IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: D3822/2025

In the matter between:

THE TRUSTEES OF THE INKWAZI TRUST	**FIRST APPLICANTS**
WARTBURG INCORPORATED	**SECOND APPLICANTS**

and

SKEMA HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**SECOND RESPONDENT**
MACSTEEL SERVICE CENTRES SA (PTY) LTD and ROBERT FELLNER-FELDEGG (AFFECTED PARTIES)	**THIRD RESPONDENT**

(Application in terms of s 131 of the Companies Act 71 of 2008 for the commencement of business rescue proceedings)

ORDER

The following order is made:

1. The application for leave to appeal is dismissed.

2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application for leave to appeal, including the costs of two counsel where so employed.

JUDGMENT

Delivered: 13 August 2026

MASIPA J

Introduction

[1] This is an application for leave to appeal against the whole of my judgment delivered on 13 April 2026, in which I dismissed the applicants' application brought in terms of s 131 of the Companies Act 71 of 2008 (the Companies Act) for an order placing the first respondent, Skema Holdings (Pty) Ltd (Skema Holdings), under supervision and commencing business rescue proceedings. I further dismissed the applicants' application to strike out and ordered the applicants, jointly and severally, to pay the costs of the application on Scale B, including the costs occasioned by the interlocutory applications and the costs of two counsel where so employed.

[2] Leave to appeal is opposed by Macsteel Service Centres SA (Pty) Ltd (Macsteel) and Mr Robert Fellner-Feldegg (Mr Fellner-Feldegg), each of whom opposed the principal application as affected parties. The Companies and Intellectual Property Commission abided the decision of the Court.

[3] The applicants seek leave to appeal to the Supreme Court of Appeal, alternatively to a Full Court of this Division. They contend that the appeal enjoys reasonable prospects of success within the meaning of s 17(1)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Superior Courts Act). Alternatively, they submit that compelling reasons exist why the appeal should be heard in terms of s 17(1)*(a)*(ii). Leave is also sought against the costs order.

[4] In both their written and oral submissions, the applicants advanced numerous grounds of appeal. Although framed under separate headings, they substantially raise the following issues:

(a) whether this Court applied an unduly stringent threshold in determining the existence of a reasonable prospect of rescuing Skema Holdings under s 131 of the Companies Act;

(b) whether this Court impermissibly required the applicants to establish an implemented or near-final business rescue plan before granting relief;

(c) whether this Court erred in its treatment of the supplementary affidavits and the subsequent developments placed before it;

(d) whether this Court did not give sufficient weight to the evidence relating to the axle business and the employment of approximately 196 employees;

(e) whether this Court misapplied the principles articulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (*Plascon-Evans* rule)[1] in evaluating disputes of fact;

(f) whether this Court erred in referring to the judgment of Mossop J as forming part of the broader factual context;

(g) whether this Court incorrectly concluded that the application lacked bona fides and constituted an abuse of the business rescue procedure;

(h) whether this Court attached undue weight to the opposition of Macsteel and Mr Fellner-Feldegg; and

(i) whether the costs order is susceptible to appellate interference.

[5] Counsel further submitted that, irrespective of the prospects of success, the appeal raises important questions concerning the commencement threshold for business rescue proceedings, the treatment of supplementary evidence, the relevance of group structures, the application of the *Plascon-Evans* rule in business rescue proceedings and the role of creditor opposition under Chapter 6 of the Companies Act. Those issues, it was submitted, constitute compelling reasons why the appeal should be heard.

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Applicable legal principles

[6] The application is governed by s 17(1) of the Superior Courts Act, which provides that:

'Leave to appeal may only be granted where the judge…concerned [is] of the opinion that—

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

[7] The enactment of the Superior Courts Act materially altered the threshold previously applicable to applications for leave to appeal. The Legislature deliberately employed the word 'would' in place of the former test that another court 'might' come to a different conclusion. The consequence is that leave should not readily be granted merely because another conclusion is arguable.

[8] In *S v Smith*,[2] the Supreme Court of Appeal explained that what is required is a dispassionate assessment of the facts and the law to determine whether the proposed appeal enjoys realistic prospects of success. The Court emphasised that there must be a sound and rational basis for concluding that another court could reasonably arrive at a different conclusion and that an arguable case, or one which is not hopeless, is insufficient. In *S v Kruger*,[3] the Supreme Court of Appeal reiterated that, in deciding whether leave to appeal should be granted, the enquiry is 'whether there is a reasonable prospect of success'. The Court emphasised that 'more is required than the mere "possibility" that another court might arrive at a different conclusion'.

[9] Likewise, in *MEC for Health, Eastern Cape v Mkhitha and Another*,[4] the Supreme Court of Appeal stated:

'Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)*(a)* of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given

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[2] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7. Reaffirmed in *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para10.

[3] *S v Kruger* [2013] ZASCA 198; 2014 (1) SACR 647 (SCA) para 2.

[4] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176.

where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'[5] (Citation omitted)

[10] The second leg of s 17(1) permits leave to be granted where there exists some other compelling reason why the appeal should be heard. In *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* (*Caratco*),[6] the Supreme Court of Appeal explained that such compelling reasons ordinarily arise where the appeal raises an important question of law, a discrete issue of public importance or the appeal raises an important question of law or a discrete issue of public importance. The enquiry under s 17(1)*(a)*(ii), however, remains directed at the judgment sought to be appealed. The mere fact that litigation concerns issues which parties regard as important or of public interest does not, without more, constitute a compelling reason for granting leave to appeal. The compelling reason must relate to the decision actually made by the Court.

[11] During argument, Mr Mr *Harpur*, for the applicants, criticised the frequently cited observation in *Mont Chevaux Trust (IT2012/28) v Goosen and Others* (*Mont Chevaux*)[7] that the use of the word 'would' imports 'a measure of certainty' that another court will differ. He submitted that such an interpretation is inconsistent with the statutory requirement of a 'reasonable prospect of success' and impermissibly elevates the threshold beyond what the legislature contemplated.

[12] It is unnecessary, for present purposes, to determine whether the observations made in *Mont Chevaux* accurately describe the degree of persuasion required by s 17(1)*(a)*. This Court has not approached the present application on the basis that it must be satisfied with certainty that another court will arrive at a different

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[5] Ibid paras 16 and 17.
[6] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* [2020] ZASCA 17; 2020 (5) SA 35 (SCA) (*Caracto*) para 2.
[7] *Mont Chevaux Trust (IT2012/28) v Goosen and Others* 2014 JDR 2325 (LCC).

conclusion. Equally, however, the authorities of the Supreme Court of Appeal make it plain that more is required than a mere possibility that another court might differ. The applicants must demonstrate, on proper grounds, a realistic and rational basis for concluding that another court would come to a different conclusion. Against that standard, the grounds of appeal must be assessed.

[13] Mr *Harpur* correctly submitted that the enquiry is not whether this Court remains persuaded that its original judgment was correct. Equally, however, an application for leave to appeal is not an invitation to reargue the merits or to revisit every factual finding made in the principal judgment. The issue is whether the criticisms advanced disclose appealable misdirection of fact or law which create a realistic prospect that another court would interfere with the result. Mere disagreement with the Court's evaluation of the evidence does not satisfy the threshold prescribed by s 17(1)*(a)*.

The nature of the applicants' challenge

[14] Although the notice of application for leave to appeal and the accompanying heads of argument identify numerous grounds upon which leave is sought, many of them overlap and are interrelated. Properly analysed, the applicants' complaint is not that this Court identified the wrong legal principles. Indeed, during oral argument, Mr *Harpur* accepted that the judgment correctly referred to the authorities governing applications under s 131 of the Companies Act. The gravamen of the complaint is that, notwithstanding its identification of the correct legal principles, the Court applied them too stringently and consequently reached factual and evaluative conclusions that another court would allegedly not reach.

[15] The applicants accordingly contend that this Court impermissibly elevated the statutory threshold for the commencement of business rescue proceedings by requiring a level of certainty or factual completeness not contemplated by s 131(4) of the Companies Act. Allied to that submission are complaints concerning the Court's assessment of the supplementary affidavits, its treatment of the evidence relating to the axle business and the employees, its evaluation of the proposed rescue plan, its reliance upon the judgment of Mossop J, its application of the *Plascon-Evans* rule, and the significance attributed to the opposition of Macsteel and Mr Fellner-Feldegg.

The applicants submit that each of these matters constitutes an independent misdirection and that, when considered cumulatively, they demonstrate reasonable prospects that another court would reach a different conclusion.

[16] The respondents, on the other hand, submitted that the application is no more than an attempt to reargue the principal application. Mr *Lotz*, appearing for Mr Fellner-Feldegg, described the application as adopting a 'shotgun approach', contending that almost every finding made in the judgment has been challenged without identifying any material error of fact or law. Mr *Lotz* submitted that the judgment must be read holistically and that, when so considered, it demonstrates a careful evaluation of the evidence against the established principles governing business rescue applications. Mr *Mostert*, appearing for Macsteel, associated himself substantially with those submissions.

[17] I agree that the judgment must be read as a whole and not as a series of isolated findings. The conclusions reached in the principal judgment were not discrete findings divorced from one another. They formed part of an overall evaluative exercise directed at answering the statutory question posed by s 131(4), namely whether, on the facts before the Court, the applicants had established a reasonable prospect of rescuing Skema Holdings. It follows that individual passages cannot properly be considered in isolation from the reasoning.

[18] Equally, it bears emphasising that an application for leave to appeal is not an occasion to revisit the merits of the principal application or to determine whether another court could reasonably have reached a different factual conclusion on the same evidence. The enquiry is narrower. It is whether the applicants have demonstrated an appealable misdirection of fact or law that establishes a realistic and rational basis for concluding that another court would interfere with the judgment. Against that background, I turn to consider the principal grounds advanced by the applicants'.

Whether the Court applied an unduly stringent threshold under s 131

[19] The principal theme underpinning the applicants' submissions was that, although the judgment correctly stated the legal principles applicable to business rescue proceedings, it applied a materially more onerous standard in practice.

Mr *Harpur* submitted that the Court effectively required the applicants to establish an implemented or near-final business rescue plan before granting relief and, in so doing, conflated the commencement stage contemplated by s 131 with the later stages of the business rescue process regulated by ss 150 to 154 of the Companies Act. The submission cannot be sustained.

[20] The principal judgment expressly recognised that the applicants were not required to prove that business rescue would ultimately succeed, nor were they required to present a completed or approved business rescue plan before relief could be granted. To the contrary, the judgment accepted the principles articulated in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*[8] and *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd*,[9] namely that the requirement of a 'reasonable prospect' does not demand certainty of success but equally requires more than speculative optimism. The judgment proceeded on the basis that there had to exist objectively ascertainable facts demonstrating a reasonable prospect that one of the statutory objectives of business rescue could be achieved. That is the standard consistently adopted in the authorities.

[21] In substance, the applicants' complaint is directed not at the legal test applied but at the conclusions reached on the evidence. The fact that the Court found the proposed rescue strategy insufficiently grounded in objective facts does not mean it imposed a higher legal threshold than contemplated by s 131. It means only that, on the facts presented, the Court was not persuaded that the statutory threshold had been crossed.

[22] Closely allied to this complaint is the applicants' submission that the Court impermissibly required them to establish a completed or substantially implemented business rescue plan before granting relief. They submitted that the judgment discounted the proposed property sales, post-commencement funding, operational developments and restructuring initiatives because they remained conditional or

[8] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) paras 29-31.
[9] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) paras 21-23.

required implementation by a business rescue practitioner. In doing so, it was argued, the Court effectively required proof of matters which the Companies Act contemplates will ordinarily occur only after business rescue has commenced. I am unable to agree with that characterisation of the judgment.

[23] The judgment did not reject the applicants' case because the proposed transactions were conditional. Nor did it proceed on the basis that a completed rescue plan had to exist before relief could be granted. Had that been the approach adopted, it would plainly have been inconsistent with Chapter 6 of the Companies Act, which contemplates that the business rescue practitioner will investigate the affairs of the company, consult affected persons and thereafter prepare and publish a business rescue plan for consideration by creditors and other affected persons.

[24] What the judgment found was that the objective factual foundation relied upon by the applicants did not demonstrate a reasonable prospect that those contemplated transactions would ultimately achieve the statutory objectives of business rescue. The distinction is an important one. The Court did not require certainty that the proposed transactions would succeed; it required objectively ascertainable facts demonstrating a reasonable prospect of success.

[25] The applicants relied upon, amongst other matters, proposed property sales, expressions of interest, contemplated funding arrangements and anticipated operational developments. Those matters were carefully considered in the principal judgment. They were not rejected because they remained subject to future implementation, but because, viewed cumulatively and against the evidence presented by the opposing parties, they did not establish the factual platform required by the authorities.

[26] In this regard, the applicants’ criticism conflates the legal standard with the Court's evaluation of the evidence. The complaint is, in substance, that another court may attach greater weight to the evidence relied upon by the applicants or draw different factual inferences from it. That, however, is not equivalent to demonstrating that this Court applied an incorrect legal test. An appellate court is concerned with appealable misdirection, not merely with the possibility that another court might have

evaluated the evidence differently. Nor do I agree that the judgment impermissibly collapsed the distinction between the commencement stage contemplated by s 131 and the later stages regulated by ss 150 to 154 of the Companies Act.

[27] The judgment recognised that the practitioner bears the statutory responsibility for investigating the company's affairs and formulating an appropriate rescue plan. It nevertheless remained incumbent upon the applicants to satisfy the jurisdictional requirements prescribed by s 131, before the Court could invoke that statutory process. The existence of those subsequent statutory mechanisms does not relieve an applicant of the obligation to establish, on objectively ascertainable facts, that there is a reasonable prospect of rescuing the company. The criticism that this Court required proof of an implemented or near-final rescue plan is therefore not borne out by a proper reading of the judgment. Properly analysed, the applicants' complaint amounts to no more than disagreement with the factual conclusions reached by the Court after considering the evidence. That does not establish a realistic prospect that another court would interfere with the judgment.

The supplementary affidavits

[28] The applicants next contend that this Court committed a material misdirection by admitting the supplementary affidavits in the interests of justice while simultaneously treating the very fact of their filing as indicative of an evolving case and drawing adverse inferences from that circumstance. Mr *Harpur* submitted that, having admitted the affidavits, the Court was obliged to determine the application based on the record as supplemented and could not thereafter rely upon the supplementation itself as demonstrating that the rescue case lacked coherence or bona fides. The submission, whilst attractively presented, overlooks the distinction between the admissibility of evidence and the weight properly to be attached to it.

[29] This Court exercised its discretion to admit the supplementary affidavits because it considered that the matter should be determined on the fullest factual record available. That, however, did not oblige the Court to ignore the circumstances in which the additional evidence came to be placed before it, nor did it preclude the Court from considering whether the supplementation demonstrated that material

aspects of the rescue case emerged only after significant deficiencies had been exposed in the answering affidavits.

[30] I accept that, where subsequent developments occur which are material to the relief sought, an applicant is not only entitled, but may in appropriate circumstances be obliged, to place those developments before the Court. Motion proceedings are not conducted in a factual vacuum and a court determining prospective relief is generally entitled to have regard to facts existing at the time the matter is adjudicated rather than confining itself rigidly to circumstances existing when proceedings were instituted. It does not follow, however, that once supplementary affidavits are admitted, the Court is precluded from considering what their contents reveal concerning the nature and development of the case originally advanced. The admission of further affidavits determines only their admissibility. It does not insulate either the evidence contained therein or the manner in which the case evolved from judicial scrutiny.

[31] The principal judgment did not draw an adverse inference merely because supplementary affidavits had been filed. Rather, it considered that significant aspects of the rescue proposal, which subsequently assumed prominence, had not formed part of the applicants' original factual foundation but emerged only after material criticisms had been levelled in the answering affidavits. That was a relevant consideration in assessing whether the applicants had, at the commencement of the proceedings, established the objectively ascertainable factual basis required by s 131 of the Companies Act.

[32] The applicants submitted that this reasoning effectively penalised them for complying with their duty of disclosure. I do not agree. The judgment did not criticise the applicants for placing further facts before the Court. To the contrary, those affidavits were admitted precisely because the interests of justice required that the Court should determine the application on the fullest available record. The Court ultimately found that, even after considering the record as supplemented, the additional material did not cure the fundamental deficiencies identified in the applicants’ case.

[33] Nor is there merit in the submission that the Court disregarded the subsequent developments solely because they occurred after the institution of the proceedings. Those developments were considered. The Court nevertheless concluded that many remained contingent upon future events, depended upon assumptions which had yet to materialise, or were insufficiently supported by objective evidence to demonstrate the reasonable prospect required by s 131. That conclusion formed part of the Court's evaluative assessment of the evidence and not the application of an incorrect legal principle.

[34] During argument, Mr *Harpur* further submitted that the applicants found themselves in an invidious position. Had they failed to disclose subsequent developments, they may have been criticised for withholding material information. Having disclosed those developments, however, they were criticised for advancing what was described as an evolving case. The submission has superficial attraction but, with respect, it overlooks the distinction already referred to. There is no inconsistency between admitting subsequent evidence in the interests of justice and concluding, after considering that evidence together with the original papers, that the rescue case lacked the objective factual foundation required when viewed as a whole.

[35] Ultimately, the complaint once again amounts to a disagreement with the weight the Court attaches to the evidence. The applicants have not demonstrated that the Court excluded relevant evidence, misunderstood the purpose of the supplementary affidavits, or applied an incorrect legal principle in evaluating them. At its highest, the submission suggests that another court might have attributed greater significance to the subsequent developments. That falls short of establishing that another court would interfere with the evaluative conclusions reached.

The evolving factual foundation

[36] Closely related to the treatment of the supplementary affidavits is the applicants' complaint that the Court impermissibly characterised the rescue proposal as evolving and reactive. During argument, Mr *Harpur* submitted that the Court effectively penalised the applicants for supplementing their case in response to subsequent developments and criticisms raised by the respondents. I do not agree

that this fairly reflects the reasoning of the principal judgment. The concern identified in the principal judgment was not that further affidavits were filed. It was that important features of the rescue proposal emerged incrementally as the litigation progressed, often after deficiencies had been identified in the answering affidavits.

[37] The Court was entitled to consider whether the cumulative effect of those developments demonstrated that the objective factual foundation required by s 131 did not exist when the application was launched and whether the subsequent material genuinely strengthened the original case or merely sought to overcome difficulties exposed during the litigation. Nor did the Court make adverse credibility findings based upon demeanour or unsupported inference. The conclusions reached flowed from the objective documentary record and the internal consistency of the applicants' own evidence. The Court evaluated the affidavits, considered the directors' explanations, and assessed whether those explanations consistently supported the proposed rescue strategy. The applicants' complaint therefore amounts, once again, to disagreement with the Court's factual evaluation rather than the identification of an appealable misdirection.

The evidence concerning the axle business and the employees

[38] Considerable emphasis was placed, both in the written heads and during oral argument, upon the Court's findings concerning the relationship between Skema Holdings and the axle business, and in particular the finding that the applicants had failed satisfactorily to establish that the approximately 196 employees whose interests featured prominently in the application were employees of Skema Holdings itself. Mr *Harpur* submitted that the Court overlooked the evidence of the company's external auditor, Mr Karim, who explained that, although the operational costs of the axle business were borne by Skema Mining Components under the leasing arrangement, the employees remained contractually employed by Skema Holdings. Counsel referred extensively to the supplementary affidavits and the relevant financial statements in support of that submission and argued that there was no direct evidence from any person with personal knowledge contradicting that evidence.

[39] The submission cannot be considered in isolation from the reasoning of the principal judgment. The issue before the Court was never simply whether certain individuals were employed by Skema Holdings. The broader enquiry concerned whether the applicants had demonstrated, on the evidence as a whole, that Skema Holdings itself possessed a rescuable business and that the preservation of those employment relationships materially advanced the statutory enquiry under s 131. The judgment expressly considered the evidence concerning the group structure, the leasing arrangements, the axle business and the employment position. It also considered the auditor's explanation. The Court's ultimate conclusion that the evidence did not satisfactorily address the concerns raised by the respondents does not mean that the evidence was ignored or overlooked. Nor do I agree with the submission that the judgment proceeded from an incorrect factual premise.

[40] The applicants' complaint isolates one component of the Court's reasoning while overlooking the broader enquiry undertaken in the principal judgment. The issue was not merely whether the employees were contractually employed by Skema Holdings, but whether the applicants had established, on objectively ascertainable facts, that Skema Holdings itself possessed a viable business capable of rescue and that the proposed restructuring was capable of achieving one or more of the statutory objectives contemplated by Chapter 6 of the Companies Act.

[41] Throughout the proceedings the respondents consistently contended that the applicants had blurred the distinction between Skema Holdings and the other entities within the group. The judgment addressed that criticism extensively. It recognised that Skema Holdings formed part of a larger corporate structure but also observed that the application before the Court concerned the rescue of Skema Holdings, not the group. The separate juristic personality of the companies within the group could not simply be disregarded because their affairs were commercially interrelated.

[42] Mr *Harpur* submitted that the Court adopted an unduly narrow approach to the position of a holding company. He argued that a holding company cannot be viewed in isolation from its subsidiaries and that its shareholding, contractual arrangements and economic interests within the group formed part of the business rescue enquiry. I did not understand the principal judgment to suggest otherwise. Commercial reality

required consideration of the relationship between Skema Holdings and the entities through which the operational business was conducted. That relationship was considered. The difficulty identified in the judgment was that the evidence did not sufficiently demonstrate how those arrangements translated into a realistic and objectively sustainable rescue of Skema Holdings itself.

[43] Likewise, the Court did not disregard Mr Karim's evidence. His explanation regarding the employment arrangements, the treatment of employee costs and the accounting treatment reflected in the financial statements formed part of the evidential matrix considered by the Court. The applicants' submission, however, effectively invites this Court to reconsider the weight attached to that evidence and to substitute a different factual evaluation. That is not the function of an application for leave to appeal. The mere fact that another court might attribute greater significance to one aspect of the evidence does not establish that another court would interfere with the overall evaluative conclusion reached by this Court.

[44] The same applies to the evidence concerning the preservation of employment. The principal judgment fully appreciated the importance of preserving employment, one of the central objectives underlying the introduction of business rescue into South African company law. The judgment did not minimise the significance of the potential loss of employment. Rather, it concluded that the statutory objective of preserving employment, important though it undoubtedly is, could not displace the jurisdictional requirement that an applicant establish a reasonable prospect of rescuing the company concerned. The existence of substantial employment considerations does not, without more, satisfy the requirements of s 131.

[45] In the result, I am not persuaded that the applicants have demonstrated any appealable misdirection in relation to the Court's treatment of the employment evidence, the axle business or the relationship between Skema Holdings and the other entities within the group. These grounds are directed principally at the factual evaluation undertaken by the Court and do not establish a realistic prospect that another court would interfere.

Operational viability and the ability to meet ongoing obligations

[46] During argument, considerable emphasis was placed on the value of the Skema Holding's immovable property, the proposed sales of properties, anticipated funding and the existence of valuable assets. The applicants submitted that these demonstrated that Skema Holdings was factually solvent and capable of successful restructuring. That submission, however, does not fully answer the reasoning contained in the principal judgment. The principal judgment was not confined to an assessment of the value of Skema Holding's assets. It considered whether the evidence established that the company possessed the present operational capacity to sustain itself, while business rescue was pursued.

[47] The Court examined, amongst other matters, the company's ability to meet its current liabilities, maintain ongoing operations, fund its trading activities and implement the proposed restructuring pending the formulation of a business rescue plan. The Court ultimately concluded that the applicants had not established, on objectively ascertainable facts, that the proposed rescue strategy could meet those immediate operational demands. The reliance upon anticipated property sales, future funding arrangements and contingent transactions did not adequately address the practical difficulties identified in the evidence. Those findings formed an integral part of the overall evaluation undertaken by the Court.

[48] Once again, the applicants' submissions seek to persuade this Court that another factual evaluation is possible. That is not the enquiry under s 17(1)*(a)*. The issue is whether another court would conclude that the principal judgment misdirected itself in its evaluation of the evidence. In my view, no such misdirection has been demonstrated.

The application of the *Plascon-Evans* rule

[49] The applicants further contend that the Court misapplied the *Plascon-Evans* rule. They argue that the enquiry under s 131 is prospective and evaluative, rather than directed at the determination of final rights, and that the Court therefore erred in resolving disputed matters in favour of the respondents, particularly where the respondents' assertions concerning future viability were said to be speculative and

unsupported by persons with direct personal knowledge. The submission cannot be upheld.

[50] The principal judgment did not proceed on the basis that every denial advanced by the respondents had to be accepted merely because final relief was sought. Nor did it treat the respondents' predictions concerning future commercial viability as established facts. Rather, the Court applied the well-established principles governing motion proceedings in evaluating disputed factual issues while simultaneously undertaking the prospective enquiry required by s 131 of the Companies Act.

[51] The distinction is important. The historical facts upon which the applicants relied remained subject to the ordinary principles governing motion proceedings. The ultimate question whether those facts established a reasonable prospect of rescuing the company was an evaluative conclusion to be drawn by the Court. The judgment recognised and applied that distinction. It did not convert opinions concerning future viability into facts; nor did it determine the application solely by preferring the respondents' commercial pessimism over the applicants' optimism. Properly analysed, the applicants' criticism once again concerns the factual conclusions reached by the Court after evaluating the evidence. That another court may possibly attribute different weight to aspects of that evidence does not demonstrate that the Court misapplied the *Plascon-Evans* rule, nor does it establish a reasonable prospect that another court would interfere with the judgment on that basis.

The reference to the judgment of Mossop J

[52] The applicants further contend that this Court materially misdirected itself by referring to the judgment of Mossop J, delivered after argument had been heard in the present matter, as forming part of the broader factual context. Mr *Harpur* submitted that the applicants were not afforded an opportunity to address either the factual or legal relevance of that judgment before it was referred to in the principal judgment. He further submitted that the judgment was itself subject to appellate proceedings and therefore lacked finality. I do not agree that the reference to the judgment constitutes an appealable misdirection.

[53] Judges routinely consider judgments delivered after a matter has been argued but before judgment is handed down. Indeed, it would ordinarily be remiss of a court to ignore a judgment which may bear upon the legal issues before it merely because it was delivered after argument had concluded. Where such a judgment establishes or develops a legal principle material to the decision, fairness may, in appropriate circumstances, require the parties to be afforded an opportunity to address its significance. That, however, is not what occurred in the present matter.

[54] The judgment of Mossop J was neither cited nor relied upon as creating a new legal principle, nor was it treated as binding authority upon this Court. To the contrary, the judgment expressly recognised that it was not binding and that each case must necessarily be determined upon its own facts. The reference served only to record that another court had recently dealt with litigation arising within the same corporate environment and involving similar commercial contentions. It was not relied upon as evidence establishing facts in the present proceedings. More importantly, the conclusions reached in the principal judgment did not depend upon the judgment of Mossop J. They were founded upon the evidence placed before this Court, the affidavits filed by the parties, the documentary material and the submissions presented during argument. The reasoning contained in the judgment neither adopted nor incorporated factual findings made by Mossop J, nor did it treat those findings as binding upon the parties before this Court.

[55] The applicants nevertheless submitted that the mere reference to the judgment may have influenced the Court's reasoning. Respectfully, that submission is speculative. The principal judgment contains a comprehensive analysis of the evidence placed before this Court and reaches its conclusions independently of the judgment delivered by Mossop J. Read as a whole, there is no basis for concluding that the outcome depended upon that judgment or that, absent the reference to it, a different conclusion would have been reached. Nor does the fact that appellate proceedings were contemplated or pending, in relation to the judgment of Mossop J, alter the position.

[56] The judgment was not relied upon as binding precedent, nor did it constitute the ratio decidendi of the principal judgment. Whether it ultimately withstands

appellate scrutiny is therefore immaterial to the reasoning adopted in this matter. In the circumstances, I am not persuaded that another court would conclude that the reference to Mossop J's judgment constituted either procedural unfairness or a material misdirection warranting appellate interference.

Mala fides and abuse of the business rescue procedure

[57] Closely related to the preceding ground is the applicants' complaint that this Court incorrectly concluded that the application lacked bona fides and constituted an abuse of the business rescue procedure. Mr *Harpur* submitted that the Court effectively treated the timing of the application, the filing of supplementary affidavits and the interruption of the liquidation proceedings as demonstrating an improper purpose, notwithstanding that s 131(6) of the Companies Act expressly contemplates that business rescue proceedings may be instituted while liquidation proceedings are pending.

[58] It is correct that the institution of business rescue proceedings after the commencement of liquidation proceedings is not, without more, indicative of mala fides or abuse. Section 131(6) expressly recognises that possibility and provides for the suspension of liquidation proceedings in those circumstances. The Legislature plainly contemplated that business rescue may, where appropriate, interrupt or delay the liquidation process. It does not follow, however, that the timing of such an application is irrelevant. Whether a business rescue application has been brought bona fide or merely to delay the inevitable consequences of liquidation remains a question to be determined upon the facts of each case. The timing of the application, the surrounding circumstances and the objective evidential foundation upon which it rests may all properly be considered in determining whether the statutory remedy has been invoked for the purpose for which it was enacted.

[59] The principal judgment did not conclude that the application was abusive merely because it was launched after the liquidation proceedings had been argued. Rather, the timing of the application formed one of several factors considered in evaluating the objective factual foundation of the rescue proposal. Those factors included the evolution of the applicants' case, the nature of the proposed restructuring, the evidential basis for the rescue strategy and the practical obstacles

identified in the affidavits. The finding ultimately reached was the product of a cumulative assessment of all those considerations and not of any single factor viewed in isolation.

[60] The applicants further submitted that the respondents themselves possessed commercial interests in opposing the business rescue application and that their opposition should therefore have been viewed with caution. The principal judgment recognised that both Macsteel and Mr Fellner-Feldegg were substantial creditors pursuing their respective commercial interests. That circumstance was neither surprising nor improper. It did not, however, diminish the Court's obligation independently to determine whether the statutory requirements prescribed by s 131 had been established.

The significance of creditor opposition

[61] The applicants contend that this Court attached disproportionate weight to the opposition of Macsteel and Mr Fellner-Feldegg. During argument, Mr *Harpur* submitted that the Court effectively afforded those creditors a veto over the commencement of business rescue proceedings notwithstanding that no business rescue practitioner had yet been appointed, no business rescue plan had yet been formulated and no meeting of creditors had yet been convened. He argued that creditor opposition at the commencement stage could not determine the outcome of an application brought under s 131 of the Companies Act. The submission proceeds from a premise which the principal judgment did not adopt.

[62] The judgment did not proceed on the basis that Macsteel and Mr Fellner-Feldegg possessed a statutory veto over the commencement of business rescue proceedings. Nor did it conclude that the application should fail merely because they indicated that they would oppose any future rescue plan. Had that been the reasoning, the criticism would have been justified because the Companies Act plainly contemplates that the formulation and adoption of a business rescue plan occurs only after business rescue has commenced.

[63] Rather, their opposition formed one component of the broader factual matrix. Both Macsteel and Mr Fellner-Feldegg were substantial judgment creditors whose

claims constituted a significant portion of Skema Holding's indebtedness. Their stance was therefore relevant in assessing the commercial realities confronting the proposed rescue, but it was neither decisive nor treated as determinative of the enquiry under s 131. Mr *Harpur's* submission that the Companies Act provides mechanisms for challenging unreasonable creditor votes does not advance the enquiry. The judgment did not refuse business rescue because it anticipated that creditors would reject a plan. It considered creditor opposition together with all the other evidence in determining whether the applicants had established an objectively reasonable prospect of rescue.

[64] Likewise, the applicants' submission that the general body of creditors did not oppose the application cannot, without more, advance the enquiry. The absence of opposition by some creditors is not equivalent to evidence supporting the viability of the proposed rescue. Nor does it diminish the significance of the evidence placed before the Court by those creditors who actively opposed the application. Each case must ultimately be determined on the evidence properly before the Court and not by a numerical assessment of those who choose to participate in the proceedings.

[65] Properly analysed, this ground of appeal once again challenges the weight the Court attributes to aspects of the evidence rather than to the legal principles applied. The applicants have not demonstrated that this Court regarded creditor opposition as decisive or as amounting to a statutory veto. Nor have they established that another court would interfere with the evaluative conclusions reached in that regard.

Compelling reasons

[66] The applicants submitted, in the alternative, that even if reasonable prospects of success have not been demonstrated, compelling reasons nevertheless exist why the appeal should be heard. Reliance was placed upon the importance of business rescue as a statutory mechanism, the preservation of employment, the role of holding companies within corporate groups, the proper treatment of supplementary affidavits, the application of the *Plascon-Evans* rule to proceedings under s 131 of the Companies Act and the significance of creditor opposition during business rescue proceedings.

[67] I readily accept that business rescue occupies an important position within South African company law and that the issues identified by the applicants are matters of considerable commercial significance. The preservation of viable businesses and employment lies at the heart of Chapter 6 of the Companies Act. Equally, the proper application of the statutory business rescue regime is of continuing importance to courts, creditors, companies and employees alike.

[68] The enquiry contemplated by s 17(1)*(a)*(ii), however, is not whether the subject matter of the litigation is important in the abstract. As explained by the Supreme Court of Appeal in *Caratco*, the compelling reason must relate to the judgment sought to be appealed.[10] It is therefore necessary to identify some important question of law, conflicting authority or other feature of the judgment itself which renders appellate consideration necessary in the interests of justice.

[69] The applicants have not demonstrated that this judgment establishes a new legal principle, departs from established authority or creates uncertainty in the interpretation of Chapter 6 of the Companies Act. The legal principles governing applications under s 131 were neither reformulated nor extended. The principal judgment applied the established authorities to the particular facts presented on the papers. In substance, the applicants seek appellate reconsideration of the factual and evaluative conclusions reached by this Court. That does not constitute a compelling reason within the meaning of s 17(1)*(a)*(ii). The fact that the litigation concerns important commercial issues does not, without more, justify the granting of leave to appeal.

Costs

[70] The applicants finally contend that leave should be granted against the costs order. They submit that the Court erred in awarding costs on Scale B and that, even if the application for business rescue ultimately failed, it cannot properly be characterised as deserving of a punitive costs order. An appeal against a costs order does not ordinarily lie, unless the applicants demonstrate that the Court failed to

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[10] *Caracto* para 2.

exercise its discretion judicially or acted upon a wrong principle or material misdirection. The applicants have not identified any such misdirection. Their complaint is directed principally at the conclusions reached on the merits.

[71] The costs order followed upon the Court's evaluation of the conduct of the litigation as a whole and the findings reached in the principal judgment. No proper basis has been established for concluding that another court would interfere with the exercise of that discretion.

Conclusion

[72] Before concluding, it is necessary to emphasise that many of the applicants' grounds of appeal isolate individual findings contained in the principal judgment and challenge them separately. That approach overlooks the manner in which the judgment was constructed. The principal judgment did not rest upon any single finding. It was the cumulative effect of the deficiencies identified in the evidence, the speculative nature of significant aspects of the proposed rescue, the evolving factual foundation, the uncertainty concerning operational viability, the treatment of the group structure and the absence of objectively ascertainable facts demonstrating a reasonable prospect of rescue that led the Court to dismiss the application. The applicants have not demonstrated that another court would interfere with that overall evaluative conclusion.

[73] Having carefully considered the application for leave to appeal, the written heads of argument, the comprehensive oral submissions presented by counsel, and the authorities relied upon, I am not persuaded that the applicants have demonstrated a realistic and rational basis for concluding that another court would reach a different conclusion. Nor am I persuaded that compelling reasons exist, within the meaning of s 17(1)*(a)*(ii) of the Superior Courts Act, for the appeal to be heard. I am satisfied that the application falls to be dismissed.

Order

[74] The following order is made:

1. The application for leave to appeal is dismissed.

2. The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application for leave to appeal, including the costs of two counsel where so employed.

MASIPA J

Appearances

Matter heard on:	5 August 2026
Judgment delivered:	13 August 2026
For the applicants:	G D Harpur SC
Instructed by:	Shepstone & Wylie, Durban
For the affected party:	G M E Lotz SC
(**ROBERT FELLNER-FELDEGG)**	
Instructed by:	Hay & Scott Attorneys, Pietermaritzburg
For the affected party:	M Mostert
(**MACSTEEL SERVICE CENTRES SA (PTY) LTD)**	
Instructed by:	Bentley Attorneys, Durban.