IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO.: D4472/2023

In the matter between:

TONGAAT HULETT LIMITED (IN BUSINESS RESCUE)	First Applicant
TONGAAT HULETT SUGAR SOUTH AFRICA (PROPRIETARY) LIMITED (IN BUSINESS RESCUE)	Second Applicant
TREVOR JOHN MURGATROYD N.O.	Third Applicant
PETRUS FRANCOIS VAN DEN STEEN N.O.	Fourth Applicant
GERHARD CONRAD ALBERTYN N.O.	Fifth Applicant

and

SOUTH AFRICAN SUGAR ASSOCIATION	First Respondent
S.A. SUGAR EXPORT CORPORATION (PROPRIETARY) LIMITED	Second Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Third Respondent
SOUTH AFRICAN SUGAR MILLERS' ASSOCIATION NPC	Fourth Respondent
SOUTH AFRICAN CANE GROWERS' ASSOCIATION NPC	Fifth Respondent
SOUTH AFRICAN FARMERS' DEVELOPMENT ASSOCIATION NPC	Sixth Respondent
RCL FOODS SUGAR & MILLING (PROPRIETARY) LIMITED	Seventh Respondent
ILLOVO SUGAR (SOUTH AFRICA) (PROPRIETARY) LIMITED	Eighth Respondent
UMFOLOZI SUGAR MILL (PROPRIETARY) LIMITED	Ninth Respondent

GLEDHOW SUGAR COMPANY (PROPRIETARY) LIMITED	Tenth Respondent
HARRY SIDNEY SPAIN N.O.	Eleventh Respondent
UCL COMPANY (PROPRIETARY) LIMITED	Twelfth Respondent
ALL REGISTERED GROWERS	Thirteenth to Twenty-Three Thousandth Respondents
THE AFFECTED PERSONS IN THL'S BUSINESS RESCUE	Twenty-Three Thousand and First Respondents and Further Respondents

And in the matter of an Application for Leave to Appeal

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by publication on *SAFLII*. The date and time for hand-down is deemed to be 10h00 on 06 May 2024.

Vahed J:

[1] The applicants were unsuccessful in the application ("the main application") and my reasons for non-suiting them are set out in some detail in my judgment delivered on 4 December 2023. It is to be found at [2023] ZAKZDHC 93 and [2024] 1 All SA 509 (KZD). It also records the facts and background of the matter and it is unnecessary to recount them here. The applicants seek leave to appeal, contending that on the two principal issues I erred. Those two being firstly, whether, having regard to s 136(2)(a)(i) of the Companies Act, 2008, ("the Act") the obligations of the first applicant ("THL") under the Sugar Industry Agreement, 2000 ("SI Agreement") are capable of suspension during the period THL remained under business rescue, and secondly and alternatively, if that was not to be, declaring the section unconstitutional and invalid for its failure to provide for that suspension. A third issue dealt with in the judgment relating to the seventh's respondent's application before the Sugar Industry Appeals Tribunal is not being challenged.

[2] It is not in dispute that after delivery of the judgment, and on 11 January 2024, a majority of THL's creditors present at a meeting convened in terms of s 151 of the Act voted in favour of the adoption of a revised and amended Business Rescue Plan put up by the Vision Consortium ("the Vision Plan").

[3] For the purposes of considering the application for leave to appeal it is assumed that the Vision Plan has been approved and adopted and that it is final and binding on THL and all affected persons. The treatment of the outstanding payments due to the first respondent ("SASA") is dealt with in the Vision Plan, and appears to be contingent on the outcome of the intended appeal process. In its relevant part the Vision Plan provides as follows:

> "6.1.6. **Applicable to the Vision Transactions:**
>
> 6.1.6.1. Key Stakeholders:
>
> • SASA:
>
> - THL will discharge its future payment obligations towards SASA in accordance with the Sugar Industry Agreement, including ongoing payment of SASA levies and the local market redistributions duly owed to SASA by THL.
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> - On 29 November 2023, the Declaratory Application was dismissed with costs by Vahed J. The judgement of Vahed J in respect of such order was handed down on 4 December 2023 ("**the Vahed Judgement**"). THL and the BRPs have applied for leave to appeal the decision. THL will abide by the final outcome of the appeal process of the Declaratory Application (i.e. after any and all appeals have been finally exhausted).
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> - SASA asserts that the outstanding amount as at 23 November 2023 (which takes into account the final 2023 season's local market redistribution and SASA levies and the set off of export proceeds payable by SASEXCOR/SASA to THL and which obligation to pay such proceeds has been assigned by SASEXCOR to SASA) is R525 956 121, which is in full and final settlement of SASA's statutory obligations ("**SASA Claim**"). THL agrees with the calculation of the SASA Claim and also agrees not

to dispute the aforegoing assignment or set off of the obligation to pay export proceeds by SASEXCOR to SASA.

- THL will, within twenty (20) Business Days after the Closing Date, but prior to substantial implementation:

    - pay the SASA Claim into an escrow account ("SASA Escrow"); or

    - should THL be unable to pay the full SASA Claim into the SASA Escrow within twenty (20) Business Days after the Closing Date, Vision shall, on behalf of THL, pay the full SASA Claim into the SASA Escrow;

- THL agrees that the SASA Escrow shall be ringfenced in that the amounts retained in the SASA Escrow shall be solely payable to SASA, The SASA Escrow account shall be in the name of an independent reputable firm of attorneys ("Independent Attorneys") in a suitable interest bearing account, and for the benefit of such party as is ultimately successful in the Declaratory Application;

- in the event that the outcome of the appeal process is that the Vahed Judgement is:

    - upheld THL will make payment of its full liability to SASA (including any order as to interest and costs of the appeal and costs of the Declaratory Application), within 10 Business Days after the handing down of the final appeal judgement by means of SASA calling on the Independent Attorneys to release funds from the available amount held in the SASA Escrow and pay same to SASA;

    - overturned, THL shall be entitled to call on the Independent Attorneys to withdraw the SASA Claim from the SASA Escrow and pay same to THL;"

[4] The application for leave to appeal was initially set down for hearing on 13 December 2023, but was postponed to permit voting on a then proposed business

rescue plan. As indicated above the Vision Plan was subsequently voted on and approved by THL's accepted creditors and as such the applicants submit that the intended appeal accordingly raises live issues between the parties.

[5] The application for leave to appeal is opposed by the first, second, third, fourth, seventh, eighth, and 12th respondents ("the respondents").

[6] The test in an application for leave to appeal is settled. Section 17(1)(a) of the Superior Courts Act, 2013 provides as follows:

> "(1) Leave to appeal may only be given where the judge or judges concerned are 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] There must exist more than just a mere possibility that another court will find differently on both the facts and the law. What is required by the test of reasonable prospects of success has been dealt with in *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 at para 10 (footnotes omitted):

> "[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in *Caratco,* concerning the provisions of s 17(1)*(a)*(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those

prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist."

[8] This perhaps harkens back to what was said in *S v Smith* 2012 (1) SACR 567 (SCA) at para 7 (footnotes omitted):

> "[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[9] It must follow that the success of an application for leave to appeal depends on the prospects of eventual success of the appeal itself. See *Zuma v Democratic Alliance and Another* 2021 (5) SA 189 (SCA) at para 2 (footnotes omitted):

> "[2] The two judges who considered the application referred it for oral argument in terms of the provisions of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for an applicant to convince the court that he or she has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, inter alia, on the prospects of eventual success of the appeal itself, the argument on the application, to a large extent, had to address the merits of the appeal."

[10] It is necessary to test the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an appeal court *would* interfere in the decision against which leave to appeal is sought. In *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at para [34] it was put thus (footnotes omitted):

> "[34] There is a further principle that the court a quo seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its

findings that the plaintiff failed to prove locus standi or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this court succeeding, or that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit."

[11] The crucial question is whether on appeal the applicants *would* have strong prospects on the merits. In *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 the question was described in these terms (footnote omitted):

> "[16] 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 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.
>
> [17] 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."

To my mind the use of the word "*would*" in the test "...*would have a reasonable prospect of success*..." as applied in determining whether to grant leave to appeal means that I must be satisfied that the applicants have a realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.

[12] Enquiring thereafter whether there is some other compelling reason for the appeal to be heard it is to be noted that in *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre* and Others 2016 (3) SA 317 (SCA) it was observed as follows (footnotes omitted):

> "[22] Apart from its finding that the appeal had become moot the High Court also referred to s 17(1)*(a)*(i) of the Superior Courts Act and held that an appeal had no reasonable prospect of success. But in reaching that conclusion it did not consider the new basis upon which the government sought to justify its opposition to SALC's claim. So we do not have the benefit of the High Court's view in regard to those contentions.

[23] After expressing its conclusion on prospects of success the High Court also said that it had no discretion once it reached that conclusion to grant leave to appeal. But it failed to consider the provisions of s 17(1)*(a)*(ii) of the Superior Courts Act which provide that leave to. appeal may be granted, notwithstanding the court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. This is linked to the question of mootness. In that regard there is established jurisprudence in this court that holds that, even where an appeal has become moot, the court has a discretion to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters. That jurisprudence should have been considered as a guide to whether, notwithstanding the High Court's view of an appeal's prospects of success, leave to appeal should have been granted. In my view it clearly pointed in favour of leave to appeal being granted.

[24] That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued."

[13] It is also worth noting that *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* and Others 2013 6 SA 520 (SCA) stressed that (footnotes omitted):

"[24] For those reasons the court below was correct to dismiss the challenge to the arbitrator's award and the appeal must fail. I should however mention that the learned acting judge did not give any reasons for granting leave to appeal. This is unfortunate as it left us in the dark as to her reasons for thinking that Dexgroup enjoyed reasonable prospects of success. Clearly it did not. Although points of some interest in arbitration law have been canvassed in this judgment, they would have arisen on some other occasion and, as has been demonstrated, the appeal was bound to fail on the facts. The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal."

[14] A consideration of test for leave to appeal is perhaps appropriately concluded with a comment that the interesting interplay between the requirements for prospects of success on the one hand and the requirements when considering the question of compelling circumstances on the other. This is brought into focus in what was said in *JK Structures CC v City of Cape Town and Others (leave to appeal)* [2023] ZAWCHC 93 (footnotes omitted):

> "[15] The implication in the sentence in the learned judge's observation in *Caratco* that I have underlined is that appeals are primarily meant to be about obtaining different results, not second opinions. Even if there is an important point of law or an issue of public importance in point, no purpose is served by it being reconsidered on that basis alone by another court on appeal if the prospect of interference with the judgment at first instance is remote. The filtering object of s 17(1) would be subverted were meritless questions sent on appeal when there was no compelling reason for the matter in question to deserve the attention of a higher court."

[15] The applicants argue that present application for leave to appeal satisfies those tests at every level.

[16] They argue firstly that the matter it is of substantial importance to the parties, and to the sugar industry at large. In this regard they contend that under the Vision Plan an amount of slightly in excess of R525 million – being the value of the suspended payments, after set-off, has been paid (or will be paid) into escrow pending the final determination of these (or the appeal) proceedings. If my judgment and order were to stand, that amount will be paid over, in full, to SASA. If the judgment and order are overturned on appeal, THL will be entitled to procure that such amount is instead paid to it and thus it is contended that these proceedings have substantial financial ramifications for SASA, and for all the millers and refiners involved. It is also argued that because of the revenue sharing arrangement, the fates of the millers and refiners are interconnected with those of the other sugar industry participants and thus the case is also important for the industry at large. On this aspect I am reminded that in my judgment I noted that the sugar industry is critical to the South African economy.

[17] Next they argue that the case is important to the administration of justice in that it concerns the proper interpretation and application of s 136(2)(a)(ii) of the Act which they assert is an issue of considerable significance in the business rescue

context. The third to fifth applicants, being professional business rescue practitioners, argue that they require clarity on the proper interpretation of that provision for the proper discharge of their professional functions and obligations.

[18] Then too it is suggested that the proposed appeal raises a number of legal issues of public importance which include:

a. the proper interpretation of s 136(2)(a)(i), read with the definition of "agreement" in the Act;

b. the proper interpretation of s 133, read with the definition of "regulatory authority" in the Act;

c. the legal status of the SI Agreement and of SASA and what the implications of the application of s 136(2)(a)(i) and s 133 of the Act are for them;

d. the constitutionality of s 136(2)(a)(i) of the Act if, as I have determined, it permits the suspension of obligations that arise under contract, but not of what is contended to be the self-same kind of obligations because they arise under subordinate legislation.

[19] The applicants argue that those issues have constitutional implications and are *res nova* and thus warrant the attention of a higher court.

[20] And finally, the appellants argue further that the intended appeal also raises at least two discreet issues of public importance:

a. It is suggested that the first is the question whether the SI Agreement qualifies as an agreement for the purposes of s 136(2)(a)(i) of the Act, and whether the payment obligations (or at least the local market redistribution payment obligations) are capable of suspension by the BRPs in business rescue. They say that that has important ramifications for THL and SASA in the current business rescue and also for the sugar industry generally.

b. The second, it is suggested too, is the status of the SI Agreement, in particular, whether it is a contract made by the Minister between the parties or subordinate legislation imposed on the industry. That issue, so the submission develops, has implications for the nature of the rights and obligations the sugar industry participants (including SASA) owe one another, and the basis on which their decisions and actions can be challenged. While this is an issue that has been considered by a full bench in *Even Grand Trading 51 CC v Tongaat Hulett Ltd (South African Sugar Association intervening)* (Unreported Judgment, KwaZulu Natal High Court, Pietermaritzburg, 2 November 2012, Case No: AR517/11), but not by the Supreme Court of Appeal ("SCA") and the applicants submit that it warrants consideration by that Court.

[21] The applicants contend that in those circumstances it cannot seriously be disputed that there are compelling reasons for granting leave to appeal, but that in any event the intended appeal enjoyed prospects of success because:

a. There are no appeal judgments on the proper interpretation of either s 133(f) or s 136(2)(a)(i) of the Act and there is no precedent at all on the meaning to be attributed to a "*regulatory authority*" or an "*agreement*" in those provisions;

b. The same is true of the constitutional challenge and the main interpretive and constitutional questions at issue in the case are thus entirely *res nova*.

c. In addition, the central principle in dispute is whether payments made among industry participants under the SI Agreement amount to the discharge of private law obligations, or public law functions and it is emphasised that distinguishing the discharge of public law functions from private law ones is an inherently complex issue. legislation.

[22] The applicants also rely on the fact that six parties participated in the proceedings, represented by some 14 counsel, and that the matter was argued over two full days. The judgment was prepared urgently, was handed down some 2½

months after the hearing and runs to 74 pages. The applicants suggest that these factors indicate self-evidently that the matter raises arguable legal issues of public importance.

[23] The applicants submit that I ought to have found that on a textual interpretation of sections 136 and 133 of the Act the business rescue practitioners are entitled to suspend THL's payment obligation under the SI Agreement. They submit further that I ought to have found that the obligations of the nature sought to be enforced by SASA qualify as obligations of the company arising under an agreement to which the company was party at the commencement of the business rescue proceedings within the meaning of s 136(2)(a)(i) of the Act.

[24] The respondents persist in the view that the applicants' argument ignores the fact that the SI Agreement lacks the essential feature of an agreement which is that an agreement imposes obligations on the contracting parties to the agreement by virtue of the consensus manifested in the agreement. The respondents also persist in the view that applicants' argument ignores the fact that the SIA has been held to be subordinate legislation by a full bench of this division in *Even Grand Trading* and that I was bound by such finding (See para 19(b) above).

[25] It seems to me that it is no answer for the applicants to suggest that in fact when the Minister imposes the SI Agreement on the industry, it is generally as a result of consultation with the industry and with consensus having been reached. Whether consensus is reached within the industry, the source of the obligation under the SI Agreement is not such consensus but it is the Minister's power in terms of section 4(1)(c) of the Sugar Act to impose the regime on the industry and the resultant effect that the industry is bound by the Minister's determination.

[26] Irrespective of the nature of the SI Agreement, the applicants' interpretation would lead to the conclusion that the business rescue practitioners have the power to suspend the Minister's power under section 4(1)(c) of the Sugar Act, thus rendering the SI Agreement not binding. This to my mind would be wholly untenable.

[27] The essential difference between obligations arising under a statutorily binding regime and obligations arising under an agreement is that, in the case of a

statutorily binding regime what makes the obligations binding on the parties bound is the statutory imposition, while under an agreement what makes the obligations binding on the contracting parties is the consensus of those parties. The essential feature of a statutorily binding regime is that it is imposed on the industry, whether or not individual members have agreed.

[28] The third respondent's illustration that the difference found in the binding compromise under the old s 311 of the Companies Act, 61 of 1973 is appealing. Section 311 provided a statutory mechanism whereby, provided more than 75% of parties entitled to vote on a scheme supported the scheme, all creditors were bound, regardless of whether or not they agreed. The statutory compromise under s 311 is contrasted to the individual agreements which would need to be reached with all of the creditors in order to achieve a binding obligation on such creditors by means of an agreement, as opposed to the statutorily imposed regime. The compromise under s 311 qualitatively cannot be said to be an agreement. It lacks the necessary attribute of consensus and is imposed by a statutory mechanism. To call the source of the obligation under a statutory compromise under s 311 an agreement is to negate the very essence of an agreement which is consensus and to ignore the coercive element of the compulsory binding of each creditor, whether or not such creditor has agreed.

[29] In addition to that it has been argued that in an analogous context the SCA has endorsed the approach that an instrument such as the SI Agreement is subordinate legislation. In *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs* and Another 2014 (3) SA 251 (SCA), an industry body (contended by the respondents to be on all fours with the characteristics of SASA), namely, the Recycling and Economic Development Initiative of South Africa NPC ("REDISA") which was a non-profit company charged with recycling waste tyres and empowered in terms of national legislation and the so-called "REDISA plan" (promulgated in the Government Gazette) to raise compulsory levies from all tyre manufacturers, was found to be doing so in terms of subordinate legislation.

[30] In other words, in *Retail Motor Industry* the SCA had to decide on the nature of the REDISA plan, and specifically whether it was subordinate legislation and thus excluded from the *functus officio* principle. The SCA held that it was subordinate legislation. It was reasoned thus (footnotes omitted):

"[28] I turn now to consider the nature of the approved plan, it having been argued on behalf of REDISA that it is subordinate legislation and thus excluded from the functus officio principle by s 10(3) of the Interpretation Act. It needs to be emphasised that the purpose of this exercise is to determine whether the *plan* is an instrument of subordinate legislation, rather than the minister's *withdrawal of approval of the plan*.

[29] Hoexter has set out a number of characteristics of subordinate legislation that distinguish it from other species of administrative action. These are: *(a)* legislative action is general in its application, applying impersonally to society as a whole or groups within it, rather than to individuals; *(b)* legislation is concerned with the implementation of policies, rather than the resolution of individual disputes; *(c)* legislation tends to operate prospectively and creates legal consequences for the period after it comes into force; *(d)* legislation is usually intended to remain in force indefinitely (but may be designed to lapse after a prescribed period); *(e)* legislation requires promulgation — usually publication in the *Government Gazette* — before it acquires the force of law; and *(f)* often legislation will require further administrative action in order to make it effective, such as the enforcement of a sanction.

[30] The plan contains many of these features. It is general in its application, imposing obligations on all who subscribe to it and all those who will, once it is given effect to, enter into contractual relationships with REDISA. It creates a system by which waste tyres will be managed over a period of time. It is concerned with the implementation of that system rather than aspiration. It operates prospectively. It has an indefinite life span, but, according to reg 12(1), it must be revised and resubmitted to the minister every five years (or sooner if needs be). In terms of reg 11(4), an approved plan must be published in the *Government Gazette*. It contains the framework within which action will be taken to deal with waste tyres in an environmentally acceptable way. In my view, therefore, the plan is an instrument of subordinate legislation.

[31] The way in which the plan has been made requires brief comment. Usually legislative instruments are drafted by drafters who work for the legislative functionary concerned. That, as this case shows, is not the only way in which subordinate legislation can come into being. In this case the drafting of plans has, in effect, been outsourced to private individuals. Once the efforts of the drafter of a plan meet with the approval of the minister, she gives legal effect to the plan by approving it and publishing it in the *Government Gazette*. This is an example of what Hoexter calls negotiated rule-making.

[32] My conclusion is that the July plan is legislative in nature. While it cannot be described as a set of regulations or a bylaw, it can be described as rules for purposes of s 10(3) of the Interpretation Act. The minister was empowered by the Waste Act and the Waste Tyre Regulations to approve the July plan. A power to make rules was therefore conferred on her. She exercised that power when she approved and published the July plan. She was also empowered by s 10(3) to

rescind the plan. That being so, the functus officio principle has no application and did not prevent her from withdrawing the July plan."

[31] It was submitted that the similarities with and the identical nature of the SI Agreement to the REDISA plan are obvious. Paragraph 31 of the SCA decision regarding individuals assisting in the crafting of the legislation is suggested to be exactly why the SI Agreement is not an agreement, but legislation, despite the input of private industry. I dealt with this aspect in paras 132 to 136 of my judgment and will not repeat same here.

[32] The facts in a later matter (*Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA)) reveal that the REDISA plan was amended from time to time (before being withdrawn in October 2017). In or about early 2017 legislation was passed such that from February 2017 the levies would no longer be collected in terms of the plan and that thereafter the tyre producers had to pay a so-called "tyre tax" directly to government (rather than paying their levies directly to REDISA). It was argued that to refer to a "tyre tax", as the SCA did in this later case, was to make an accurate analogy of what these compulsory industry-wide levies imposed in term of legislation are – they are like a tax and ought to be treated like the payment of a tax.

[33] In paragraphs 108 and 109 of my judgment I observed that the various taxes a business is subject to cannot be suspended during business rescue. They are a cost of doing business – as are the levies and redistributions owed to SASA.

[34] It was accordingly submitted that my finding that the SI Agreement was subordinate legislation was essentially the same finding made by the SCA in *Retail Motor Industry* in relation to the REDISA plan and that my finding was not one that was going to be overturned on appeal.

[35] I find that the comparison to *Retail Motor Industry* was one well drawn and compelling.

[36] It was suggested by the applicants that if my judgment were to stand it would in effect be holding that there could never be a business rescue in the context of the sugar industry. The suggestion appears to overlap the purposive argument and the constitutional argument advanced by the applicants but, however, it seems to me that the suggestion made would be an oversimplification of the effect of what I have found. The simple effect of my findings are that obligations that are imposed by statute cannot be suspended. Wrapped up in that suggestion was also the suggestion that the effect of my finding is subversive of business rescue and that inevitably it would have led to liquidation. I have found that the payment of the obligations due to SASA is simply the cost of doing business and without more that must be considered to be a fact of life within the sugar industry. However, if the spectre of continued payment of those dues had led to liquidation then the charges we are concerned with in this matter would not have arisen because THL would not have continued in business as it has for the period of business rescue. That is not subversive of business rescue but, instead, subversive of a "business rescue" where the costs of doing business are *not* paid.

[37] If the overall goal was to rescue THL it cannot be that that rescue occurs to the potential prejudice and expense of the industry. The levies that the applicants wish suspended have a cascading effect. Those levies that are not paid by THL are reassigned so that others pay those charges.

[38] In relation to the constitutional challenge the applicants describe my findings as follows:

a. the impugned differentiation was between payment obligations that arise under contract, on the one hand, and payment obligations that arise under subordinate legislation, on the other. The differentiation was underpinned by the legitimate government purpose of preferring regulatory authorities for payment, so as to enable them to perform their statutory regulated functions;

b. because statutory levies become due in business rescue, to withhold payment qualifies them as post-commencement finance, and thus their ranking is catered for in s 135. Excluding regulatory fees and

levies from suspension under s 136(2)(a)(i) does not interfere with the legislatively prescribed ranking of claims, or render the scheme internally inconsistent and irrational;

c. the proposed reading in was impermissibly broad and entailed an intrusion into the legislative realm.

and submit that there are at least reasonable prospects that an appeal court would find differently on one, or more, or all of these findings, and would consequently overturn my order.

[39] The applicants accept, and accepted in the main case, that the government purpose proffered in support of the differentiation at issue is legitimate, but submit that rationality is concerned not only with the legitimacy of the purpose to be achieved, but also with whether there is a close enough link between that purpose and the means chosen to achieve it. The applicants submit that another court may find that there was a mismatch between the purpose sought to be achieved, and the means used to achieve it because differentiating between monies and other obligations owed under statute, and those owed under contract or consensus, does not serve to safeguard public funds and public functions. The source of a payment obligation is not determinative of whether that obligation amounts to the discharge of a public or a regulatory function, or not. The contend that there are a number of rights and duties imposed by statute that have nothing at all to do with the discharge or the funding of public functions.

[40] I was reminded that in the main application the applicants put up several examples of powers entrenched in statute that are unequivocally not public in nature. They include:

a. the rights and duties imposed on a company and its officers by the Companies Act;

b. a municipality's right to charge and collect fees for services that it provides;

c. the rights and duties imposed under an extended collective bargaining agreement; and

d. the debts owed to body corporates created by section 36(2) of the Sectional Title Scheme Act 95 of 1986 and section 2 of Sectional Title Schemes Management Act 8 of 2011;

and it was suggested that these examples all illustrate that an obligation may be imposed by statutory instrument, but nevertheless remain a private, parochial power. They have no impact on the state's ability to fund itself or to provide a service. There is no legitimate reason for affording these kinds of obligations protection above, and in preference to, obligations that arise by purely private fiat.

[41] It was argued that this is a nuance that I did not engage with at all I was urged to find that it may well be that an appeal court will find that the differentiation enacted is not a rational measure for achieving the legitimate government purpose at issue.

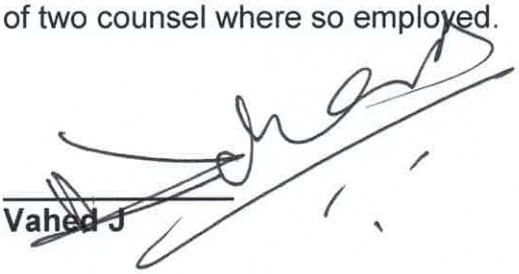
[42] If I was correct in dismissing the applicants' interpretation of s 136(2) of the Act the constitutional challenge would not arise at all for consideration by an appeal court, since it was raised by the applicants only in the alternative to their main argument on the interpretation of s 136(2). But, in any event, it was resisted here too by the respondents, because their grounds for appeal are weak. The 3rd respondent's evidence was determinative of this issue.

[43] I have dealt with some of the more important arguments for and against the application for leave to appeal. Many more were advanced at the hearing but those need not detain me further.

[44] Finally, although not solely determinative on the question of compelling circumstances it is noteworthy that in this case I have had, one guise or another, every single member of the sugar industry, up and down the value chain, before me. I have had every grower, every miller, every association (millers and growers), the regulator and the regulator's "sister" company formed under the agreement. They were all

before me in this case. There is one entity that claims that the matter is of importance to the industry, ie. the applicants, and it is worthy of observation that the applicants' contentions as to public importance are co-extensive with their personal interests in maintaining that the main judgment was wrong on the merits. That cannot be a matter of compelling public importance for the sugar industry. The sugar industry, being every "player" other than THL, appears entirely satisfied with the outcome. The interest of the BRPs is confined to that capacity (ie. the entity sought to be rescued) and is not in any way connected to world of business rescue generally. issue.

[45] I am not satisfied on any score that the application for leave to appeal ought to be granted and it is accordingly dismissed with costs, such costs to include the costs of two counsel where so employed.



Vahed J

Case Information:

Date of Argument:	20 March 2024
Date of Judgment:	06 May 2024
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Instructed by:	Garlicke & Bousfield Inc La Lucia Ridge Ref: Mr H Stephenson
3rd Respondent's Counsel:	L Harris SC (with M Mtshali)
Instructed by:	The State Attorney Durban Ref: 417/0021795/23/T/P9/ncm

4th & 12th Respondents' Counsel:	N Beket
Instructed by:	Garlicke & Bousfield Inc La Lucia Ridge Ref: Mr A Liebenberg
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