and Management Agreement. In the result no order should be made in respect of the costs relating to the above.

73. My award is as set out above". (Own emphasis)

[19] In sum the Expert dismissed applicant's claim in respect of the service agreements, dismissed applicant's claim in respect of the management agreements and ordered each party to pay its own costs.

[20] During argument I canvassed from the parties what was the intention of the parties in the statement of agreed facts with the wording "stands to be confirmed as owing..." and when and where it should be confirmed. It was proffered that the Expert was to confirm the admitted amounts as part of his findings.

[21] Section 40 of the Business Rescue Plan deals with dispute resolution which makes provision for the appointment of a Retired Judge as an Expert.

[22] The section reads as follows:

"40. DISPUTE RESOLUTION

40.1 Subject to paragraph 40.3, save as provided for in section 133 of the Companies Act, in respect of all or any disputes by the BRPs on Claims submitted by Creditor(s), PCF Creditors and Employees, which disputes include, but are not limited to, disputes on the existence or otherwise of Claim(s), on quantum of Claim(s), security claimed by a Creditor, the nature of the security, the extent and value of the security and the like ("the dispute") such dispute may be resolved in accordance with the dispute mechanism outlined below ("the Dispute Mechanism").

.....

40.2.5. The Creditor/s or Employee/s agrees that, save for any manifest error the determination of the expert will be final and binding on the Creditor/s or Employee/s, the Company and the BRPs and will not be subject to any

subsequent review or appeal application / procedure / process.

40.2.6. The expert shall be entitled to make an award for costs in his discretion.

40.2.7. To the extent necessary, should the BRPs be of the view that certain disputes may be settled or compromised, the BRPs shall be authorised to settle and compromise such a dispute". (Own emphasis)

[23] Section 136 of the Companies Act 71 of 2008 reads as follows:

"…..

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

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings; or

(b) …."

[24] The definition of 'agreement' in section 1 of the Companies Act 'includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties.'

[25] In the instant case the BRPs elected to exercise their power in terms of section 136 (2) (a) of the Companies Act to suspend applicant's obligations, instead of first respondent's obligations, under its contracts, service providers, etc. and accordingly gave notice.

[26] At the hearing before the Expert Mr. Peter Cooke, on behalf of applicant, submitted a witness statement which stood as evidence in chief, was confirmed under oath and the BRPs' legal representative elected not to cross-examine him on the

contents at all. Mr. Siviwe Dongwana, third respondent, on behalf of the BRPs also submitted a witness statement which stood as evidence in chief, was also confirmed under oath and during cross-examination made some "stark and telling concessions".

[27] During Mr. Dongwana's testimony he referred to specifically section 136 of the Act and gave an exposition why applicant would no longer be required to render goods and services during business rescue. This defence was rejected by the Expert.

[28] In cross-examination Mr. Dongwana confirmed that the first respondent's obligations under the agreements was not suspended only the services were suspended which prevented the applicant from doing its work. Applicant therefore continuously tendered its services, but was denied access to the Medupi site, which constitutes a breach of the agreements between the parties.

[29] In cross-examination Mr. Dongwana admitted that creditors should be given reasons for the rejection of their claims, but could not explain why applicant did not receive a response to any of its requests. He never investigated applicant's claims. He did not know how many agreements were in place between first respondent and applicant. He did not know what applicant would have to do to become entitled to payment under any of the agreements. He did not know what services were rendered in terms of the agreements. He did not know how the payment structure of agreements worked. He never read the agreements between first respondent and applicant.

[30] He further testified that the anticipated liquidation dividend to concurrent creditors was 5,4 cents in the rand and in business rescue nothing (R0.00). He confirmed the fundamental purpose of business rescue could not be achieved, but admitted having charged his fees for the past five years.

[31] He could not explain his duties under section 141 of the Companies Act and when so asked, he responded:"remind me". He also did not take any steps to comply with the duties in section 141 of the Companies Act to end the business rescue.[1]

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[1] Section 141 of the Companies Act, Act 71 of 2008, reads:"
141. Investigation of affairs of company
(1)...
(2) If, at any time during business rescue proceedings, the practitioner concludes that-

(a) there is no reasonable prospect for the company to be rescued, the practitioner must-

[32] Mr Dongwana's oral evidence was in conflict with his statement (and conclusions drawn therein) as well as the statement of agreed facts and was unable to proffer any substance to substantiate same. An attempt to shift the blame to his co-BRP was also unsuccessful as the latter did not testify or adduced any evidence.

[33] In the Award, paragraph 7, the Expert noted: "This is not a man that should be charged with the fate of distressed companies. He is neither fit nor proper to fulfil that function. His appointment has in this case resulted in patent detriment to the body of creditors generally and, Cos Consult in particular. His appointment in other cases likely will too".

[34] The Award of the Expert is reviewable, according to the applicant, on at least five grounds:

> "1. The first respondent did not contend that applicant was not entitled to payment because services were never provided;
>
> 2. The issue of reciprocity precluding payment, as a ground independent of the section 136 issue was not pleaded, canvassed in evidence or put to either party in argument;
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> 3. The Expert did not have regard to the undisputed evidence of why applicant did not render services after May 2015, it having been precluded from doing so by first respondent;
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> 4. The Expert ignored the undisputed evidence that applicant repeatedly tendered to render the relevant services.
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> 5. The Expert upheld the BRPs' defence under section 136 of the Companies Act without legal or factual foundation or justification".

(i) so inform the court, the company, and all affected persons in the prescribed manner; and
(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
(b)....." (Own emphasis)

[35] The Expert incorrectly upheld the BRPs' section 136 defence and its consequence without any evidence or foundation despite having correctly reasoned that there was no factual or legal merit in the BRPs' defence.

[36] It is common cause that applicant has not rendered services after May 2015 having been prevented from doing so by first respondent. First respondent admitted liability under the service agreements for the period to 15 June 2018 included in the total amount of R50 836 127.31. This underscores the fact that first respondent never relied on reciprocity outside of the BRPs' section 136 defence.

[37] Had reciprocity been pleaded by the BRPs at any time, their admission of liability would have been limited to May 2015 and not to 15 June 2018 when first respondent went into business rescue.

[38] There was no other defence raised by the BRPs or found by the Expert. The Expert in finding against the BRPs in respect of the section 136 issue, ought to have given effect to paragraph 41 and 42 of the agreed statement of facts.

[39] The Expert made a finding on the costs issue predicated on his reciprocity finding. Applicant was already entitled to the agreed pre-commencement amount. The Expert ought to have confirmed the amount of R50 836 127.31, and based on the outcome of the section 136 issue the amount R8 970 000.00 as well, which amounts to substantial success.

[40] In the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* **(920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)** it was said:"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd* ***v*** *General Hendrik Schoeman Primary School.*[2] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to

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[2] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* **2008 (5) SA 1 (SCA)** paras 16 - 19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* **2009 (4) SA 399 (SCA)** para 39.

the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'.[3] It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga* ***v*** *Dönges NO and another*,[4] namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:
'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.' "

[41] In my consideration of the statement of facts, I cannot come to the same conclusion as the Expert in not confirming the pre-commencement amount, the confirming of the post-commencement amount in the event of his finding against s 136

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[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* **[2004] ZACC 15; 2004 (4) SA 490 (CC)** para 90.
[4] *Jaga v Dönges NO & another, Bhana v Dönges NO & another* **1950 (4) SA 653 (A)** at 662G-663A.

and costs. The wording of the first notice of the BRPs is clear regarding suspension of applicant and should there have been ambiguity, which is not, the interpretation is to go against the BRPs. If, for a moment, I have to consider the intention of Mr. Dongwana it also does not come to his aide considering the agreed facts, his testimony and the Expert's remarks about him.

[42] In the matter of *Transnet National Ports Authority v Reit Investments (Pty) Limited and Another* **(1159/2019) [2020] ZASCA 129 (13 October 2020)** it was said:
"[33] This distinction serves an important purpose in review proceedings because, as Ponnan JA put it in *Lufuno Mphaphuli & Associates (Pty) Ltd* ***v*** *Andrews and Another* **[2007] ZASCA 143; 2008 (2) SA 448 (SCA)** para 22:
'. . . Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. . . .'
[34] Accordingly, the power of the courts to interfere with an expert's decision in review proceedings is severely circumscribed. The juridical ambit of this power was described by this Court in *Wright* ***v*** *Wright* **[2014] ZASCA 126; 2015 (1) SA 262 (SCA)** para 10 as follows:
'The position of a referee under s 19b is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard, the dictum of Boruchowitz J in *Perdikis* ***v*** *Jamieson* is apposite:
"It was held in *Bekker* ***v*** *RSA Factors* **1983 (4) SA 568 (T)** that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result."
This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds.'
[36] ... The crux of the dispute, as I see it, was essentially whether Mr Seota had acted in accordance with his mandate from the parties and, if so, whether his determination was otherwise manifestly unjust.
[37...In *Telcordia Technologies Inc v Telkom SA Ltd* **[2006] ZASCA 112; 2007 (3) SA 266 (SCA)** para 51, Harms JA made the following pointed remarks:
'Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise....'

[38] Thus, it was not open to him to disregard the parties' explicit instructions and, on a frolic of his own, ... in *Hos+Med Medical Aid Scheme* ***v*** *Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* **[2007] ZASCA 163; 2008 (2) SA 608 (SCA)** para 30:
'In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. . . .'
[40] On the authorities discussed above, it is now well established that an expert's bona fide determination or award will not be lightly interfered with by the courts."

[43] In the instant case the parties agreed on the statement of facts which limited the issues embodied in the mandate referred to the Expert and his Award will be final and binding except in the case of a manifest error. It is apparent that the Expert did not act in accordance with his mandate by not making a bona fide determination and exercised his powers manifestly unjust by not confirming any amount. Reciprocity was not in issue or raised by either party. The section 136 issue was found in favour of applicant and if so, the parties agreed what the result would be, namely confirmation of the post-commencement amount as well.

[44] In the case of *Rebah Construction CC v Renkie Building Construction CC* **(42794/2007) [2008] ZAGPHC 34; 2008 (3) SA 475 (T) (11 February 2008)** at paragraph 31 it was said:"In *McKenzie NO* ***v*** *Basha* 1951 (3) 783 (NPD) 786A, BROOME JP said:'The Court may always interfere with an award which extends to matters not submitted. If an arbitrator deals with a question which is not within the terms of the submissions, the decision of the arbitrator is a nullity. The submissions made by the parties in this case, makes no provision for default awards and by granting default award without giving any notice to the respondent, the arbitrator acted outside the terms of reference'.
On this ground alone, the court is entitled to set aside the award as the arbitrator has exceeded his powers as mentioned in section 33(1)(b) of the Arbitration Act *supra*."

[45] In the matter of *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* **(115/2011) [2012] ZASCA 4 (8 March 2012)** it was said in paragraph 18:"...(c) Arbitrators, including arbitral appeal tribunals, are bound by the pleadings. The only difference between the two in this regard, as I see it, is that on appeal the pleadings also include notices of appeal and cross-appeal. Unlike a court,

arbitrators therefore have no inherent power to determine issues or to grant relief outside the pleadings. Arbitrators who stray beyond the pleadings therefore exceed their powers as contemplated by s 33(1)(*b*)."

[46] In the matter of *Kingsgate Clothing (Pty) Ltd and Others v Edcon Limited (In Business Rescue) and Others* **(57045/2020) [2021] ZAGPPHC 769 (15 November 2021)** it was said:"

[7] The jurisdictional fact for any further appeal or review procedure is the existence of a 'manifest error' in the determination made by the expert. Due to the wording of this clause, I am of the view that it is irrelevant whether the adjudicator of any dispute provided for in clause 39 is referred to as an 'expert' or an 'arbitrator' or even a 'mediator.' Absent a manifest error, the determination of the dispute in issue is final.

[8] In *Media24 (Pty) Ltd* ***v*** *Estate Late Du Plessis*[5] the Supreme Court of Appeal explained that a manifest error is an error that is:

'plain and indisputable and that amounts to a complete disregard of the controlling law or the credible evidence on record.'

The Supreme Court of Appeal referred with approval to *Winfield* ***v*** *Dimension Data Holdings Limited & Others,*[6] where the court in turn referred not only to the meaning ascribed to the term in Black's Law Dictionary, but also to a decision of the Chancery Division of Northern Ireland – *Dixon Group plc v John Andrew Murray-Oboynski*[7] where it was held that a manifest error is an error that 'may easily be seen by the eye or perceived by the mind'.

[9] Van der Linde AJ, as he then was, held in *James v Micor Holdings Ltd* [8]that-

'A narrower interpretation of 'manifest error', is that it refers to an error which is manifest, or patent, on the face of determination; one which results in the determination not being that which the appointee himself/herself had intended. On this interpretation, 'error' would relate to the standards set by the appointee himself/herself and 'manifest' would relate to the obviousness of this deviation.'

He rejected the argument that that deviation from the required standard of conduct would constitute a manifest error as this would mean that:

'the determination may be revisited on the merits, in order to assess whether it contains a deviation …, and if so, whether the deviation in question is manifest or not. In my view, such an interpretation of 'manifest error' is subversive of the notion of the final determination of complex accountant disputes by a third party'.

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[5] **(169/2017) [2017] ZASCA 168 (1 December 2017)** at para [13].
[6] **2004 JDR 0307 (T)** at para [25].
[7] **86 BLR** 32.
[8] **1999 CLR 237 (W)** at [24] and [25].

[10] A cumulative reading of the case law referred to above, leads to the conclusion that a 'manifest error' is more than merely a wrong conclusion. It refers to oversights and blunders so obvious and obviously capable of affecting the award or determination 'as to admit no difference of opinion'. This narrow interpretation of the term limits a court's jurisdiction to interfere with awards made subject to what can be referred to as the manifest error exception. This limitation is justified, however, in the context of cases like the present, where the legislature provided for the adoption of a BRP in prescribed circumstances with the aim of speedily resolving issues. It sets a high bar for establishing that such an error has occurred. If courts were to have a wider scope in which to interfere with an expert's determination the courts would simply become an alternative forum for the party dissatisfied with the expert's conclusions, and this would refute the purpose of business rescue proceedings. Having said this, the question as to whether a plain and obvious error has occurred will be a question of fact that needs to be assessed in the face of the 'controlling law or the credible evidence on record.'

Audi et alteram was not violated. The applicants did not provide an iota of evidence indicating that the fourth respondent failed to follow a procedurally fair process or that they were not afforded a fair hearing.

[15] Even if it is accepted to the benefit of the applicants, without finding so, that the applicants' proposed interpretation constitutes an arguable competing interpretation, the applicants failed to show that the fourth respondents' interpretation was obviously wrong. The applicants did not make out a case that the fourth respondent's report is the product of an indisputable error of judgment in complete disregard of the facts of the case, the applicable law and credible evidence". (Own emphasis)

[47] In the case before me the applicant did make out a case regarding the Expert's error of judgment by disregarding the statement of agreed facts and credible evidence. I cannot come to a different conclusion that a manifest error did occur or the existence of an exclusion to a manifest error that occurred.

[48] The statement did refer to an Arbitrator whereas an Expert heard the dispute in terms of section 40 of the business rescue plan. I accept it was a mistake common to the parties and was also not in issue.

[49] In the matter before me the *audi alteram partem* rule was violated with regards to the reciprocity issue. Reciprocity was never pleaded by first respondent or placed

in dispute. The dispute was limited to the section 136 issue. No portion of the reciprocity finding was put to applicant's witness by the respondents or to counsel in argument by the Expert. The *audi alteram partem* failure led to a reviewable irregularity. [9]

[50] In his Award the Expert relied on the *BP* case for his finding on reciprocity. I have considered the matter of *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* **(34716/2016) [2016] ZAGPJHC 310; 2017 (4) SA 592 (GJ) (25 November 2016)** where it was said:" [37] Interpretation starts with a textual treatment of the words in their context. The language conferring the power of suspension is pretty clear, at least on the face of it; "*any*" is notoriously a word of wide if not unlimited import, and so it would, at least *prima facie* and unless any absurdity is thrown up, include obligations that are contractually tied with a reciprocal obligation of the creditor."

[51] In the proceedings before the Expert, applicant took issue with the wording of the Notices alleging an improper exercising of the BRPs power under section 136(2) to the extent that the BRPs sought to suspend the contractual rights and/or obligations of service providers rather than the contractual obligations of the first respondent. The Expert found that the BRPs could not under section 136(2) suspend any obligation of the applicant that contracted with the first respondent and therefore did not suspend the applicant's contractual rights as a claimant.

[52] Applicant continued to tender its suspended services. Whilst it may have been the intention of the BRPs to suspend first respondent's obligations, it was never communicated to applicant and what was agreed in the statement of agreed facts expressed the contrary. This has also to be considered with what was said about the BRP that testified.

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[9] *Telcordia Technologies Inc v Telkom SA Ltd* **(26/05) [2006] ZASCA 112; [2006] 139 SCA (RSA) ; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006)** at paragraph 69 it was said:" [69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith."

[53] Predicated on this, applicant was entitled to its post-commencement claims, notwithstanding the non-provision of services during business rescue proceedings (and as agreed prior thereto). In the statement of agreed facts this was also not in dispute. I have considered paragraph 9 of the 5 July 2018 notice and cannot come to a different conclusion.

[54] It cannot be excluded that the BRPs' actions in the exercise of their powers may amount to gross negligence in terms of section 140(3)(c)(ii) of the Companies Act.[10]

[55] In the *BP* case the BRP exercised the power under section 136(2) of the Companies Act suspending the obligations of the company in business rescue and the impact on the reciprocal obligations of the other party. In the case before me the BRPs suspended the obligations of the claimant only and reciprocity was not pleaded, canvassed in evidence or put to either party. The BRPs also admitted a portion of the pre-commencement claim, knowing that services were not rendered in lieu thereof, which was not the case in the *BP* matter.

[56] One cannot assume what the BRPs actually intended since they might well have continued with their payment obligations after having received in excess of R 2 083 078 574,62 in 2021 in lieu of completed services. This has to be considered against the backdrop of what was agreed between the parties. Whilst it may be true that applicant should not be entitled to payment for services not rendered post-commencement, it was expressly agreed what the outcome will be in the event of the BRPs' section 136(2) defence not successful.

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[10] "140.General powers and duties of practitioners
(3) During a company's business rescue proceedings, the practitioner:
(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;
(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and
(c) other than as contemplated in paragraph (b)
(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but
(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner."

[57] Notwithstanding the fact that it may not be the norm or standard to agree as it happened in the case before me, the BRPs acquiesced by persisting with the notices and agreeing to the statement of facts.

[58] In the matter of *Tongaat Hulett Limited and Others v South African Sugar Association and Others* **(945/2024) [2025] ZASCA 190; 2026 (3) SA 108 (SCA) (15 December 2025)** it was said:"

[34] These provisions should be construed in accordance with the recognised principles of interpretation. The proper approach to legislative interpretation in our law requires courts to ascertain and give effect to the intention of the legislature, as expressed in the wording of the statute, while also considering the context, purpose, and underlying values of the Constitution. In this regard, the purposive approach is favoured, ensuring that statutory provisions are read holistically and in a manner that promotes the spirit, purport, and objects of the Bill of Rights.[11]

[35] The Constitutional Court, in *Investigating Directorate: Serious Economic Offences and Others* ***v*** *Hyundai Motor Distributors (Pty) Ltd and Others* (*Hyundai Motor Distributors*),[12] affirmed that interpretation must be consistent with constitutional values and that ambiguity must be resolved in a way that best promotes those values.

[36] It is a fundamental tenet of our law of statutory interpretation that legislation must, wherever possible, be read in a manner that is consistent with the Constitution. This principle, often referred to as the doctrine of constitutional compliance, has become a cornerstone of modern interpretive methodology in South Africa. It requires courts to favour an interpretation of statutory provisions that upholds, rather than undermines, constitutional rights and values.

[37] Section 39(2) of the Constitution specifically directs that when interpreting any legislation, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights. This interpretive injunction means that if a statutory provision is reasonably capable of more than one meaning, the meaning that is consistent with the Constitution should be preferred. Therefore, courts are not permitted to adopt an interpretation that would render the provision unconstitutional if a constitutionally compliant construction is reasonably possible.

[38] This approach was articulated by the Constitutional Court in *Hyundai Motor Distributors*, as follows:

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[11] *Cool Ideas 1186 CC v Hubbard and Another* **[2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC)** para 28.

[12] *Investigating Directorate: Serious Economic Offences and Others* ***v*** *Hyundai Motor Distributors (Pty) Ltd and Others; In re: Hyundai Motor Distributors (Pty) Ltd and Others* ***v*** *Smit NO and Others* **[2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC)** (*Hyundai Motor Distributors*).

'Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such interpretative approach can be reasonably ascribed to the section.'

[39] The Constitutional Court further emphasised that ambiguity is not a prerequisite for the application of this principle – wherever a statute is reasonably capable of a meaning that avoids constitutional invalidity, that meaning ought to be adopted. This ensures that legislative intent is realised as far as possible without encroaching upon constitutional rights.

[56] In summary, I find that the definition of an agreement under the Companies Act contemplates a covenant concluded by parties through mutual assent, creating rights and obligations *inter partes*.[13](Own emphasis)

[59] In the instant case the statement of facts agreed has to be considered with the history between the parties and the BRPs intentions in specifically this case. What was agreed in writing was consented to as set out in the Companies Act.[14]

[60] In the matter of *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* **(136/2022) [2023] ZASCA 34; 2023 (4) SA 78 (SCA) (31 March 2023)** at para 23 it was said:"The primary purpose of business rescue is to enable the practitioner to

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[13] See also the case of *Tongaat Hulett Limited (In Business Rescue) and Others v South African Sugar Association and Others* **(D4472/2023) [2023] ZAKZDHC 93; [2024] 1 All SA 509 (KZD) (4 December 2023)**

"[73] I am consequently of the opinion that, having regard to the ordinary meaning of the words used and the ordinary rules of grammar and syntax, it is plain that what the Legislature regards as an "agreement" for the purposes of the Companies Act, is a set of rights and obligations that are founded or created by, and derive their legal power from, a "contract", "arrangement" or "understanding" "between or among" the persons who are party to it. Those obligations are private law obligations arising from consensus between contracting parties (i.e. obligations *ex contractu*).

[74] The text of s 136(2)(a)(i) itself suggests that the meaning of "agreement" refers to obligations arising *ex contractu*. The "agreement" must be an agreement "to which the company was a party". A person or an entity is "a party" to a contract or agreement and not to national or subordinate legislation.

[75] The meaning of the word "agreement" as used in s 136(2)(a)(i) as referring to a contract and obligations that arise *ex contractu* is reinforced when regard is had to s 136 as a whole. Firstly, the heading signifies that what the section deals with is the "Effect of business rescue on employees and contracts". Secondly, ss 136(1) and 136(2A) refers to and deals with contracts which comply with the qualification that come into being by consensus and that create rights and obligations, namely employment contracts and agreements to which ss 35A or 35B of the Insolvency Act, 1936 apply. Thirdly, in s 136(2)(b) provision is made for an application to court to "cancel ... any obligation of the company contemplated in paragraph (a)". While a court may have the power (by virtue of s 136(2)(b)) to "cancel" an obligation that arises in contract, a court has no power to "cancel" legislation. Parties themselves have the power to bring a contract into being by consensus and thereby to create legal rights and obligations. This distinguishes an obligation arising *ex contractu* from one arising *ex lege*. They also have the power to cancel the contract, always by mutual agreement, sometimes unilaterally, and sometimes after following certain formalities. They never have the power to cancel legislation or law that binds them for reasons other than because they created it."

[14] "General moratorium on legal proceedings against company

133. (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except— (a) with the written consent of the practitioner;....."(Own emphasis)

prepare and implement a plan 'to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors, or shareholders than would result from the immediate liquidation of the company.'[15]

[28] It follows that the purported differentiation by the appellants in respect of pre-and post-adoption of the plan has no foundation in the provisions of chapter 6. This case is concerned with the creditors' right to vote as contemplated in s 151 read with s 152. The shareholders do not feature. Section 152(3)*(c)* deals with shareholders' rights. In terms of that section, if the proposed plan alters the rights of any class or classes of the holders of the company's securities, the holders of such rights will be present at the meeting where the plan is being considered. Thus, in that special case, the shareholders are consulted."

[61] In the case before me it cannot be said that the BRPs' plan was to rescue the first respondent and, failing to, thereafter immediately liquidate the first respondent. The first respondent went into business rescue eight years ago with a dividend of 5,4 cents to the rand that diminished to 0,00. First respondent also attempted to terminate the agreements with applicant eleven years ago.

CONCLUSION

[62] In this case the Expert misconstrued the issue he was called upon to decide and acted outside his mandate. The dismissing of the agreed amounts in the Award, with the reciprocity issue, constitutes a gross irregularity and a manifest error. The review, in my view, is successful and it is in the interests of justice that the findings and conclusions made in paragraph 67 to 73 of the Expert's Award, handed down on 29 February 2024 is reviewed and set aside.

COSTS

[63] Applicant's application was successful with costs to follow the result. The general principle regarding the award of costs is well-settled: it is entirely a matter for

[15] Section 128(1)*(b)*(iii) of the Companies Act.

the discretion of the court which is to be exercised judicially upon a consideration of the facts of each case and in essence it is a matter of fairness to both sides.[16]

[64] In *De Naamloze Vennootschap Alintex v Von Gerlach* **1958 (1) SA 13 (T)** on page 16 it was said: "The question of the engagement of two counsel has of course been discussed in a number of cases and in *South African Railways and Harbours v Mills*, **1924 CPD 110**, numerous authorities were reviewed and from the case there are to be extracted the following requirements, namely, the length of the hearing or argument, the importance of questions of principle or of law involved, and the number of legal authorities quoted." In my view the issues involved, length of the argument, questions of law and the complexity of the matter warranted the employment of two counsel and I therefore allowed the cost of two counsel.

[65] In the result the following order is made:

ORDER:

1. The findings and conclusions made in paragraph 67 to 73 of the Expert's award, handed down on 29 February 2024 ("the Award") are reviewed and set aside.

2. Paragraphs 67 to 73 of the Award are replaced with the following:

   2.1 The second and third respondents are to recognize, in accordance with the Plan, the claimant's claims against the first respondent of:

      2.1.1 R50 836 127.31, together with interest thereon; and
      2.1.2 R8 970 000.00, together with interest thereon.

   2.2 It is declared that the applicant has an in-principle entitlement under the management agreement, the quantum of which is held over for determination at a later stage, and

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[16] *Graham v Odendaal* **1972 (2) SA 611 (A)** on page 616 and *Gelb v Hawkins* **1960 (3) SA 687 (A)** on page 694: "In seeking a basic principle to apply, I do not think it is necessary or desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides. The various decisions in the reports in regard to costs seem to me to be illustrations of this basic principle."

2.3 The applicant's costs in the dispute under section 40 of the business rescue plan are to be paid by the first, second and third respondents jointly and severally, the one paying, the other to be absolved, on the attorney and client scale.

3. The applicant's costs in its review application are to be paid by the first, second and third respondents jointly and severally, the one paying, the others to be absolved, on the attorney and client scale to include the costs of two counsel where so employed.

ALLEN AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION JOHANNESBURG

This judgment was prepared by Acting Judge Allen. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 May 2026.

HEARD ON:	12 May 2026
DECIDED ON:	21 May 2026
For the Applicant:	Adv B Berridge SC
With him:	Adv M Cooke
Instructed by:	Ryan D Lewis Attorney
For the Respondents:	Adv A Bham SC
With him:	Adv C Kruger
Instructed by:	Mkhabela Huntley Attorneys