IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: _____

SCA CASE NUMBER: 605 / 2024

HIGH COURT CASE NUMBER: D4472/23

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

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HARRY SIDNEY SPAIN N.O	Eleventh Respondent
UCL COMPANY (PROPRIETARY) LIMITED (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

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APPLICANTS' FOUNDING AFFIDAVIT IN APPLICATION FOR LEAVE TO APPEAL

I, the undersigned

GERHARD CONRAD ALBERTYN

state under oath as follows -

1 I am an adult male, and a consultant to Metis Strategic Advisors (Proprietary) Limited ("**Metis**"). Metis has its registered address situate at Jindal Africa Building, 22 Kildoon Road, Bryanston, Johannesburg.

2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.

INTRODUCTION AND OVERVIEW

3 This case concerns the proper interpretation of the business rescue provisions in Chapter 6 of the Companies Act, 2008 ("**Companies Act**"). In particular, it raises novel questions regarding the meaning of section 136(2)(a) of the Companies Act, and the extent to which it applies to the written Sugar Industry Agreement, 2000

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("**the SI Agreement**"), which is published under the Sugar Act, 1978 ("**the Sugar Act**").

4 Among the key mechanisms available to business rescue practitioners ("**BRPs**") to create a protective environment within which to develop and implement a business rescue plan is the power to suspend the company's obligations in terms of section 136(2)(a) of the Companies Act.

5 Tongaat Hulett Limited ("**THL**") was voluntarily placed into business rescue by its board of directors and the third to fifth applicants were appointed as its BRPs. On 24 February 2023, the BRPs elected, in terms of section 136(2)(a) of the Companies Act, to suspend THL's payment obligations arising under the SI Agreement.

6 Various respondents disputed the BRPs' entitlement to suspend the payment obligations under the SI Agreement. They contended that the SI Agreement is not an "*agreement*" within the meaning of section 136(2)(a), and that THL's obligations under the SI Agreement are statutorily imposed and are therefore incapable of suspension under section 136(2)(a) of the Companies Act. That is the dispute at the heart of this application for leave to appeal.

7 The applicants applied in the first instance to the High Court for an order declaring that section 136(2)(a)(ii) of the Companies Act, read together with the definition of "*agreement*" in section 1, empowers the BRPs to suspend any payment obligation of THL which arises under the SI Agreement, *alternatively,* any local market redistribution charges, and interest thereon, that become due in terms of the SI Agreement, and which would otherwise become due during the business rescue proceedings.

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8 In the alternative to their interpretive argument, the applicants contended that the section is under-inclusive and irrational, and that it accordingly contravenes the rule of law in section 1 of the Constitution, and arbitrarily differentiates between creditors, in breach of section 9(1) of the Constitution.

9 On 4 December 2023, the High Court handed down its judgment, dismissing the application, with costs. The judgment is attached marked "**FA1**".

10 On 6 December 2023, the applicants applied for leave to appeal. The application for leave to appeal was initially set down for hearing on 13 December 2023, but was postponed by the High Court to permit voting on a proposed business rescue plan.

11 The Plan was voted on and approved by THL's accepted creditors on 11 January 2024. The total amount to be paid to SASA under the approved Plan is contingent on the final outcome of the appeal proceedings. This appeal accordingly raises live issues between the parties.

12 On 6 May 2024, the High Court refused leave to appeal. Its judgment is attached marked "**FA2**".

13 The applicants petitioned the SCA. On 29 July 2024, the SCA (per Mokgohloa JA and Dippenaar AJA) granted the applicants leave to appeal to the SCA. However, on 15 December 2025, the SCA dismissed the appeal. The SCA judgment is attached marked "**FA3**".

14 The applicants respectfully submit that the High Court and the SCA erred. At a minimum, there is a reasonable prospect that this Court would, on appeal, reach different conclusions on the novel and particularly important questions that arise – that is, on the proper interpretation of section 136(2) of the Companies Act, and on

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the constitutional validity of the provision in the event that the respondents' interpretation is preferred.

15 The issues arising for determination in the proposed appeal are of particular importance in a number of spheres, are novel and require definitive pronouncement from this Court in relation to at least—

15.1 the proper interpretation of the Sugar Act in the context of the SI Agreement;

15.2 the legal status of the SI Agreement in the context of both the Sugar Act and the Companies Act;

15.3 the proper interpretation of section 136(2) of the Companies Act having regard to the purpose of Business Rescue and of section 136(2) in the context of chapter 6 of the Companies Act, and having regard to what is a novel and relatively untested concept of Business Rescue in our law; and

15.4 the interplay between the Sugar Act, the SI Agreement, and the Business Rescue provisions of the Companies Act.

16 The remainder of this affidavit is structured as follows.

16.1 First, I set out the material facts.

16.2 Second, I explain that the appeal engages this Court's jurisdiction, both because it raises constitutional issues, and because it raises arguable questions of law of general public importance.

16.3 Third, I address that it is in interests of justice to hear the appeal, because of the novelty and importance of the issues it raises, and because it bears strong prospects of success.

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16.4 Fourth I deal with the merits of the appeal, and particularly:

16.4.1 the proper interpretation and meaning of section 136(2)(a)(ii) of the Companies Act. It will be demonstrated that there is at least a reasonable prospect that this Court will find that the obligations under the SI Agreement are capable of suspension under that provision;

16.4.2 that if the respondents' interpretation of section 136(2)(a)(ii) is preferred, then there is a reasonable prospect that this Court will find that the provision is unconstitutional and invalid.

RELEVANT FACTS

17 The South African sugar industry comprises two broad segments. The first segment is growers, which number approximately 23 000. The second segment is the milling companies, which are THL, Illovo Sugar, RCL (which each owns three mills), and Gledhow Sugar, Umfolozi Sugar and UCL (which own one mill each). Of these, THL, Illovo Sugar, RCL and Gledhow Sugar operate as both millers and refiners.

18 The growers' and millers' associations interact with one another – and with government – through the SASA Council.

19 SASA is an association initially established by agreement among the growers and millers, and now recognised by section 2 of the Sugar Act. SASA is constituted as an industry forum, through which participants negotiate and agree on issues affecting the industry, in the best interests of the sugar industry.

20 SASA's powers derive, in the main, from the SI Agreement. The SI Agreement governs, *inter alia*, the relationship between growers and millers, on the one hand,

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and between millers on the other, which includes recording the terms of a revenue-sharing arrangement reached among and between them.

21 The revenue-sharing arrangement is particularly important in this matter because it is THL's obligations under this regime that the BRPs sought to suspend under section 136(2)(a) of the Companies Act. The revenue-sharing arrangement is recorded in the SI Agreement. It has historically been negotiated between and agreed among the industry participants, and operates so as to maximise domestic production, and the benefits associated therewith and to ensure equitable exposure to the lower valued export markets.

22 While it is not necessary for present purposes to describe the revenue-sharing regime in great detail, its relevant feature is that SASA allocates each miller a quota based on the proportion of total raw (rather than refined) product that it has produced. The quota applies in each of the domestic sugar markets (i.e. for refined white sugar and refined brown sugar), and for the export market (which is a low-priced dumping market). Where a miller sells more than its quota for a particular product in the domestic market (i.e. refined white or brown sugar), it must pay to SASA quarterly to the extent of its overperformance, based on a notional price. SASA then redistributes the amount paid by over-performing mills to under-performing mills, in proportion to their quotas. The purpose of this arrangement is to ensure that the growers and the millers should all benefit from an equitable division of the proceeds of the domestic market. Because the proportion of product that a miller sells into the export market is a function of how much refined product it has failed to sell, relative to its quota, on the domestic market, the revenue-sharing regime also exposes all millers to the same degree of risk of cheap export prices in the global market.

23 THL is an overproducer of sugar in the refined sugar domestic market. In other words, it refines and sells a greater percentage of the total refined sugar on the domestic market than its allocated quota. It has become, and is forced to remain, an overseller of refined sugar because other millers, particularly RCL and Illovo, have *maintained* their raw milling capacity (and thus their quotas) but *reduced* their refining capacity (and thus their actual supply of refined sugar to the domestic market). THL's overproduction and overselling into the local market has thus carried the local refined sugar market. It has ensured that local demand is met, and that local millers (who are THL's competitors) are paid.

24 As an overproducer of refined sugar in the domestic market, THL is required, under the terms of the SI Agreement, to pay SASA refined redistribution amounts.

25 In 2022, THL found itself in dire financial straits. It had approximately 1 000 creditors, with cumulative claims amounting to a total of approximately R10,4 billion. All of its assets were encumbered. Despite its best efforts, it had been unable to turn its financial position around.

26 Consequently, on 26 October 2022, THL's board of directors resolved to commence voluntary business rescue proceedings. The board did so because, in its view, THL remained capable of rehabilitation under the business rescue provisions of the Companies Act. The only alternative was to liquidate the company – with all of the immediate and deleterious consequences that would have entailed for the sugar industry and the public.

27 When THL first entered business rescue, the BRPs elected to suspend certain of THL's payment obligations under section 136(2)(a) of the Companies Act – including under the SI Agreement – to afford THL some financial respite within which potentially to recover. Importantly, the BRPs only suspended THL's *payment*

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obligations under the SI Agreement. Other than its payment obligations, THL continued to comply with all of its other obligations in terms of the SI Agreement.

28 Although SASA recognised the "*catastrophic social and economic consequences*" that THL's collapse would have, it adopted the stance that these payment obligations could not be suspended, and that SASA was entitled, under section 133(1)(f) of the Companies Act, to bring proceedings to enforce payment.

29 The applicants accordingly applied to the High Court for an order declaring, among others, that section 136(2)(a)(ii) of the Companies Act empowers the BRPs to suspend any payment obligation of THL which arises under the SI Agreement. In the alternative they sought to declare section 136(2)(a)(ii) unconstitutional and invalid.

30 The High Court dismissed the application and refused leave to appeal. On 11 January 2024, THL's accepted creditors voted on and approved a revised business rescue plan. The total amount to be paid to SASA under the approved Plan is contingent on the final outcome of these proceedings. An amount of more than R525 million – being the net value of the suspended payments, after set-off of, *inter alia*, the export proceeds due to THL – will be paid into and remain in escrow pending the outcome of these proceedings.

31 On 12 December 2025, the SCA dismissed the applicants' appeal.

JURISDICTION

Constitutional issues

32 This Court's jurisdiction is provided for in section 167(3) to (7) of the Constitution. Section 167(3) provides:

> *"The Constitutional Court—*

(a) is the highest court of the Republic; and

(b) may decide—

(i) constitutional matters; and

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) *makes the final decision whether a matter is within its jurisdiction.*"

33 This matter self-evidently raises constitutional issues. It further raises arguable points of law of general public importance.

34 The matter is, in the first instance, essentially one of statutory interpretation, a task to be undertaken in terms of section 39(2) of the Constitution, taking into account the spirit, purport and objects of the Bill of Rights.[1] Importantly, the obligation on courts to interpret legislation in conformity with the Constitution arises not only when rights-violations are alleged. Courts are also required to prefer an interpretation of legislation that would avoid irrationality and thereby keep the meaning of the provision within constitutional bounds.[2]

35 The applicants contend that, in addition to conforming with the text, context and purpose of section 136(2)(a), their interpretation ought to be preferred in order to avoid the constitutional invalidity of the provision – or, at a minimum, in order to give better effect to the Constitution.

36 In particular, the applicants contend that:

36.1 if the respondents' interpretation of section 136(2)(a) is adopted, and the BRPs are accordingly not entitled to suspend the payment obligations under

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[1] SCA judgment, paras 35 to 39.

[2] See SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC) para 37.

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the SI Agreement, then section 136(2)(a) is irrational and unconstitutional to that extent;

36.2 this Court must strive, at the level of interpretation, to avoid the result that section 136(2)(a) is unconstitutional;

36.3 to the extent that section 136(2)(a) is reasonably capable of the interpretation for which the applicants contend – that is, that it applies to any horizontal *inter partes* obligation, and not only those that derive from contract – then that interpretation should be preferred, as it avoids constitutional invalidity and, at a minimum, gives better effect to the relevant structural provisions of the Constitution.

37 The interpretive question therefore clearly engages this Court's constitutional jurisdiction.

38 Second, the applicants' alternative cause of action is quintessentially constitutional in character. That is, if the applicants' interpretation of section 136(2)(a) of the Companies Act is rejected, then they contend that the provision is under-inclusive and irrational and that it accordingly contravenes the rule of law in section 1 of the Constitution, and arbitrarily differentiates between creditors in breach of section 9(1) of the Constitution. On that basis, they seek an order declaring the provision unconstitutional and invalid. That is self-evidently a constitutional issue engaging this Court's jurisdiction.

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Arguable questions of law of general public importance

39 In addition, and in any event, this application falls squarely within the Court's jurisdiction as an arguable point of law of general public importance, which ought to be considered.

40 The proposed appeal raises a number of legal questions of public importance.

41 First, it concerns the proper interpretation of section 136(2)(a)(i), read with the definition of *"agreement"* in the Companies' Act.

41.1 The question whether the SI Agreement qualifies as an *agreement* for the purposes of section 136(2)(a)(i), and thus whether the payment obligations under it are capable of suspension in business rescue, has important ramifications, not only for the current business rescue, but also potentially in the future in other business rescues.

41.2 One of the other millers, Gledhow, is also in business rescue. And, on the respondents' papers, there is an ongoing risk of industry collapse, and thus of other millers/refiners being forced into business rescue, as a consequence of THL's suspension of payment. The competence of suspending payments under the SI Agreement may thus inform future business rescues.

42 Second, the proposed appeal raises the legal status of the SI Agreement and of SASA – and what the implications thereof are for the application of section 136(2)(a)(i) to them.

42.1 The question whether the SI Agreement is a contract made by the Minister between the parties, or subordinate legislation imposed on the industry, has implications for the nature of the rights and obligations the sugar industry

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participants (including SASA) owe one another, and the basis on which their decisions and actions can be challenged (including the applicability of PAJA).

42.2 It is an issue that has been considered by a full bench in *Even Grand*,[3] and now by the SCA, but never by this Court.

43 Third, the appeal raises the constitutionality of section 136(2)(a)(i) if, as the High Court and SCA found, it permits the suspension of obligations that arise under contract, but not of the self-same kind of *inter partes* obligations merely because they are recorded in subordinate legislation.

44 Each of these is an important legal issue with ramifications beyond the parties to the case, has constitutional implications, and is *res nova*. They clearly warrant the attention of this Court.

INTERESTS OF JUSTICE

45 I am advised that it is well established that whether this Court grants leave to appeal turns also on what is in the interests of justice.

46 The "*interests of justice*" are determined with reference to a range of factors, including the circumstances of the parties, the nature of the rights involved, and the prospects of success. I respectfully submit that it is in the interests of justice that this Court determine this matter, for four principal reasons.

47 First, the important questions of law described above are novel and have never been considered by this Court.

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[3] 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).

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48 Second, apart from the public importance of the legal questions, the matter is of substantial importance to the parties, and to the sugar industry at large:

48.1 Under the approved Business Rescue Plan, an amount of more than R525 million ("**SASA's Claim**") is at stake. The Business Rescue Plan stipulates that SASA's Claim must be paid into an escrow account within twenty (20) Business Days after the Closing Date, but prior to substantial implementation.

48.2 If the judgment and order stand, the SASA Claim will be paid over, in full, to SASA from the escrow account.

48.3 If the judgment and order are overturned on appeal, THL will be entitled to have the SASA Claim amount in escrow returned to it. The approximate R525 million will be treated as a concurrent claim against THL, which claim will share in the distributions available to be paid to all concurrent creditors. These proceedings thus have substantial financial ramifications for SASA, and for all the growers/millers/refiners involved.

48.4 Because of the revenue-sharing arrangement, their fates are interconnected with those of the other sugar industry participants – so, the case is also important for the industry at large. And, as the SCA acknowledged,[4] the sugar industry is a "cornerstone" of the South African economy.

49 Third, the case is important to the administration of justice. It concerns the proper interpretation and application of section 136(2)(a)(ii) of the Companies Act. That is an issue of considerable significance in the business rescue context. The third to fifth applicants are professional business rescue practitioners and require clarity on

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4 SCA judgment para 18.

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the proper interpretation of that provision for the proper discharge of their professional functions and obligations.

50 Fourth, the appeal has strong prospects of success. This is apparent from the merits of the appeal, to which I now turn.

THE MERITS OF THE APPEAL

The proper interpretation of section 136(2)(a)(ii)

The meaning of section 136(2)(a)(ii)

51 Section 136(2) provides as follows -

> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
>
> *(a)* entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-
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> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
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> (ii) would otherwise become due during those proceedings; or
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> *(b)* apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph *(a)*.

52 Section 136(2)(a)(i) thus empowers the BRPs to suspend "*any obligation of the company*" that arises "*under an agreement*" to which the company was a party when the business rescue proceedings commenced.

53 Given that the power to suspend applies to "*any*" obligation, there is no textual limit on the kinds of obligations to which section 136(2) of the Companies Act applies, provided that they arise "*under an agreement*".

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54 "*An agreement*" is defined broadly in section 1 of the Companies Act to include "*a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties*".

55 There are three stand-out features of the definition of "*agreement*" –

55.1 the term is defined in an entirely non-exhaustive manner. It is not defined to mean a contract, arrangement or understanding. Instead, it is defined to "*include*" these things, which suggests that there may be agreements that do not fit perfectly within the meaning of a contract, arrangement or understanding, but that should nevertheless be recognised as agreements for purposes of the Companies Act. The SCA erred in finding that the word "*include*" in this provision is akin to "*means*";[5]

55.2 an agreement is not defined merely to include a "*contract*". The definition includes "*an arrangement or understanding*" – both concepts that are extremely broad, and which suggest that relationships between parties that do not meet the ordinary common law requirements of contract might nevertheless qualify as an *agreement* for purposes of this provision; and

55.3 the definition encompasses not only contracts, arrangements, and understandings that in fact create rights and obligations between parties – but also those that merely "*purport*" to do so. That further evidences a clear intention on the part of the legislature to extend the definition to encompass the widest possible range of arrangements, including those that would not meet the ordinary requirements of a legally recognised contract.

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[5] SCA judgment, para 51.

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56 The broad wording of this definition shows that the legislature intended to capture within its remit any rights or obligations that arise *"between or among two or more parties"* (that is, *inter partes*), regardless of the form in which they are captured or the instrument in which they are housed. It is the horizontal nature of the parties' relationships that bring them within the scope of the business rescue practitioners' powers.

57 Section 136(2)(a) must also be interpreted within the broader *context* of the business rescue provisions of the Companies Act as a whole, and in light of the *purpose* of those provisions.

58 The provisions of Chapter 6 of the Companies Act – a relatively recent innovation in our law - were introduced as a mechanism to allow a financially distressed company "*breathing room*" to restructure its affairs whilst continuing to trade, in the hope of enabling it to rehabilitate itself.

59 These provisions cumulatively afford business rescue practitioners the broadest possible scope to restructure and rescue the company, within the protective regime that business rescue creates. They allow the business rescue practitioners effectively to step into the shoes of the company's board; they create a general moratorium, subject to certain stipulated exceptions, on legal proceedings against a company in business rescue, or any property belonging to it or in its lawful possession; and they empower the business rescue practitioners entirely, partially or conditionally, to suspend, or with the leave of the court cancel, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings.

60 Seen in this context, section 136(2) provides business rescue practitioners the opportunity to disengage the company from onerous obligations that may otherwise

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prevent the company from being rescued. It applies to any *inter partes* obligation that, if not otherwise suspended, would make it impossible or difficult to rescue the company.

61 The payment obligations under the SI Agreement are obligations of precisely this kind. They arise *inter partes* and pursuant to an agreement or arrangement among the participants in the sugar industry. They are therefore amenable to suspension under section 136(2)(a) of the Companies Act. Indeed, local market redistribution proceeds constitute amounts collected by SASA – in the words of Illovo – for "*pooling and sharing*" among millers, and in respect of which SASA essentially acts as what RCL describes as a "*clearing house*". SASA aggregates production data, local and export market quotas, and then allocates and distributes payments for over- and under-supply on each quota. SASA's role in the revenue-sharing regime is, in other words, limited to collecting and distributing amounts owed by one miller to the others, *inter partes*.

62 Chapter 6 of the Companies Act cannot sensibly be interpreted to exclude payment obligations under the SI Agreement from the operation of section 136(2). Such an interpretation subverts the purpose of business rescue and undermines the proper functioning of the Companies Act. That is because it changes the ranking of creditors and affords SASA (and the industry participants on whose behalf it acts) the (unjustified) opportunity to procure a preference in business rescue that is not provided for nor contemplated in the Companies Act, and which is further at odds with the ranking of claims that would apply on liquidation.

63 Significantly, were THL to have been wound up, SASA and members of the industry benefiting under the SI Agreement would not have enjoyed *any preference* or security. Yet they seek to be *preferred* in Business Rescue above other creditors

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whose claims have been suspended in terms of section 136(2). This self-evidently prejudices those creditors, and indeed the general body of creditors. This cannot have been the intention nor unintended consequence of the Business Rescue provisions of the Companies Act. There is no rational reason why SASA should not be dealt with in the same manner as other creditors, particularly insofar as they enjoy the same status as concurrent creditors. This, with respect, reveals the error in the interpretation adopted by the High Court and the SCA.

64 The SCA appeared to recognise that its interpretation would have this consequence. However, it found that even if the provision affords such a preference, it aligns with the overarching framework of business rescue under the Companies Act.[6] This is mistaken. Nothing in the framework of business rescue suggests that it is intended to up-end the ranking of claims that would apply at liquidation.

65 In any event, payments to SASA in circumstances where THL is insolvent would possibly ground an impeachment of the payments as an undue or voidable preference in the event of a supervening insolvency. It cannot have been the intention of the legislature under the Companies Act to require (impeachable) payments by a company in Business Rescue, particularly where the Companies Act provides a moratorium to enable the objectives of Business Rescue to be achieved.

66 The BRPs' approach in suspending payments under the SI Agreement must be viewed in the light of their obligations to achieve a statutorily sanctioned *rescue* and to also ensure that the general body of creditors is not prejudiced.

67 Chapter 6 only provides for two categories of preferent claims in business rescue: post-commencement finance (as defined in section 135 of the Companies Act), and

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[6] SCA judgment para 94.

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the remuneration rights of employees due and payable before the commencement of business rescue (in terms of section 144(2) of the Companies Act). The obligations imposed by the SI Agreement do not qualify as either. They thus enjoy no preference in business rescue or for that matter in a winding up. SASA consequently cannot demand that its claims be settled in business rescue ahead of other creditors.

The SCA's errors

68 The SCA held, in essence, that –

68.1 section 136(2)(a)(i) permits business rescue practitioners to suspend obligations that arise under "*an agreement*". On every textual interpretation, the term "*agreement*" presupposes some measure of "*mutual assent*" or "*consensus*";[7]

68.2 the SI Agreement is not the product of *consensus* between parties; instead, it is *subordinate legislation* imposed by the Minister;[8]

68.3 obligations imposed by subordinate legislation cannot be suspended by business rescue practitioners under section 136(2)(a)(i).[9]

69 I respectfully submit that there are reasonable prospects that this Court will reach different conclusions on one, or more, or all of these conclusions – and reverse the SCA's findings and order on appeal.

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[7] SCA judgment, para 50.

[8] SCA judgment para 82.

[9] SCA judgment para 82.

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An agreement as the product of consensus

70 The respondents argued, and the SCA accepted, that the defining feature of an *agreement* is that it is the product of *consensus*.[10] The SCA held further that the other instruments included in the definition of *agreement* – i.e. an "*arrangement*" or understanding – also share the core requirement of consensus.[11] It followed, the Court found, that rights and obligations that arise outside of a *consensual arrangement* fall beyond the remit of section 136(2)(a)(i).

71 With respect, that approach ignores the plain wording of the definition of an "*agreement*" in the Companies Act. The definition makes no mention of consensus; rather it focuses on the effect of the instrument at issue. A *contract, arrangement or understanding* fall within the definition of an agreement, for the purposes of the Companies Act, if it is between or among two or more parties and "*purports to create rights and obligations between or among those parties*". The definition is cast broadly and, on its terms, encapsulates any arrangement that creates *inter partes* rights and duties. There can be no serious dispute – though the High Court[12] and SCA[13] found otherwise – that the SI Agreement creates *inter partes* rights and duties.

72 As already indicated, the statutory definition of *agreement* is not exhaustive. Importantly too, there is no suggestion in the Companies Act that the *agreement* must have its origin in any particular source. Even if the SI Agreement has been

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[10] SCA judgment para 51.

[11] SCA judgment para 52.

[12] High Court judgment para 138.

[13] SCA judgment paras 88 and 93.

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imposed on the contracting parties, this would not render the SI Agreement any less an *agreement* for the purposes of section 136(2).

73 The SCA thus adopted an unduly narrow interpretation of the word "*agreement*", essentially equating it to a contract, and drawing no meaningful distinction between a contract, an understanding and an arrangement. The SCA's interpretation is also at odds with the purpose of the Business Rescue provisions and particularly section 136(2) of the Companies Act.

74 It is not the case that "*contract*", "*understanding*" and "*arrangement*" all share the attribute of consensually achieved agreement. In particular, there need not be anything consensual about an "*arrangement*" or an "*understanding*" – particularly one which merely "*purports*" to create rights and obligations among parties. The very purpose of including this additional broad wording in the definition of "*agreement*" is to ensure that relationships between parties that do not meet the ordinary common law requirements of contract, such as consensus, might nevertheless qualify as an agreement.

75 In fact, even traditional "*contracts*" are not invariably the product of consensus among the parties to them. Contracts can arise even in the absence of consensus between the parties, where their terms are determined by a third party.[14] That, the applicants submit, is precisely what is envisaged by section 4 of the Sugar Act, in relation to the Minister "*determin[ing]*" the terms of the SI Agreement.

76 Therefore, in the circumstances, there is a reasonable prospect that this Court will conclude that section 136(2)(a) empowers the BRPs to suspend the payment

[14] See, for example, Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA) para 16; Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC 2020 (2) SA 419 (SCA).

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obligations owed by THL under the SI Agreement.

77 Moreover, and in any event, the SCA overlooked the extent to which the SI Agreement *is* in fact the product of consensus. The Sugar Act gives legislative *recognition* to a pre-existing contractual, cooperative arrangement between millers and growers. This is borne out by the manner in which the SI Agreement has *in fact* been amended by the Minister – that is, pursuant to consultation, and with agreement from SASA.

78 The SCA also erred in finding that its interpretation is supported by section 133(1)(f), which establishes a moratorium on legal proceedings against a company in business rescue but creates a specific exception allowing regulatory authorities to institute enforcement proceedings.[15]

79 Even if, as the SCA found,[16] it were so that SASA is a regulatory authority – which the applicants do not accept, it being more akin to an association acting in the interests of its members – that has no bearing on the question whether the BRPs are competent to suspend obligations under the SI Agreement.

80 The SCA thus erred in conflating the inquiry into the proper interpretation of section 136(2) of the Companies Act, with the separate question of whether SASA is a regulatory authority under section 133(1)(f) of the Companies Act.

The SI Agreement as subordinate legislation

81 The SCA also found that the SI Agreement is subordinate legislation. It found, in this regard, that the full bench decision in *Even Grand* is "*pertinent and instructive*"[17] and

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[15] SCA judgment, paras 54 and 55.

[16] SCA judgment paras 83 and 84.

[17] SCA judgment para 88.

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that the SI Agreement's obligations are statutory in nature in order to "*ensure that public law obligations and regulatory oversight remain paramount, thereby safeguarding the integrity and orderly functioning of the sugar industry.*"[18]

82 However, the *Even Grand* case is materially distinguishable and was not concerned with the Companies Act or Business Rescue. It is with respect of no application and the reliance on that case fails to have proper regard to the true nature of the enquiry, viz the proper interpretation of section 136(2) of the Companies Act.

83 In any event, this Court, like the SCA, is not bound by *Even Grand* and will consider the status of the SI Agreement afresh, and more importantly, in the context of Business Rescue. There is every prospect that this Court will find that the SI Agreement is not truly subordinate legislation, but rather a private law agreement or arrangement among the participants in the sugar industry.

84 In this regard, I highlight the following –

84.1 it is significant that section 4(1)(a) of the Sugar Act describes the SI Agreement as an "*agreement*". The point is not merely that it names the agreement the "*Sugar Industry Agreement*". The point is that it provides that there shall be "*an agreement to be known as the Sugar Industry Agreement*". In other words, what is being named the Sugar Industry Agreement is, according to section 4(1)(a), "*an agreement*". If the purpose of the provision was to make the SI Agreement something other than an agreement, the provision would have empowered the Minister, for example, to "*make regulations to be known as the Sugar Industry Agreement*";

[18] SCA judgment para 90.

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84.2 section 4 merely provides for the Minister to "*determine the terms of an agreement*", to amend the agreement in specified circumstances, and to "*publish*" the agreement in the Gazette, whereupon it becomes binding. The purpose of publication is to ensure certainty as to the terms and the obligations arising under the Agreement. It is for purposes of publicity, not decree. And the SI Agreement, once published, applies to and binds industry participants only. It does not legislate generally across society;

84.3 this stands in stark contrast to sections 6 and 10 of the Sugar Act, which contemplate subordinate legislation in the form of regulations. Section 6 empowers SASA to, "*by notice in the Gazette prescribe*" the maximum industrial price at which a sugar industry product may be sold. Section 10 empowers the Minister to "*make regulations providing for*" various issues;

84.4 the SI Agreement operates by virtue of consensus among industry participants. Although section 4(3) empowers the Minister to impose sanctions for non-compliance with its terms, none has in fact been imposed;

84.5 the terms of the SI Agreement are administered by SASA, which is, we submit, an industry association, and not a regulatory authority. That follows from the fact that it is contractually established (albeit recognised by the Sugar Act), acts in the interests of the industry, is funded from industry levies, and is staffed by industry representatives. A regulatory authority, by contrast, is usually established by legislation, funded, and staffed (at least in part) by government representatives and, most crucially, acts in the public interest;[19]

[19] See, for example, Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd 2022 (4) SA 57 (SCA) para 17; Recycling and Economic Development Initiative of South Africa and Others v Electronic Media Network [2022] ZAGPJHC 76 paras 10 to 11; Advertising Standards Authority v Herbex 2017 (6) SA 354 (SCA) para 17.

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and

84.6 SASA is thus akin to the Press Council, sports professional bodies, or the Advertising Regulatory Board – entities which, though capable in certain circumstances of exercising public power and facilitating industry self-regulation, are in essence private, non-statutory bodies acting in the interests of their members, in terms of powers contractually conferred upon them.

85 Nor is the *Redisa* judgment[20] - upon which the SCA relied in its judgment[21] – determinative of whether the SI Agreement constitutes subordinate legislation. It is not binding on this Court, and is in any event clearly distinguishable:-

85.1 *Redisa* dealt with the status of a Waste Management Plan adopted in terms of the Waste Management Regulations. The Waste Management Plan gave effect to a national waste tyre recycling scheme.[22] It was thus a measure designed to give effect to the (obviously public) function of waste management[23] – and, through it, to the constitutional environmental right entrenched in section 24 of the Constitution. A scheme enacted in terms of an empowering legislative provision to discharge a public function, is plainly public in nature; and

85.2 the SI Agreement is an entirely distinct instrument, adopted under the auspices of wholly different legislation. It operates to the benefit of industry participants, and primarily manages the parochial revenue sharing and other

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[20] Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA).

[21] SCA judgment para 89.

[22] Redisa para 2.

[23] Waste disposal is an exclusive provincial and municipal functional competence, in Schedule 5 of the Constitution.

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arrangements between them. The SCA's findings in respect of the Waste Management Plan are not relevant to the SI Agreement.

86 There is thus every prospect that this Court will find that the SI Agreement is not subordinate legislation.

The suspension of obligations imposed by subordinate legislation

87 The respondents argued, and the SCA held, that obligations imposed by *subordinate legislation* are not capable of being suspended by the BRPs because to permit such suspension would undermine the rule of law.

88 However, even if this Court were to find that the SI Agreement is subordinate legislation (contrary to the applicants' contentions), there is no principled reason why obligations imposed by subordinate legislation cannot be suspended – *provided that the authority to suspend is conferred by law*.

89 Indeed, legislation commonly confers the power to exempt parties from the operation of general provisions, and thereby to suspend their application – such as in the context of collective bargaining agreements under the Labour Relations Act and ministerial determinations under the National Environment Management Act.

90 Simply put, statutorily imposed duties are capable of suspension under a statutorily conferred power. Thus, if the definition of an agreement in section 136(2)(a)(i) encompasses *inter partes* obligations imposed even by subordinate legislation, then, in terms of the same statute, they are amenable to suspension by the BRPs.

Conclusion

91 In sum, therefore –

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91.1 the legislature intended that a business rescue practitioner must be able to suspend any *inter partes* obligation that, if not otherwise suspended, would make it impossible to rescue the company;

91.2 unless the business rescue practitioners have the power to suspend payment obligations of this nature, Chapter 6 of the Companies Act will be rendered incapable of achieving the very object of business rescue. It would be inimical to the ability to rescue the company were the obligations under the SI Agreement not capable of suspension and SASA as concurrent creditor were able to elevate its status from concurrent to preferred creditor, avoid the suspension, and thus frustrate the ability to rescue the company in the manner contemplated by the Companies Act;

91.3 a preclusion on suspension would force the BRPs to treat SASA as a *preferent* creditor, when there is no statutory basis for it to assume that status;

91.4 an interpretation of the Companies Act which allows the BRPs to suspend the payment obligations under the SI Agreement therefore accords better with the statutory context and purpose of the Business rescue provisions of the Companies Act; and

91.5 on each of the grounds detailed above, there is a reasonable prospect that this Court would interpret section 136(2)(a)(i) as permitting the BRPs to suspend the payment obligations owed by THL under the SI Agreement (or at least those arising under the revenue sharing arrangement).

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The constitutional challenge

The unconstitutionality of section 136(2)(a)(ii)

92 The constitutional challenge arises in the event that this Court were to find, as the SCA did, that on a proper interpretation of the Companies Act, the SI Agreement does not qualify as an "*agreement*" under section 136(2)(a) of the Companies Act.

93 In that event, the Court would have accepted the interpretation advanced by the respondents that payment obligations that are owed under a regulatory regime – even where those payment obligations are owed *inter partes*, for onward payment to another industry participant – are incapable of suspension under the Companies Act.

94 In that event, the applicants contend that the section is under-inclusive and irrational, and that it accordingly contravenes the rule of law in section 1 of the Constitution, and arbitrarily differentiates between creditors in breach of section 9(1) of the Constitution.

95 First, it differentiates between debts owed to private persons, on the one hand, and debts owed to regulatory bodies, on the other, even where those debts arise out of the self-same kinds of obligations –

95.1 in the present case, the payment obligations under the SI Agreement are fees owed for services rendered by SASA and, in relation to the redistribution proceeds, monies owed by THL to other millers. Those are *inter partes* obligations, not taxes, fines or penalties imposed in the public interest; and

95.2 the irrationality and unconstitutionality of section 136(2)(a) lies precisely in permitting the suspension of obligations arising from contracts, agreements,

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or arrangements between private parties, but not permitting the suspension of the self-same kinds of obligations, merely because these obligations are recorded in subordinate legislation (as the respondents contend, and we assume, for present purposes).

96 Second, on the respondents' interpretation, section 136(2) of the Companies Act subverts and undermines the purpose and operation of the business rescue provisions. It does so by affording organs of state (including regulatory bodies) a preference in business rescue that they would not enjoy in liquidation – even where the object of the business rescue is an orderly winding down of the company. Put differently, it would mean that the Companies Act provides two interrelated regimes – business rescue and liquidation – that can have the same object and outcome, but which are structured and conducted according to entirely different rankings, with the effect that different creditors enjoy different preferences in each (notwithstanding that they hold, or lack, the same secured status at each stage). No legitimate government purpose has been identified for this distinction.

97 The applicants accordingly seek an order –

97.1 declaring section 136(2)(a)(i) of the Companies Act unconstitutional and invalid insofar as its fails to provide for the suspension of charges that become due during business rescue proceedings; and

97.2 reading in the words "*inter partes*" before the word "*obligation*" and the words "*or regulatory regime*" after the word "*agreement*" in section 136(2)(a)(i) of the Companies Act.

The SCA's errors

98 In relation to the constitutional challenge, the SCA found that –

98.1 the impugned differentiation was between payment obligations that arise under contract or agreement (which may be suspended under section 136(2)), on the one hand, and payment obligations that arise under "*legislative schemes*" (which may not be suspended under this provision), on the other;[24]

98.2 there is no differentiation amongst persons or categories at all, because the differentiation is based on the nature of the obligation, and not the identity of the person upon whom it is imposed;[25]

98.3 in any event, the Minister provided a justification for excluding statutory obligations, namely to protect not only organs of state and industry role players, but also the broader public interest, over the rescue of companies.[26]

99 Again, I respectfully submit that there are at least reasonable prospects that this Court will reach different conclusions on one, or more, or all of these issues, and would consequently overturn the SCA's order.

The differentiation

100 The SCA's primary finding in relation to the constitutional challenge was that there is no relevant differentiation at all, because the provision differentiates between obligations and not between people.

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[24] SCA judgment para 108.

[25] SCA judgment para 108.

[26] SCA judgment paras 111 to 113.

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101 However, the distinction is respectfully an artificial one. The *bearers* and *subjects* of the obligations in question are people (whether juristic or natural). And so, even on the SCA's characterisation of the relevant differentiation, the provision clearly differentiates between people: it differentiates between people who are subject to contractual obligations, and people who are subject to obligations sourced in a legislative regime.

No rational connection

102 The applicants accept – and accepted *a quo* – that the government purpose proffered in support of the differentiation at issue is legitimate. It is legitimate, in other words, for parliament to give preference to regulatory authorities to enable them to perform their statutory regulatory functions.

103 But rationality is concerned not only with the legitimacy of the purpose to be achieved. It is also concerned with the *connection* between that purpose and the means chosen to achieve it. In the present case, there is a mismatch between the purpose sought to be achieved, and the means used to achieve it. If the respondents' and the SCA's interpretation of section 136(2)(a)(i) is correct, then it is not a rational means by which to achieve the stated government purpose.

104 That is because differentiating between payment obligations owed under statute, and those owed under contract or consensus, does not serve to safeguard public funds and public functions. Whether the source of a payment is statutory or contractual is not determinative of whether (or not) that obligation amounts to the discharge of a public function. Indeed, 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, but which, on the respondents' interpretation, would be precluded from being suspended under section 136(2) of the Companies Act.

105 In the High Court and the SCA, the applicants put up several examples of powers entrenched in statute that are unequivocally not public in nature. They include, for example, the rights and duties imposed on a company and its officers by the Companies Act; a municipality's right to charge fees for services that it provides; the rights and duties imposed under an extended collective bargaining agreement; and 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.

106 These examples 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.

107 The SCA noted these examples,[27] but never addressed them or explained why they were inapposite. Instead, in a single paragraph, it is asserted that the exemption of statutory obligations under section 136(2)(a) is directly connected to the purpose for which the power was conferred. Respectfully, it for the reasons above, it erred in doing so.

108 There is a reasonable prospect that this Court will find that the differentiation enacted is not a rational measure for achieving the legitimate government purpose at issue.

PRAYER

109 The proposed appeal engages this Court's jurisdiction. It is also in the interests of

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[27] SCA judgment para 100.

justice that this Court hears the appeal, particularly given its prospects of the success, and the importance of the issues raised. Tongaat accordingly prays for an order in terms of the notice of motion to which this affidavit is attached.

GERHARD CONRAD ALBERTYN

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at JOHANNESBURG on 5 February 2026, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS
Full names:
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Capacity:

GEORGE CHRISTODOULOU
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COMMISSIONER OF OATHS EX OFFICIO
PRACTISING ATTORNEY R.S.A

"FA1"

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

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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

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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 14h00 on 04 December 2023.

Vahed J:

Introduction

[1] The applicants seek Orders:

a. Declaring that:

i. the business rescue practitioners ("**BRPs**") of Tongaat Hulett Limited ("**THL**") are empowered to suspend, for the duration of the business rescue proceedings, any obligation of THL which arises under the Sugar Industry Agreement, 2000 ("**the SI Agreement**");

ii. *alternatively*, the BRPs are empowered to suspend, for the duration of the business rescue proceedings, any local market redistribution payment obligations, and related levies and interest, that became due in terms of clauses 183 and 184 of the

SI Agreement, and which would otherwise become due during the business rescue proceedings.

b. *In the alternative* to the relief in paragraph a. –

i. declaring s 136(2)(a)(i) of the Companies Act, 71 of 2008, unconstitutional and invalid insofar as its fails to provide for the suspension of regulatory charges that become due during business rescue proceedings; and

ii. reading in the words "*or regulatory regime*" after the word "*agreement*" in s 136(2)(a)(i) of the Companies Act.

c. striking the application brought by the seventh respondent ("**RCL Foods**") before the Sugar Industry Appeals Tribunal; *alternatively* permanently staying RCL Foods' application and directing RCL Foods to pay the applicants' costs in relation thereto.

[2] In the main three issues require determination:

a. The first is the proper interpretation of s 136(2)(a)(i) of the Companies Act, read together with the definition of "*agreement*" in s 1. The question that requires determination is whether, properly interpreted, the provision allows the BRPs of THL to suspend, for the duration of the business rescue proceedings, payment obligations that arise under the SI Agreement.

b. The second issue arises only if it were held that s 136(2)(a) of the Companies Act does not allow the BRPs to suspend payment obligations that arise under the SI Agreement. In that event, the question that requires determination is whether s 136(2)(a) is under-inclusive and irrational, and accordingly contravenes the rule of law in s 1 of the Constitution, and arbitrarily differentiates between creditors in breach of s 9(1) of the Constitution.

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c. The third issue is whether it was permissible for RCL Foods to institute proceedings before the Sugar Industry Appeals Tribunal seeking declaratory relief to the effect that millers' payment obligations under the SI Agreement are binding, and that no miller is entitled to suspend them

The Parties

[3] A description of the parties is required for context.

[4] The first applicant is Tongaat Hulett Limited (In Business Rescue) ("**THL**"), a public company which is currently in business rescue.

[5] The second applicant is Tongaat Hulett Sugar South Africa (Proprietary) Limited (In Business Rescue) ("**THSSA**"), a public company which is also currently in business rescue. THSSA is a wholly owned subsidiary of THL and which has been appointed as THL's agent to deal with all matters of and concerning the South African sugar industry pursuant to a written agency agreement between THSSA and THL.

[6] The third, fourth and fifth applicants are Trevor John Murgatroyd N.O., Petrus Francois van den Steen N.O. and Gerhard Conrad Albertyn N.O. respectively, all of Metis Strategic Advisors (Pty) Ltd, Johannesburg, and who are the duly appointed joint business rescue practitioners of THL.

[7] The first respondent is the South African Sugar Association ("**SASA**"), a juristic entity incorporated and constituted in terms of s 2 of the Sugar Act, 9 of 1978 ("**the Sugar Act**").

[8] The second respondent is the S.A. Sugar Export Corporation (Pty) Limited ("**SASEXCOR**").

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[9] The third respondent is the Minister Of Trade, Industry And Competition ("**The Minister**"), the executive authority responsible for administering the Companies Act and the Sugar Act as well as the Minister responsible for determining the terms of the SI Agreement in terms of section 4 of the Sugar Act. The Minister is also joined in this application pursuant to Rule 10A of the Uniform Rules of Court.

[10] The fourth respondent is South African Sugar Millers' Association NPC ("**SASMA**"). All domestic sugar millers and refiners are required to be members of SASMA, which represents all domestic millers and refiners in sugar industry engagements, negotiations, agreements, and arrangements, including when it participates in SASA matters.

[11] The fifth and sixth respondents are the South African Cane Growers' Association NPC ("**SACGA**") and the South African Farmers' Development Association NPO ("**SAFDA**") respectively. All domestic sugarcane growers are obliged to be members of either SACGA or SAFDA, which represent the growers in the sugar industry engagements, negotiations, agreements, and arrangements, including when they participate in SASA. In terms SASA's Constitution, SACGA and SAFDA have equal representation on SASA. For ease of reference SACGA and SAFDA will be referred to collectively as "the Growers' Section". As the industry representatives, the Growers' Section are parties to the SI Agreement and the arrangements to which the SI Agreement gives effect.

[12] The seventh respondent is RCL Foods Sugar & Milling (Proprietary) Limited.

[13] The eighth respondent is ILLOVO SUGAR (SOUTH AFRICA) (PROPRIETARY) LIMITED ("**Illovo Sugar**").

[14] The ninth respondent is UMFOLOZI SUGAR MILL (PROPRIETARY) LIMITED ("**Umfolozi Sugar**").

[15] The tenth respondent is GLEDHOW SUGAR COMPANY (PROPRIETARY) LIMITED (IN BUSINESS RESCUE) ("**Gledhow Sugar**").

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[16] The eleventh respondent is HARRY SIDNEY SPAIN N.O. ("**Mr Spain**"). Mr Spain is the duly appointed business rescue practitioner of Gledhow Sugar.

[17] The twelfth respondent is UCL COMPANY (PROPRIETARY) LIMITED ("**UCL**").

[18] The thirteenth to twenty-three thousandth respondents are the members of SACGA and SAFDA who comprise all of the registered sugar cane growers. They were informed of these proceedings by way of substituted service authorised by this court on a previous occasion in the present proceedings.

[19] The twenty-three thousand and first respondent and further respondents are the affected persons in THL's business rescue. They are entitled to be joined in this application by operation of the provisions of s 128 of the Companies Act, as read together with sections 144(3)(b) and (f), 145(1)(a),(b) and (c), 145(2)(a) and 146(a),(b),(c) and (d) of the Companies Act. They too were informed of these proceedings by way of substituted service authorised by this court on a previous occasion in the present proceedings.

[20] Ultimately, the application papers spanned some 1338 pages and the opposed hearing unfolded over two days on 13 and 14 September 2023. The 9th, 10th, 11th, 13th and further respondents have not opposed the application. Although the 6th respondent, SAFDA, initially opposed the application and delivered an answering affidavit, it subsequently withdrew its notice of opposition and affidavit and indicated that it will abide the decision to be made in this case. The matter was ultimately opposed by the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 12th respondents.

[21] All counsel delivered extremely helpful heads of argument, for which I am grateful. I borrow generously from them from time to time, particularly when sketching the background and when dealing with non-contentious matter.

Context and Factual Background

[22] I deal next with relevant aspects of the factual background.

[23] It is largely common cause that the sugar industry is important to the South African economy. An average of two million tons of sugar per season is produced placing the country regularly in the top quartile of sugar producing countries. The industry generates in excess of R18 billion annually in annual direct income and creates somewhere between 65 000 (according to 1st and 2nd respondents) and 85 000 (according to the applicants) direct jobs, and 350 000 indirect jobs, predominantly in rural areas where employment and economic opportunities are particularly hard to come by. Sugar is particularly significant for the rural economy, where sugar cane is a prolific and strategic crop, and local economies are boosted by the close proximity of sugar mills, and the infrastructural support and income-generating benefits they bring. Sugarcane farms and sugar mills, in most cases, form the backbone of the nearest rural town and are major contributors to the development of secondary economic activity, services and infrastructure that otherwise would be absent. Sustaining the sugar industry and its production levels, is a matter of national social and economic importance.

[24] The sugar industry comprises two broad segments. The first segment is growers, which currently number approximately 23 000. All growers must belong to one or other of the two growers' associations, the fifth respondent, SACGA, or the sixth respondent, SAFDA. The second segment is the milling companies, which are THL, Illovo Sugar, RCL Foods (which each owns three mills), Gledhow Sugar, Umfolozi Sugar and UCL (which own one mill each). Of these, THL, Illovo Sugar, RCL Foods and Gledhow Sugar operate as both millers and refiners. All millers belong to the fourth respondent, SASMA.

[25] The growers' and millers' associations interact with one another and with government through the council of the first respondent, SASA.

[26] SASA is an association initially established by agreement among the growers and millers, and now recognised by s 2 of the Sugar Act. It is governed by a

constitution, the terms of which are published by the Minister in the Gazette. The SASA Constitution was amended in 2018, and again in 2020.

[27] SASA is constituted as an industry forum, through which participants negotiate and agree on issues affecting the industry, in the best interests of the sugar industry.

a. SASA is made up of SASMA (representing the Millers' Section) on one hand, and SACGA and SAFDA (representing the Growers' Section) on the other. In terms of clause 2 of the SASA Constitution, each section may select 18 delegates, making up a total of 36 delegates who meet annually to appoint councillors to sit on the SASA Council.

b. The SASA Council comprises 20 councillors (in addition to the chairperson and vice chairpersons), ten of whom are nominated by the Millers' Section and ten of whom are nominated by the Growers' Section. The Council manages SASA's affairs.

[28] The government has no representation within SASA, does not appoint delegates or councillors and does not provide SASA with any revenue. SASA is funded by the sugar industry and the levies that accrue to it by its members.

[29] SASA's powers derive, in the main, from the SI Agreement. The SI Agreement governs, *inter alia*, the relationship between growers and millers, on the one hand, and between millers and millers on the other, which includes recording the terms of the revenue sharing arrangement reached among and between them.

[30] The global sugar industry is huge and constitutes one of the top ten commodities traded worldwide. South Africa is one of 120 sugar-producing countries worldwide.

[31] Sugar is globally oversupplied. While the vast majority of sugar is consumed domestically in the country in which it is produced, the export market is a dumping market, in the sense that sugar is almost always sold at a loss as an export.

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South Africa is thus vulnerable to dumping by international producers – that is, the import of cheaper sugar at prices that undercuts the price at which the industry can viably produce.

[32] The government and the sugar industry have, as a consequence, taken two significant steps to guard against the risk of sugar dumping:

a. Firstly, the government has, since 2000, imposed anti-dumping duties on imported sugar, so as to increase the price of imports and shield domestic producers against competition for cheaper imports. The duties also have the effect of constraining the domestic price of sugar, in that, in order to ensure that local consumers do not switch to imported sugar, local producers must logically price their product below the price, including the import tariff, of the imported product.

b. Secondly, given the economic importance of the domestic sugar market, and the difficulties it has faced, the sugar industry itself has, through SASA, and with the government's *imprimatur*, agreed a revenue-sharing regime in which local sugar production is protected and sustained. The revenue-sharing regime is particularly important in this matter, because it is THL's obligations under this regime that the BRPs have sought to suspend under section 136(2)(a) of the Companies Act.

[33] The revenue-sharing arrangement is based on the central and overarching principle that the growers, the millers, and the refiners should all benefit from an equitable division of the proceeds of the domestic market, and all be insulated against the risk of the export market.

[34] In broad terms the arrangement operates as follows:

a. Firstly, in terms of clause 164 of the SI Agreement, SASA calculates the gross industry proceeds. This comprises the sum of local market sugar sales (at a notional local market price); export sugar sales (at a weighted average export price) and molasses sales (at a notional local

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market price). This constitutes the total gross amount to be divided between the millers and growers, before the deduction of levies.

b. Secondly, in terms of clause 165 of the SI Agreement, SASA deducts industrial levies (which comprise all the costs SASA incurs to fulfil its obligations in terms of the SASA Constitution) from the gross industry proceeds, to arrive at the "net divisible proceeds". This constitutes the notional income generated by the industry, less the costs incurred by SASA, for division between millers and growers.

c. Thirdly, the net divisible proceeds are split into two notional pools, and attributed to the millers and growers according to the ratio provided for in the SI Agreement, based on the relative costs they incur. The ratio is approximately 64% in favour of growers and 36% in favour of millers.

d. Fourthly, the recoverable value ("RV") price of cane is determined by (*i*) deducting the grower-specific levies owed to SACGA and SAFDA (which are determined to be equal); and (*ii*) dividing this amount by the number of tons of sugarcane produced by all growers. The RV price constitutes the minimum price that a miller may pay to a grower for unprocessed cane, though millers can, and, in practice, often do, pay more than the RV price in terms of supply contracts.

e. Fifthly, SASA calculates the total tonnage of raw product produced across the domestic, export and molasses markets, and allocates each miller a quota based on the proportion of the total raw product that it has produced. It is important to note that the quota is based on the volume of raw sugar produced, as opposed to the volume of refined sugar sold. It is thus the milling activity that is rewarded, rather than the refining activity – even though both are essential activities in the value chain.

f. The quota applies in each of the domestic sugar markets (i.e. for refined white sugar, refined brown sugar, and molasses), and for the export market. Where a miller outperforms its quota for a particular

product in the domestic market (i.e. refined white or brown sugar or molasses), it must pay SASA quarterly to the extent of its overperformance, based on the relevant notional price. SASA then redistributes the amount paid by over-performing mills to under-performing mills, in proportion to their quotas. Because the quota is based on the volume of raw sugar produced but performance is based on the volume of refined sugar sold, a miller that also refines is likely to be a domestic overperformer, whilst a miller that does not refine (or refines less than the quantity of raw sugar it produces), will be an underseller into the domestic market.

g. Sixthly, any raw sugar which is in excess of the local market demand is exported by SASEXCOR which in turn pays the export proceeds (calculated at the weighted average price for the year) to each mill, according to its quota allocation. Only some mills in fact deliver raw sugar to SASEXCOR for export. THL never has.

[35] The revenue sharing arrangement is recorded in the SI Agreement. The applicants assert that the essence of that arrangement is that it has historically been negotiated between and agreed among the industry participants and thus operates consensually so as to maximise domestic production, and the benefits associated therewith. Against this the respondents contend that the SI Agreement does not operate consensually but instead as subordinate legislation which binds all millers and growers, who cannot elect not to be bound thereby.

[36] THL is an overproducer of sugar in the domestic market in that it refines and sells a greater percentage of the total refined sugar on the domestic market than its allocated quota. As a result it is required to pay SASA redistribution amounts in respect thereof.

[37] As an overproducer on the domestic market, THL undersells its quota on the export market (since the volume sold on the export market is a function of how much of the raw sugar produced is not sold on the domestic market). Therefore, while THL owes redistribution payments to SASA in respect of its domestic

overperformance, it is owed export proceeds in respect of its export underperformance. Because THL sells all the sugar that it produces in the domestic market, and does not export, it asserts that it is entitled to recover its full export proceeds from SASEXCOR as and when they fall due. The respondents, and particularly SASA, hold the view that THL has elected to over-perform domestically and not supply any sugar for export and that it cannot escape the consequences of that election. In response THL counters that it is not a large domestic over supplier by choice. It has become, and is forced to remain, an overseller of refined sugar because other millers, particularly RCL Foods and Illovo, have maintained their milling capacity (and thus their quotas) but reduced their refining capacity (and thus their actual supply of refined sugar to the domestic market).

[38] THL is the oldest sugar milling company in South Africa. Today, it is said to be a mainstay of the South African sugar industry, and a major contributor to the economic and socio-economic development of KwaZulu-Natal and South Africa. It is estimated that THL's trading activities contributed approximately R11 billion to the GDP of the country in 2021 (based on direct, indirect and induced impacts). It produces between 25% and 27% of the volume of sugar produced domestically per year, and is, by far, the industry's major producer of refined sugar, producing more than 40% of the industry's requirements.

[39] THL has found itself in dire financial straits. It asserts that it has approximately 1 000 creditors, with cumulative claims amounting to a total of approximately R10,4 billion. All of its assets are encumbered, with the Industrial Development Corporation having taken cession of its bank accounts and debts, and its remaining secured creditors holding security over all its remaining assets. For the purposes of this application it is not disputed that despite its best efforts, THL has been unable to turn its financial position around.

[40] On 26 October 2022 THL's board of directors resolved to commence voluntary business rescue proceedings. It asserts that the board did so because, in its view, THL remains capable of rehabilitation under the business rescue provisions of the Companies Act. Their only alternative was to liquidate the company, with all of the immediate and deleterious consequences that would have entailed for the sugar

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industry and the public. The respondents do not dispute this but hold the view that it was not made clear as to why the board held that view.

[41] When THL first entered business rescue, and the BRPs stepped into the shoes of THL's board of directors, two months of the 2022/2023 sugar season remained. The applicants assert that rather than ceasing THL's crushing and refining operations the BRPs decided to continue THL's crushing and refining operations and to suspend some of THL's payment obligations to afford THL some financial respite within which potentially to recover. This they further assert they were expressly empowered to do so by s 136(2)(a) of the Companies Act. In addition, the BRPs were able, after securing the provision of post-commencement finance from certain secured lender(s), to recommence THL's operations within two weeks of its being placed in business rescue.

[42] When THL went into business rescue, its affairs were effectively frozen whilst the BRPs familiarised themselves with the business. Consequently, from the end of September 2022, THL made no payments to SASA in respect of its obligations under the SI Agreement. It is disputed that during this process the BRPs were entitled to withhold payments to SASA.

[43] On 8 November 2022, SASA expressed concern about THL being placed in business rescue, particularly because its collapse would have "catastrophic social and economic consequences" and would also "have further far-reaching implications and a domino effect on other industry players". SASA therefore offered its support and established a task team to offer the BRPs industry support.

[44] On 13 January 2023, the BRPs cautioned SASA that THL was unlikely to be in a position to pay its redistribution payments, and the associated interest and levies, that would become due around 31 March 2023. SASA wrote to the BRPs on 23 January 2023 adopting the stance that these payment obligations could not be suspended, and that SASA was entitled, under s 133(1)(f) of the Companies Act, to bring proceedings to enforce payment. SASA also acknowledged that there were export proceeds due and payable to THL in the amounts of R777 473 235 (ie. in excess of R777 million), and R225 643 688 (ie. in excess of R225 million), but said

that these payments would be withheld until such time that THL settled its local market redistribution payments which were in excess of R1,727 billion).

[45] On 23 February 2023, SASA sent a letter of demand for R176 237 638.89 (ie. in excess of R176 million), comprising industry levies that it claimed had by then become due under the SI Agreement. In response, on 24 February 2023, the BRPs confirmed that they had suspended the payment obligations under the SI Agreement in terms of s 136(2) of the Companies Act and indicated that they would defend any action undertaken by SASA to enforce payment thereof.

[46] The applicants emphasise that what the BRPs suspended were only THL's payment obligations under the SI Agreement and assert that there is no merit in the respondents' argument that the BRPs were unable to suspend obligations that were reciprocal to obligations with which THL has allegedly not complied. They contend further that that the SI Agreement may contain reciprocal obligations has no bearing on the BRPs' entitlement to suspend THL's payment obligations, and that other than its payment obligations, THL has continued to comply with all of its other obligations in terms of the SI Agreement. They say that in any event, as a matter of law, the BRPs are entitled to suspend reciprocal obligations. For this they rely on the following passage in *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) (footnote omitted):

> "[37] Interpretation starts with a textual treatment of the words in their context. The language conferring the power of suspension is pretty clear, at least on the face of it; 'any' is notoriously a word of wide if not unlimited import, and so it would, at least prima facie and unless any absurdity is thrown up, include obligations that are contractually tied with a reciprocal obligation of the creditor."

The respondents dispute this on a number of grounds, including that the obligations are neither contractual nor reciprocal.

[47] 23 March 2023, SASA sent a further letter reiterating its view that the obligations under the SI Agreement were incapable of being suspended.

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[48] The amounts due to SASA that have accrued since the commencement of business rescue proceedings up to 31 March 2023, in respect of levies, redistribution payments, and interest, and those that have become due subsequently are in some respects disputed but, in the general scheme of things, irrelevant for present purposes.

[49] The BRPs have explained that subject to the availability of funding, payment of local market redistributions and levies would commence from 1 April 2023, and that the amounts accrued up to 31 March 2023 would be dealt with in the BR plan.

[50] It seems that in accordance with this undertaking, THL had commenced paying its local market redistribution charges and industry levies due from April 2023 onwards. As matters stand, it appears too that only the amounts that became due before 1 April 2023 remain outstanding (other than a disputed amount for the June redistribution payment). That much too is irrelevant for present purposes.

[51] On 31 March 2023, SASA raised a special levy, in terms of section 175 of the SI Agreement, to meet its industry obligations despite the shortfall in its funding created by, *inter alia*, THL's non-payment. This levy has been paid by other industry participants. The applicants accept that this may have impacted the other millers' profits and some have raised this aspect as being to their detriment.

[52] The BRPs published a business rescue plan ("**the BR Plan**") on 31 May 2023. The BR Plan made no provision for the payment of any industry levies or redistribution payments under the SI Agreement. The BR Plan classified THL's obligations to SASA as an unsecured debt (and SASA as an unsecured creditor), recorded that such debt had been suspended and that confirmation of that suspension was pending before the High Court. The fact that the BR Plan published on 31 May 2023 made no provision for payment of THL's industry obligations but instead seemed to suggest that payment of those obligations would be suspended for the duration of business rescue caused RCL Foods, SASMA and Illovo to launch an urgent application in the KwaZulu-Natal Division, Pietermaritzburg, to interdict the adoption of the BR Plan.

[53] After having received service of the application the BRPs obtained the consent of the creditors to postpone the meeting called to consider the BR Plan. On 14 June 2023, creditors holding 85% of the total claims against THL voted unanimously to allow the BRPs to amend the BR Plan to take into account various developments. It would seem that the intended BR Plan is a moving target.

Interpretation and Approach

[54] As the introduction foreshadows, the Companies Act and the Sugar Act require analysis and interpretation. Both require the application of a unitary exercise where text, context and purpose are examined.

[55] It is now well established that interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document (be it a contract or statute), consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production. In other words, the exercise is holistic, the considerations are applied simultaneously and without predominance. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 65.

[56] With specific reference to legislation it is helpful too to keep in mind the guidance offered in *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) (footnotes omitted):

> "[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this

interpretation would result in an absurdity. As this court has previously noted in *Cool Ideas*, this principle has three broad riders, namely —

> *'(a)* that statutory provisions should always be interpreted purposively;
>
> *(b)* the relevant statutory provision must be properly contextualised; and
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> *(c)* all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*.'

[48] Judges must hesitate 'to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'

[49] Strengthening this interpretative exercise is the obligation enshrined in s 39(2) of the Constitution, which requires courts when interpreting legislation to give effect to the 'spirit, purport and objects of the Bill of Rights'. This requires that —

> 'judicial officers [must] read legislation, where possible, in ways which give effect to [the Constitution's] fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.'

[50] The command of s 39(2) has been articulated in various judgments of this court. In *Bato Star* Ngcobo J stated as follows:

> 'The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. That is the command of s 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights is a cornerstone of [our constitutional] democracy. It affirms the democratic values of human dignity, equality and freedom.'

[51] It is now axiomatic that the interpretation of legislation must follow a purposive approach. This purposive approach was described in *Bato Star* as follows:

> 'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.'

[52] The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute. This means that if no reasonable interpretation may be given to the statute at hand, then courts are required to

declare the statute unconstitutional and invalid. It is now settled that this approach to interpretation is a unitary exercise.

[53] In *De Beer NO* this court articulated the proper approach when deciding between competing constructions of legislation:

> 'This court has accepted the well-recognised principle of constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.'

[54] However, in seeking a constitutional interpretation in accordance with their obligations under s 39(2) of the Constitution, courts must not lose sight of the fact that the construction given to legislation must still be reasonable. Strained readings of texts, no matter how well-intentioned, can lead to dissonance. As Moseneke J noted in *Abahlali BaseMjondolo Movement SA*:

> 'The rule of law is a founding value of our constitutional democracy. Its content has been expanded in a long line of cases. It requires that the law must, on its face, be clear and ascertainable. To read in one qualification to achieve constitutional conformity is very different from reading in six. Indeed, reading in so many qualifications inevitably strains the text. This is all the more so when the legislation in issue affects vulnerable people in relation to so vital an aspect of their lives as their security of tenure. It will be impossible for people in the position of the applicants, even if advised by their lawyers, to be clear on how this provision will operate. The same will indeed apply to others affected by the law, such as owners, and to the bureaucrats charged with applying it.
>
> There can be no doubt that the over-expansive interpretation of s 16 is not only strained but also offends the rule of law requirement that the law must be clear and ascertainable. In any event, separation of power considerations require that courts should not embark on an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation.'

[55] The function of a court is to arrive at an 'interpretation that achieves the most appropriate balance between the parties, that fits most comfortably into the constitutional and statutory framework, and that requires the least intrusive addition to the text'. If the only interpretation that achieves the best balance between the constitutional and statutory framework would inflict violence on the text, then the court, where appropriate, should declare the relevant provisions inconsistent with the Constitution. Doing so is vital to our conception of the rule of law, as noted above, which dictates that laws be 'clear and ascertainable' to the public. As this court noted in *Hyundai*:

> 'There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.
>
> It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance.'

[56] One final point. Even before the adoption of the Constitution, our courts refused to construe statutory provisions in a manner that rendered them useless, if the language was reasonably capable of a sensible and effective meaning. In *Schlohs* De Wet CJ formulated the principle in these terms:

> '(W)hen the words of a statute are reasonably capable of an interpretation which would not render the law useless and destitute of all effect, they should be given such interpretation.'

[57] This principle was based on an earlier decision of the Appellate Division in *Jacobson and Levy* where it was observed that —

> 'if the language of the statute is not clear and would be nugatory if taken literally, but the object and intention are clear, then the statute must not be reduced to a nullity merely because the language used is somewhat obscure'.

[58] Presently, this principle is captured fully by the provisions of s 39(2) of the Constitution, which oblige every court, where reasonably possible, to interpret every statute in a manner that makes it consonant with the Constitution. A claim for invalidity must fail if the impugned statute is reasonably capable of a meaning that is constitutionally compliant.

[59] Despite our duty to interpret legislation in accordance with the injunction under s 39(2), courts must not fall into the trap of attempting to divine sense out of nonsense. If a reasonable interpretation in line with the Constitution cannot be arrived at, then a court must conclude, and declare, that the impugned provisions are unconstitutional and have recourse to the remedies that flow from this finding."

[57] It is appropriate to conclude the discussion on interpretation and approach with references to the following passages from *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) (footnotes omitted):

> "[25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.

As *Endumeni* emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself'.

...

[47] I offer a few observations, as to the implications of what the Constitutional Court has decided in *University of Johannesburg*. First, it is inevitable that extrinsic evidence that one litigant contends as having the effect of contradicting, altering or adding to the written contract, the other litigant will characterise as extrinsic evidence relevant to the context or purpose of the written contract. Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.

[48] Second, *University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. *Blair Atholl* rightly warned of the laxity with which some courts have permited evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court. *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.

[49] Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni,* nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.

[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting

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standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."

The Companies Act

[58] It is convenient to commence with an examination of the applicable sections of the Companies Act.

[59] The focus must be the text of section 136 of the Companies Act, which reads as follows:

> "136. **Effect of business rescue on employees and contracts**
>
> (1) Despite any provision of an agreement to the contrary—
>
> ...
>
> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—
>
> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—
>
> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
>
> (ii) would otherwise become due during those proceedings; or
>
> (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).
>
> ...

(3) Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages."

[60] It is common cause that subsection 2A is not relevant for present purposes.

[61] Referring to *S v Wood* 1976 (1) SA 703 (A), *Kham and Others v Electoral Commission of South Africa and Another* 2016 (2) SA 338 (CC). *R v Hugo* 1926 AD 268 and *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* 2017 (4) SA 592 (GJ) the applicants argue that the word "any" as employed in the term "any obligation" in s 136(2)(a) of the Companies Act is of extremely wide import, extremely broad, *prima facie* unlimited and accordingly is a word of notoriously wide if not unlimited import. I think that is safe to say, looking at the word "any" in isolation from the remainder of the section, that that is uncontentious for present purposes.

[62] However, I regard the applicants' additional contentions that the term "any obligation" in s 136(2)(a) must be understood in the light of the wide meaning generally ascribed to the word "any" that there are no limits on the kinds of obligations to which s 136(2) applies as unsustainable. It is, as I understand the section, manifestly clear that the term "any obligation" is limited to obligations as defined in the Companies Act, which are those that are "arising under an agreement". The effect of the applicants' argument would be to strike a line through "arising under an agreement", and strip that term of any meaning. See *Minister of Finance v Afribusiness NPC* 2022 (4) SA 362 (CC) at paras 46 and 106 to 110; *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* 2023 (2) SA 305 (SCA) at para 18.

[63] "Agreement" is defined in s 1 of the Companies Act as one that:

"includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties".

[64] The applicants suggest that three features of the definition of "agreement" support their case. Firstly, they contend that the term is defined in an entirely non-exhaustive manner. It is not defined to mean a contract, arrangement or

understanding, but instead to include such things. That, they say, suggests that the legislature contemplated that there may be "agreements" that do not fit perfectly within the meaning of a contract, arrangement or understanding, but that should nevertheless be recognised as "agreements" for purposes of the Companies Act. Secondly they argue that an agreement is not defined merely to include a contract, but instead the definition includes an arrangement or understanding; concepts that are broad, and which suggest that relationships between parties that do not meet the ordinary common law requirements of contract might nevertheless qualify as an agreement for purposes of the Companies Act. Finally they say that the definition encompasses not only contracts, arrangements, and understandings that in fact create rights and obligations between parties, but also those that merely purport to do so which further evidences a clear intention on the part of the legislature to extend the definition to encompass the widest possible range of arrangements, including those that would not meet the ordinary requirements of a contract.

[65] In its terms, therefore, the applicants submit that s 136(2)(a) is capable of being understood to mean that the BRPs are empowered to suspend the payment obligations owed by THL under the SI Agreement whatever its status or source and that it creates rights and obligations among the sugar industry participants and consequently qualifies as an agreement amenable to suspension under the section.

[66] Implicit in the applicants' argument is that "includes" within the definition of agreement is equivalent to the phrase "includes but not limited to". However, the use of the word "includes' in the interpretation of a clause in a statute is ambiguous.

[67] In *R v Hurwitz* 1944 EDL 23 the word "includes" was discussed in the following manner:

> "In *Dillworth v Commissioner of Stamps* (1899 AC 99) it was pointed out by Lord WATSON that the use of the word "includes" in the interpretation clause of a Statute is ambiguous, that it may sometimes be used to enlarge the meaning of words and phrases occurring in the body of the Statute, but that it may also sometimes be used as being equivalent to "means and includes" and as affording an exhaustive explanation of the meaning of such words and phrases. The test would appear to depend on the context, and such cases as those of *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* (1924 AD 421)

> and *Johannesburg Municipality v Cochrane* (1928 TPD 224) on the one hand and that of *Rosen v Rand Townships Registrar* (1931 WLD 5) on the other show that the Courts have interpreted the word "includes" as having sometimes been used in an explanatory and exhaustive sense and on other occasions in an extensive sense."

[68] In *Estate Brownstein v Commissioner for Inland Revenue* 1957 (3) SA 512 (A) the use of the word was explained in these terms at 521A:

> "The question revolved round the meaning of the word 'includes'. As is well-known this word in definition sections is sometimes the equivalent of 'means', i.e. it operates to exclude everything else, while in other cases it merely adds unusual or less usual meanings to the one ordinarily borne by the word defined."

[69] Whatever the case here, all of the examples in the definition share the attribute of consensus. In my view however, the binding nature of the SI Agreement does not presuppose consensus. In addition, and obvious by omission, is any reference in the definition to "statute" or "subordinate legislation". Perhaps this is why the applicants seek the alternative constitutional relief.

[70] The definition may also differently be viewed as the Legislature extending the meaning of "agreement" on a limited extension basis by including within its ambit "an arrangement or understanding". The "arrangement" or "understanding" is not, however, any arrangement or understanding. From the context and the ordinary rules of grammar and syntax it is clear that these two words are also specifically and exclusively qualified by the inclusion only of an arrangement or understanding "between or among two or more parties that purports to create rights and obligations between or among those parties".

[71] Illovo Sugar argues that the use of the relative pronoun "that" in the definition makes clear that what creates (as in the case of a contract) or purports to create (as in the case of an arrangement or understanding) "rights and obligations" is precisely the "contract", "arrangement" or "understanding". It is clear that the legislative intention is to include only those contracts, arrangements or understandings, brought into being by the parties thereto, that are themselves the sources that give legal power to their terms. Illovo Sugar argues further that the definition of "agreement" in s 1 of

the Companies Act thus operates entirely on a horizontal level, and is confined to those instances where the relevant act of agreement, arrangement or understanding of the parties bound by the phenomenon is the source of their legal obligations – i.e. where there would be no obligation but for the consensus between them that creates the obligation. Rights and obligations created or arising by other means, including vertical imposition by the state by means of legislation, are not contained in the definition.

[72] I agree with that argument.

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

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

[75] The meaning of the word "agreement" as used in s 136(2)(a)(i) as referring to a contract and obligations that arise *ex contractu* is reinforced when regard is had to s 136 as a whole. Firstly, the heading signifies that what the section deals with is the "Effect of business rescue on employees and contracts". Secondly, ss 136(1) and 136(2A) refers to and deals with contracts which comply with the qualification that come into being by consensus and that create rights and obligations, namely employment contracts and agreements to which ss 35A or 35B of the Insolvency Act, 1936 apply. Thirdly, in s 136(2)(b) provision is made for an application to court to "cancel ... any obligation of the company contemplated in paragraph (a)". While a court may have the power (by virtue of s 136(2)(b)) to "cancel" an obligation that arises in contract, a court has no power to "cancel" legislation. Parties themselves have the

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power to bring a contract into being by consensus and thereby to create legal rights and obligations. This distinguishes an obligation arising *ex contractu* from one arising *ex lege*. They also have the power to cancel the contract, always by mutual agreement, sometimes unilaterally, and sometimes after following certain formalities. They never have the power to cancel legislation or law that binds them for reasons other than because they created it.

[76] The applicants also rely on the general moratorium on legal proceedings under s 133 of the Companies Act as support for their interpretation. The applicants submit that the general moratorium prevents enforcement action against THL whilst it is under business rescue and that that provision provides no basis for distinguishing debts owed to SASA, from debts owed to any other creditor of THL in business rescue.

[77] Section 133 of the Companies Act prescribes as follows:

> **"133 General moratorium on legal proceedings against company**
>
> (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
>
> (a) with the written consent of the practitioner;
>
> (b) with the leave of the court and in accordance with any terms the court considers suitable;
>
> ...
>
> (f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner."

[78] Section 133 thus establishes a general moratorium on the institution of any legal proceedings or enforcement actions, subject to certain, specified exceptions. It affords a company in business rescue a temporary reprieve from its ordinary obligations, in order that it can re-structure its affairs

[79] The most significant exception to that general moratorium, for present purposes, is that it does not apply to proceedings brought by a "regulatory authority" in the execution of its duties. SASA asserts that it qualifies as a regulatory authority, and consequently that it remains entitled to bring enforcement proceedings against THL in respect of its debts under the SI Agreement.

[80] The applicants submit that SASA is wrong and suggest that that is clear from the terms of s 1 of the Companies Act, which defines a "regulatory authority" as "an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry". They say that although it is now statutorily recognised, SASA was not established by statute. It was created long before the Sugar Act, and even before the 1936 Sugar Act, by agreement among the industry participants. They observe that SASA was formed in 1919, by agreement between millers and growers at the time, and resuscitated under the 1936 Sugar Act.

[81] The applicants argue that SASA also lacks the essential attributes of a statutory regulatory authority for the following reasons:

a. SASA acts as an association in the interests of its members and not in the interests of the State or in the public interest. That is evident from SASA's constitution, which provides at clause 4 that SASA is established to represent the views of the sugar industry to parliament, government and other public bodies and officials. The primary objective of SASA (including its Council) is to act in the best interests of the sugar industry. The structure and voting processes of SASA are designed to ensure that the views of all parties are considered, and the best interests of the industry promoted. SASA is, in other words, an independent, non-governmental association operating on behalf of and in the interests of its members;

b. SASA is composed solely of industry representatives. Government is not involved in their appointment, and government is not in any way represented within SASA. SASA does not bear reporting obligations to government. It is precisely because of the lack of government

involvement in SASA that a 1981 Committee of Inquiry into the Sugar Industry declined SASA's request that the industry be afforded more freedom and flexibility to determine changes to the industrial selling price, since "... it cannot, in the opinion of the Committee, be expected of government to invest an organisation with far-reaching regulatory powers, such as price fixation, without monitoring and having some say in decisions taken".

c. SASA does not receive any funds from the State. Its revenue is derived entirely from industry levies. These levies are collected for commercial reasons, particularly to enable SASA to perform services to its members, such as cane testing, research, and administrative functions. As such, SASA does not qualify as a state institution within the remit of the Public Finance Management Act, 1 of 2000.

d. SASA's powers and functions, in the main, are sourced not in the Sugar Act or any other legislation but derive from the SI Agreement.

[82] It seems to me that that assessment of SASA is skewed so as to lend support to the applicants' cause.

[83] Section 2 of the Sugar Act governed SASA's incorporation and provides for the promulgation of its constitution by the Minister. The corporate entity so recognised and invested with statutory incorporation (i.e. SASA) is one manifestly established by national legislation.

[84] It is indeed so that SASA is comprised of the membership described earlier, to the exclusion of government, and that it serves to oversee cooperation amongst the divers role-players in the industry, but it is also clear that SASA operates to regulate the industry itself.

[85] The quotation from the 1981 Committee of Inquiry into the sugar industry is somewhat selective. The Committee of Inquiry into the Sugar Industry was established in March 1981 by the Minister. The terms of reference were:

"To inquire into, report on and make recommendations on the following matters relating to the sugar industry—

(a) the expansion of sugar production in South and Southern Africa with due regard to its geographical distribution and economic, social and strategic factors;

(b) the effectiveness of the local marketing system with special reference to whether there is justification for the continued application of the existing price regulating measures within a free market economy;

(c) the system of marketing sugar abroad;

(d) the basis on which the division of proceeds formula should be adjusted from year to year for changing price levels; and

(e) any other related matters affecting the sugar industry, after consultation with the Minister of Industries, Commerce and Tourism."

[86] In describing the nature of sugar production and the sugar marketing scheme the Committee said this in chapter one of its report:

"3. The majority of the twenty-four agricultural marketing schemes in the Republic operate in terms of the Marketing Act which is a general enabling measure permitting the establishment of commodity marketing schemes appropriate to the needs of the individual farm products concerned. Special enactments, however, apply to two commodities, namely wine and sugar, and in the case of the latter, the statutory marketing arrangements are governed by the Sugar Act which was promulgated in 1936 and republished in consolidated form in 1978.

4. In terms of the Sugar Act the Minister of Industries, Commerce and Tourism shall, after consultation with the sugar industry, determine the terms of an agreement known as the Sugar Industry Agreement to regulate the production and marketing of sugar and associated products. The main regulatory provisions of the existing agreement may be summarised as follows:

(i) The exercise of quantitative control over production by means of quota allocations to cane growers.

(ii) The regulation of the supply of sugar cane to mills which, in effect, also provides regulatory control over the establishment of sugar mills.

(iii) The control and regulation of the disposal of the total quantity of sugar manufactured yearly. This involves the determination of the quantity of sugar required locally and the pro rata share of exports apportioned to each mill.

(iv) The channelling of all sugar exports through a central industry organisation known as the SA Sugar Export Corporation (Pty) Limited.

(v) The pooling of proceeds on the sale of sugar and sugar by-products and the division of these proceeds between millers and growers in accordance with the formula set out in the agreement.

(vi) The imposition of levies to cover the cost of administering the sugar control scheme.

5. In addition to the foregoing, the Sugar Act also empowers the Minister of Industries, Commerce and Tourism to prescribe, after consultation with the industry, the maximum industrial selling prices of sugar and associated products.

6. The main controlling body entrusted with the administration of the Sugar Agreement is the SA Sugar Association, which is composed of an equal number of representatives of cane growers and miners. The regulatory measures are applied in close consultation with the Minister and in major matters are subject to his approval.

7. The control scheme for sugar is in the nature of the one-channel pool schemes operated in terms of the Marketing Act for commodities such as citrus and deciduous fruit, wool and oil seeds. There are, however, two respects in which the Sugar Agreement differs significantly from the Marketing Act schemes, these being the quantitative control of production and the sharing on a partnership basis between growers and millers of the proceeds of sugar and associated products"

[87] The quotation from the Committee's report and relied upon by the applicants, can now be viewed in proper context:

"243. A second recommendation made by the Sugar Association in this regard is that the industry should be allowed more freedom and flexibility in determining the extent, frequency and timing of price changes. The Association avers that there is no doubt that the sugar industry would adopt a realistic and conservative approach in this respect because of the dangers of decreasing domestic consumption and stimulating competition from alternative sweeteners, if prices were not kept at a reasonable level.

244. It cannot, in the opinion of the Committee, be expected of government to invest an organisation with far-reaching regulatory powers, such as price fixation, without monitoring and hailing some say in decisions taken. The Committee nevertheless considers that there is merit in the recommendation of the Sugar Association. Ministerial approval of price proposals inevitably involves delays which tend to inhibit speedy decisions as well as price changes at frequent intervals. In consequence prices are normally reviewed by government only once a year when, in these times of high inflation, relatively large price adjustments

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necessarily have to be made. This not only harms the market but also encourages the accummulation (sic) of stocks in anticipation of large price increases which cannot be kept secret and are fairly generally known in advance in the trade and elsewhere.

245 The Committee accordingly recommends that the Sugar Association be given the responsibility of determining the industrial selling prices of sugar within parameters which would be approved by the Minister from time to time and which would grant the industry sufficient flexibility to decide on the timing and frequency of price adjustments."

[88] Thus it would appear that the Committee regarded SASA as an entity discharging regulatory functions.

[89] SASA's response to the assertion that the general moratorium provisions assists the BRP's case relies on the Sugar Act being national legislation and that SASA's incorporation was sanctioned in terms of s 2 of that piece of national legislation (see above). It argues accordingly that SASA in its current form has been established by national legislation. By extension it also argues by reason of s 1 of the Sugar Act, the SI Agreement is also legislation and that the duties of SASA set out in the SI Agreement are legislatively imposed duties.

[90] SASA's argues further that its Constitution is provided for expressly in s 2 of the Sugar Act and the terms thereof are determined by the Minister.

[91] One of SASA's objects as contained in clause 4 of SASA's Constitution is stated in subclause (1)

"The objects for which the Association is established are:

(1) To promote, foster, regulate, co-ordinate and assist with the production, storage, transport, handling and sale of sugar industry products." (my underlining)

The remainder of the objects referred to in clause 4 all relate to the object stated in clause 4(1).

[92] Amongst the powers conferred on SASA's council under clause 5 of SASA's Constitution subclause (1) provides:

> "Without prejudice to the general power conferred upon the Council by clause 3(2) hereof it shall have and exercise the following powers and functions, namely:
>
> (1) To control and regulate, year by year, the disposal of the total quantity of sugar manufactured by millers and refiners, and, to this end, to determine, the quantity of sugar required for the local market, the quantity of carry-over stocks, the quantity of sugar to be exported each year, and each mill's quota of those quantities, subject only to the provisions of the agreement and any regulation published under Section 10 of the Act or any section amending or replacing the same." (my underlining)

The remainder of SASA's powers stated under this clause are in the main regulatory powers.

[93] Thus SASA submits that it is established in terms of national legislation to regulate the Sugar Industry and as such falls squarely under the definition of 'regulatory authority' in the Companies Act. I agree.

[94] In the result SASA would self-evidently be acting in the execution of its duties in bringing legal proceedings against THL to enforce its compliance with the statutory scheme, including the payment of its obligations owed to SASA imposed by that statutory scheme. SASA is accordingly entitled to bring legal proceedings against THL to enforce its payment obligations owed to SASA under section 133 of the Companies Act.

[95] RCL Foods observes that in addition to the obvious difficulty of seeking a moratorium against the industry's regulatory authority, the applicants also seek a blanket moratorium against over twenty thousand other respondents from bringing any legal proceedings, including enforcement action, against THL in respect of any payments that are owing under the SI Agreement and argues that such relief is so overly broad as to render it impermissible.

[96] Section 133(1) of the Companies Act imposes a general moratorium on the

commencement of legal proceedings against companies in business rescue. It is not an absolute moratorium and may be lifted with the written consent of the practitioners or with the leave of the court on such terms the court considers suitable or by regulatory authorities upon written notice to the practitioners.

[97] RCL Foods is, in my view, correct in its submission that THL is not entitled to a blanket moratorium on any enforcement action regarding payment obligations arising under the SI Agreement as such an order would (aside from ousting SASA's rights to pursue such action as the regulatory authority) impermissibly oust the court's jurisdiction in future matters that may arise as well as limit a business rescue practitioner's discretion to provide consent if the need arises. There is accordingly no basis for such far-reaching relief, which is, in any event, entirely unnecessary since the applicants have sought the very declaratory relief that will determine whether payments owing under the SI Agreement may be suspended by the BRPs. If they are not capable of suspension, then enforcement action by SASA (or anyone who makes out a case for the lifting of the moratorium) is permissible and inherently necessary.

[98] Upon a textual interpretation I have found that sections 136 and 133 of Companies Act do not entitle the BRPs to suspend THL's payment obligations under the SI Agreement and do not preclude SASA, or anyone else in certain circumstances, from seeking to enforce those obligations.

[99] It becomes necessary, however, to consider briefly the applicants' additional hypothesis that their analysis of the Companies Act is fortified by understanding the provisions firstly, within the broader context of the business rescue provisions of the Companies Act as a whole, and secondly, in light of the purpose of the business rescue provisions.

[100] Section 7(k) of the Companies Act stipulates that one of the purposes of the Act is to "... provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders...".

[101] This purpose is achieved by Chapter 6 of the Companies Act. Prior to the

commencement of the Companies Act and the introduction of the provisions of Chapter 6, the only option available for creditors and stakeholders of financially distressed companies was to apply for the liquidation or judicial management of the company concerned, in the hope that they would procure (at least) a partial recovery of debts owing by the company. The business rescue provisions in Chapter 6 of the Companies Act were introduced as a mechanism to allow a financially distressed company "breathing room" to restructure its affairs whilst continuing to trade, in the hope of enabling it to rehabilitate itself. See *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) paras 28, 29 and 35; *Airports Co SA Ltd v Spain NO and Others* 2021 (1) SA 97 (KZD) para 2.

[102] The applicants correctly describe these provisions as cumulatively affording business rescue practitioners the broadest possible scope to restructure and rescue the company, within the protective regime that business rescue creates. In this regard:

a. Business rescue demands that the company is placed under the temporary supervision and management of one or more registered business rescue practitioners. These business rescue practitioners oversee the company during rescue, and have full management control of the company, in terms of s 140 of the Companies Act. The business rescue practitioners effectively step into the shoes of the company's board.

b. If the business rescue practitioners believe that there is a reasonable prospect that the company can be rescued, they must prepare and propose a business rescue plan for consideration and adoption by the company's creditors (and, if applicable, the company's shareholders) and any other holders of a voting interest. This plan is required to specify the basis upon which the debt of the company is to be repaid and/or the extent to which debts will become unenforceable and plot the course for rescuing the company by achieving the goals set out in s 128(1)(b) of the Companies Act.

c. Section 133 creates a general moratorium, subject to certain stipulated exceptions, on legal proceedings and enforcement action against a company in business rescue, or any property belonging to it or in its lawful possession.

d. Section 134(c) provides that no person may exercise any rights in respect of property in the lawful possession of the company, except to the extent its business rescue practitioners consent in writing thereto.

e. Section 135(1) of the Companies Act protects employees by providing for remuneration, reimbursement for expenses and any other money relating to employment that becomes due and payable during the business rescue process, to be treated as post-commencement finance and repaid only at the end of the business rescue process.

f. Section 136(2) empowers the business rescue practitioners entirely, partially or conditionally to suspend, or with the leave of the court cancel, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings, and which would otherwise become due during the course of those proceedings.

g. Section 137 stipulates that any alteration in the classification or status of any issued securities of a company (other than by way of transfer in the ordinary course of business) is invalid unless a court directs otherwise, or it is contemplated in an approved business rescue plan.

[103] It is against this backdrop that the applicants contend that ss 133 and 136 must be understood and suggest that their essential purpose is to create a payment moratorium and permit the BRPs to suspend obligations where there are little to no means to fulfil obligations. Section 136(2), in particular, provides business rescue practitioners the opportunity to disengage the company, whether temporarily or permanently, from onerous obligations that may prevent the company from being rescued.

[104] When successful, business rescue can ensure the survival of the company in question and, in turn, the survival of the commercial relationship between the company and its creditors, as well as the preservation of jobs that the company provides. Even where the company is ultimately unable to trade out of its financial distress and continue on a solvent basis, business rescue may result in a better return for its creditors and shareholders than if that company was immediately liquidated. See *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) para 31.

[105] One of the potential outcomes of business rescue, then, is the orderly winding down of the company. Where that occurs, the company's debts are ranked as provided for on liquidation. The business rescue process cannot properly be used to change the ranking of creditors, or to afford particular categories of creditors a preferent or secured status not expressly conferred upon them in business rescue. To do so would be to subvert the purpose of business rescue and to undermine the proper functioning of the Companies Act. The applicants accordingly argue that:

a. Chapter 6 only provides for two categories of preferent claims in business rescue: post-commencement finance, and the remuneration rights of employees due and payable before the commencement of business rescue;

b. The obligations imposed by the SI Agreement do not qualify as either and they thus enjoy no preference in business rescue;

c. SASA, like SARS, consequently cannot demand that its claims be settled in business rescue ahead of other creditors.

d. A contextual and purposive understanding of the Companies Act therefore illustrates that:

i. Parliament intended that a business rescue practitioner must be able to suspend any *inter partes* obligation that, if not otherwise suspended, would make it impossible to rescue the company;

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ii. unless the business rescue practitioners have the power to suspend payment obligations of this nature, chapter 6 of the Companies Act will be rendered incapable of achieving the very object of business rescue, particularly in highly regulated industries like the South African sugar industry;

iii. a preclusion on suspension would force the BRPs to treat SASA as a preferent creditor, when there is no statutory basis for it to assume that status; and

iv. an interpretation of the Companies Act which allows the BRPs to suspend the payment obligations under the SI Agreement, and prohibits SASA from instituting proceedings to enforce payment, therefore accords better with the statutory context and purpose.

[106] Submitting that the principle applies equally in this case, the applicants point to the caution in *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) 63 (SCA), albeit in a different context, against litigious creditors seeking to stultify the business rescue process or to gain advantages not contemplated by its broad purpose (footnotes omitted):

> "[1] Business rescue proceedings under the Companies Act 71 of 2008 (the Act) are intended to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. They contemplate the temporary supervision of the company and its business by a business rescue practitioner. During business rescue there is a temporary moratorium on the rights of claimants against the company and its affairs are restructured through the development of a business rescue plan aimed at it continuing in operation on a solvent basis or, if that is unattainable, leading to a better result for the company's creditors and shareholders than would otherwise be the case. These commendable goals are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted. Consequently they have given rise to confusion as to their meaning and provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose. This is such a case."

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[107] In my view the instant matter is not such a case. The applicants' summary of the objects of business rescue, the principles to be applied thereto and the description of the potential outcomes are all well and good. I agree with all of those general propositions.

[108] The problem, however, is that that additional hypothesis does not obtain here. It is one thing to say that the recovery of accumulated debts existing as at the commencement of business rescue are not claims payable in business rescue. It is quite another matter to suggest that the payment of the debts that go "hand-in-hand" with the costs of doing business during business rescue are also suspended and subject to the moratorium. It can hardly be contended that the Value Added Tax payable to SARS on ordinary day to day commercial transactions (say retail sales) by a company in business rescue is suspended! What of the PAYE contributions, ongoing pension fund or provident fund contributions due by an employer company in business rescue in respect of its employees who continue working and earning salaries during business rescue?

[109] In my view, the ongoing obligations to SASA are simply the costs of doing business – nothing more, and certainly, nothing less. They cannot be suspended and are not subject to the moratorium.

[110] During argument applicants' counsel rejected the assertion that if it were found that the SI Agreement is subordinate legislation it could not be suspended as that created rule of law problems because that was not a power that could repose in the business rescue practitioners. Applicants' counsel suggest that that submission is simply wrong. If the SI Agreement is subordinate legislation, they argue then that the rule of law requires that it be treated as binding, and that means that it must be complied with unless there are lawful grounds on which it can be departed from. The importance of that, they suggest, is that if there is a rule imposed by law or available in law that permits the suspension or abrogation from those rights, then that will be consistent with the rule of law and the suspension will be possible. Put differently, counsel for the applicants argue that the determination of whether or not the SI Agreement is subordinate legislation is also irrelevant to the outcome of these

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proceedings as a matter of public law. The question really, so the argument goes, is whether or not the functionary had the power to suspend as a matter of law.

[111] That question, they argue further, turns on the interpretation of s 136(2) of the Companies Act. If the BRP's have that power, they exercise a power conferred on them by legislation and when they do that, that will be the exercise of a statutory power or administrative action if that power is a public function.

[112] Applicants' counsel submit that the point is illustrated very clearly by two examples. The first relates to obligations that arise under a collective bargaining agreement. It is generally well known that ss 23 and 31 of the Labour Relations Act, 1995 ("**the LRA**") permit bargaining councils to conclude agreements that bind not just the parties to the agreement but their members and representatives. It is also so that under s 32 of the LRA the Minister of Labour can at the behest of the Bargaining Council extend the operation of that collective agreement to a whole industry, and so to non-parties to that agreement, which takes effect on publication to the Government Gazette. It is suggested that very close parallels exist between that regime and that applicable under the SI Agreement, i.e. an agreement that binds non-parties by virtue of imposition rather than by consensus. It is argued that it is significant that s 30 of the LRA requires that the Constitution of Bargaining Councils include in their provisions a process for exemption from collective agreements. Applicants' counsel argue that in those circumstances the Bargaining Council, a different entity from the entity which renders that agreement binding on non-parties, exercises the power to exempt and therefore suspend those obligations. They accordingly submit that the power to exempt and the power to suspend are legally identical.

[113] Applicants' counsel submit that that first example is particularly apposite because the work of a collective Bargaining Council has been found to be power exercised under a statute but a private law power, not a public power. In *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) the position was described thus (footnotes omitted):

"[39] While curial pronouncements from other jurisdictions are not necessarily transferable to this country they can nonetheless be instructive. I do not find it surprising that courts both abroad and in this country - including the Constitutional Court in *AAA Investments* - have almost always sought out features that are governmental in kind when interrogating whether conduct is subject to public-law review. Powers or functions that are 'public' in nature, in the ordinary meaning of the word, contemplate that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole' (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government.

[40] It has been said before that there can be no single test of universal application to determine whether a power or function is of a public nature, and I agree. But the extent to which the power or function might or might not be described as 'governmental' in nature, even if it is not definitive, seems to me nonetheless to be a useful enquiry. It directs the enquiry to whether the exercise of the power or the performance of the function might properly be said to entail public accountability, and it seems to me that accountability to the public is what judicial review has always been about. It is about accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct, and the question in each case will be whether it can properly be said to be accountable, notwithstanding the absence of any such special relationship.

[41] A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members. I have considerable difficulty seeing how a bargaining council can be said to be publicly accountable for the procurement of services for a project that is implemented for the benefit of its members - whether it be a medical-aid scheme, or a training scheme, or a pension fund, or, in this case, its wellness programme.

[42] I do not find in the implementation of such a project any of the features that have been identified in the cases as signifying that it is subject to judicial review. When implementing such a project a bargaining council is not performing a function that is 'woven into a system of governmental control' or 'integrated into a system of statutory regulation'. Government does not 'regulate, supervise and inspect the performance of the function', the task is not one for which 'the public has assumed responsibility', it is not 'linked to the functions and powers of government', it is not 'a privatisation of the business of government itself', there is not 'potentially a governmental interest in the decision-making power in question', the council is not 'taking the place of central government or local authorities', and, most important, it involves no public money. It is true that a government might itself undertake a similar project on behalf of the public at large - just as it might provide medical services generally and pensions and training schemes to the public at large - but the council is not substituting for government

when it provides such services to employees with whom it is in a special relationship.

43] Much was sought to be made by counsel for the appellants, of the fact that the council's collective agreement - which records the terms upon which the wellness fund was established and is to be administered - has been extended to the industry in general by declaration in the *Government Gazette*. The argument, as I understand it, was that the collective agreement - which has been called, in a comparable context, a 'piece of subordinate, domestic legislation' - constitutes a 'public power' that it exercises when it establishes and administers such a fund, but in my view counsel's reliance on the collective agreement is misplaced. The collective agreement is not the source of the council's powers. The powers of the council emanate from its constitution, or the equivalent powers conferred upon it by s 28 of the statute. The collective agreement is no more than the terms upon which the parties have agreed that the council will exercise those powers.

[44] That the procurement of goods and services by the council - for whatever purpose - is not a public function seems to me to find support in the Constitution itself. Government and its agencies are expected to be publicly accountable for the contracts that they conclude because they are spending public money, and there are two principal reasons why that should be so. In the first place the public is entitled to be assured that its moneys are properly spent. And secondly, the commercial public is entitled to equal opportunity to benefit from the bounty of the State to which they are themselves contributories. The accountability of government for procurement is expressly provided for in s 217 of the Constitution, which requires that government bodies must contract 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective', but that prescript does not apply to a bargaining council. It is not an 'organ of State' within the narrower definition of that term in s 217, nor is it an 'institution identified in national legislation' to which that procurement policy applies. I also see no principial reason why it should be publicly accountable for the contracts that it concludes. It is not expending public money, but money that emanates from its members and, in some cases, others in the industry, and it is to them, not the public, that it is accountable for the manner in which it does so. More important, for present purposes, I can see no basis upon which the commercial public, who are not contributors to its funds, not even indirectly, might justifiably be entitled to hold the council to account for the manner in which they are spent.

[45] Indeed, a singular feature of this case is that counsel for the appellants conceded, correctly, that the council would have been perfectly entitled to seek out and appoint a service provider without first inviting tenders or proposals at all. If it is not publicly accountable for choosing with whom to contract then I see no reason why it is publicly accountable for choosing with whom not to contract.'

[114] The second example that counsel for the applicants raised of powers suspended, conferred or imposed by statute but suspended by the determination of a single person arises under s 24M of the National Environmental Management Act, 1998 ("**NEMA**") which permits the Minister or MEC for Environmental Affairs to suspend the obligation to obtain an environmental authorisation or to change the process and to impose unilaterally a different process for obtaining environmental authorisation in particular specified circumstances. So again, argues applicants' counsel, statutory regulation, this time enacted very clearly in the public interest, is capable of abrogation by the decision of the Minister in favour of the interests of a particular person. So, the submission made is said to be a simple one. It is argued that it is clear that, as matter of law, rights and obligations imposed by statute can be suspended where there is a power to do so, and here that power resides in 136 (2)(a) of the Companies Act, and there is simply no merit to the submission that that suspension cannot occur as a matter of law.

[115] The submission is, in my view, fundamentally flawed. In both examples the power to exempt or suspend is given to the very person or entity charged with the administration of, or the regulation of, the industry or activity or section to whom or which the exempted or suspended obligation is owed. Not so here – quite obviously. Here the BRPs take control of THL and owe the obligation.

The Sugar Industry Agreement and the Sugar Act – Historical Assessment

[116] Referring in some detail to David Lincoln 'An Ascendant Sugarocracy: Natal's Millers-Cum-Planters, 1905 – 1939' (1988) *Journal of Natal and Zulu History* 1, the applicants suggest that an analysis of the history of the sugar industry, the Sugar Act, and the SI Agreement reveals two important facts. The first is that SASA has never been a public regulatory authority, but simply an association representing the interests of the industry. The second is that the Sugar Act has always merely given legislative recognition to the pre-existing contractual, cooperative arrangement between millers and growers. They continue by saying that SASA, as an industry association, has always existed outside of government. It was formed in 1919 as an alliance struck between the millers and the growers but one that was, at the time, a fragile association born of compromise and pragmatism. Following a period of

miller/grower friction in the 1920s, and SACGA splitting from SASA in 1930, resulting in its collapse, SASA was resuscitated under the 1936 Sugar Act, which brought a new accord, and which compelled the industry to adopt a formula for cane pricing that made provision for both the millers' and growers' costs of production. It thereby created a less secretive and better regulated relationship between millers and growers.

[117] They then submit that SASA's mandate has thus always been, on the one hand, to engage with government on behalf of the industry and, on the other, to facilitate the cooperative, revenue sharing arrangement agreed among industry participants.

[118] It is so that the SI Agreement and the Sugar Act must be understood and interpreted in their statutory and historical context. See *Kalil NO and Others v Mangaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA) para 22. It is appropriate to consider the provisions of the predecessor to the Sugar Act, ie. the Sugar Act, 28 of 1936 ("**the 1936 Act**").

[119] The provisions of the 1936 Act gave legislative recognition to the cooperative and contractual arrangements between millers and growers:

a. Section 1 authorised the Minister to publish in the Gazette "an agreement entered into ... between representatives of growers, millers and refiners" if such an agreement had been approved by at least 90% of the growers who together had produced not less than 90% of the cane grown in South Africa during that time, and if it was in the public interest.

b. Section 2 authorised the Minister, where no agreement under s 1 had been concluded or published, to "determine the terms of an agreement between growers, millers and refiners" if it was in the interests of the sugar industry. On publication, the agreement became binding on every grower, miller and refiner that received a quota in respect of the manufacture of sugar, "as if it had been an agreement

or amending agreement, as the case may be, signed by such grower, miller or refiner".

c. Section 6 provided that the Minister could, by notice in the Gazette, prescribe specific prices, quantities, and grades of sugar.

d. In terms of s 8, publication in the Gazette of any agreement or amending agreement served as *prima facie* proof of the terms of the agreement, and of the prerequisites to its conclusion. Publication thus served an evidentiary purpose, providing certainty as to the terms of the agreement.

[120] The applicants argue that the effect of these provisions was that the Minister could make an agreement on behalf of all industry participants who received a quota and bind them to it. Relying on *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) para 16, quoting *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1 at 26E - 27B, and *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA) para 18 they contend that contracts of this kind (ie. those that permit a third party to determine uncertain or ambiguous terms on behalf of the parties) are recognised and binding. Thus, they conclude, that there was little doubt that the Minister's power to make such an agreement was contractual, and distinct from the Minister's powers under s 6, to prescribe regulations. An agreement made by the Minister remained a deemed agreement, and not subordinate legislation. It gave legislative recognition to the underlying agreement among industry participants.

[121] I am not convinced that those authorities support the proposition contended for. Ponnen JA, who penned the judgments in both *Southernport Developments* and *Shepherd Real Estate*, said clearly that the third party in this context could not give effect to arrangements that the parties themselves had not concluded. In other words, the third party, who by agreement was empowered to do so, was merely adding flesh to an already agreed skeleton. The third party was empowered to settle ambiguities and uncertainties, not to make an entirely new agreement where none existed before.

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[122] It therefore seems to me that, if under the 1936 Act, the Minister acted in circumstances where no agreement existed (or had been published) at all, it was not as if he was making an agreement for the parties. The terminology is unfortunate but it would appear that the second use of the word agreement in s 2(a) was intended fit in with the scheme of the provision. It is interesting that in ss 2(b), 2(c) and 3 what the Minister does is referred to as "a determination" and not "an agreement" and is said to operate "as if it had been an agreement".

[123] Accordingly at first blush it might be arguable, in my view, that under the 1936 Act the SI Agreement was either a contract or a statute dependant on whether it was one published in terms of s 1 or a determination by the Minister in terms of s 2.

[124] Seemingly in support of the submission that the SI Agreement was an agreement proper (and not something else) the applicants refer to *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D), where it was held that the contract of sale and purchase that was deemed to exist between a grower and a miller under the 1943 SI Agreement (published pursuant to the 1936 Act), was a contract for the sale of movables within the meaning of the Prescription Act, 18 of 1943. It was suggested that that case concluded that the SI Agreement there was an agreement proper. I do not agree. A close consideration of the decision in *Lombard* reveals that it was concerned with the sale of sugar cane between a grower and a miller and the related transport costs concerning the movement of the sugar cane from point of harvest to the mill. Relying on a provision in the SI Agreement to the effect that "[c]ane delivered ... shall ... be deemed to be so delivered ... in pursuance of a contract for the sale of such cane on the terms and conditions herein set out" the court held that the supply of the sugar cane in terms of the SI Agreement was supply in terms of an agreement in respect of which the Prescription Act, 18 of 1943 applied. That was the issue before the court which found that the provision was "... clear and unambiguous, and the true meaning of the clause is that the contractual relationship between the grower and the miller in relation to cane delivered and accepted is to be governed by the rules of law relating to purchase and sale". The issue had nothing to do with whether the SI Agreement itself was an agreement proper or something else.

The Sugar Industry Agreement and the Sugar Act – 1978 onwards

[125] The Sugar Act is very short, consisting of a mere eleven effective sections. Section 12 is the section defining its short title and providing for dates of commencement. To undertake an appropriate textual and contextual analysis it is best that the necessary provisions be set out in full:

> **"To consolidate and amend the laws relating to the sugar industry; and to provide for matters incidental thereto.**
>
> **1 Definitions**
>
> In this Act, unless the context otherwise indicates-
>
> **'Agreement'** means the Sugar Industry Agreement referred to in section 4;
>
> **'Association'** means the South African Sugar Association incorporated in terms of section 2;
>
> ...
>
> **'Minister'** means the Minister of Economic Affairs;
>
> ...
>
> **'this Act'** includes the Agreement, a notice issued in terms of section 6 and any regulation made in terms of section 10;
>
> ...
>
> **2 Incorporation of South African Sugar Association**
>
> (1) The Association known as the South African Sugar Association shall under that name, with effect from the date of commencement of this Act, be a juristic person with a constitution of which the terms shall be published by the Minister by notice in the *Gazette*.
>
> (2) The Minister shall in like manner publish any amendment of the said constitution.
>
> (3) The Registrar of Companies shall as soon as possible after the commencement of this Act enter the name of the Association in the register kept by him of bodies incorporated by Statute.
>
> ...
>
> **4 Sugar Industry Agreement**
>
> (1) *(a)* The Minister shall after consultation with the Association determine the terms of an agreement to be known as the Sugar Industry Agreement, which shall provide for, and deal with, such matters relating to the sugar industry as are, in the opinion of the Minister, in the interests of that industry but not detrimental to the public interest.
>
> *(b)* (i) The Minister may at the instance of, or after consultation with, the Association, amend the Agreement if the Minister is satisfied that such amendment is in the interests of the sugar industry and not detrimental to the public interest.

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(ii) An amendment may be made with retrospective effect to any date determined by the Minister after consultation with

(c) The Minister shall publish the Agreement and any amendment thereof by notice in the *Gazette*, whereupon the Agreement or such amendment shall become binding upon every grower, miller and refiner.

(2) Without derogating from the generality of subsection (1) *(a)*, the matters with reference to which the Minister may provide for, and deal with, in the Agreement, shall include-

(a) the designation of any agricultural product from which it is or becomes possible to manufacture sugar as a product which is subject to the Agreement;

(b) (i) the regulation and control of the production, marketing and exportation of sugar industry products;

(ii) the prohibition of the production, marketing and exportation of sugar industry products;

(c) the confiscation or destruction, which may be with or without compensation, and the sale or other disposal, which may be for the benefit of the Association or not, of any sugar industry product in circumstances in which the production of that product, or the marketing or other disposal or the exportation thereof, has been effected or attempted in contravention of the Agreement or any notice published under section 6 or any regulation made under section 10;

(d) a formula for determining the price to be paid by millers to growers for sugar cane or any designated agricultural product, which may include any factor related to the sale or other disposal of any sugar industry product;

(e) the functions to be performed by the Association in the execution of the Agreement;

(f) the establishment and constitution of a board to carry out the terms of the Agreement, and the functions to be performed by it thereunder;

(fA) the granting of power, in specified cases or in general, to the board established under paragraph *(f)* to impose any penalty prescribed in the Agreement for the contravention of, or failure to comply with, any term of the Agreement, or any provision of a notice issued under section 6;

(g) the imposition of levies upon growers, millers and refiners for the purpose of giving effect to the terms of the Agreement and for the purpose of enabling the Association to fulfil any obligation incurred by it in accordance with its constitution;

(h) the regulation and control of the transportation of sugar cane from growers to millers, the prohibition of agreements which are contrary to the terms relating to such regulation and control, whether or not the agreements exist at the commencement of those terms, and whether or not the other terms of the Agreement are applicable to the parties to those agreements.

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and any compensation to parties who suffer loss as a result of such a prohibition;

(i) the granting of power-

(aa) in specified cases, to any person or body (including the Association) to provide for and deal with, with the approval of the Minister, any matter referred to in subsection (1) *(a)*, read with paragraphs *(a)* to *(h)*, inclusive, of this subsection, and, where necessary or desirable, with retrospective effect to any date determined by the said person or body with the approval of the Minister, by means of rules, regulations, notices, directions, orders or similar general measures; and

(bb) in specified cases or in general, to any such person or body to publish any such rules, regulations, notices, directions, orders or measures, after consultation, where applicable, with the Association, by notice in the *Gazette* or, with the prior approval of the Minister, where it is deemed expedient due to the restricted operation thereof or for any other reason, in such other manner as may in the opinion of the Minister be suitable in the circumstances to make them known to the persons affected thereby,

and which rules, regulations, notices, directions, orders or measures shall on any such publication become binding in accordance with the provisions thereof on any grower, miller, refiner or other person affected thereby.

(3) The Minister may, after consultation with the Association, in the Agreement or in any subsequent notice in the *Gazette*, declare any contravention of, or failure to comply with, any term of the Agreement, or a notice issued by the Association under section 6, an offence, and may in like manner prescribe penalties for any such contravention or failure.

5 Equality of treatment of growers, millers and refiners

Unless the Agreement expressly provides to the contrary in respect of any particular growers, millers or refiners, or any particular class or category of growers, millers or refiners, any right conferred, or any obligation imposed, upon growers, millers or refiners under the Agreement, shall be construed as applying equally and without distinction to all growers, millers and refiners, respectively.

6 Powers of Association with regard to prices and surcharge

(1) *(a)* The Association may by notice in the *Gazette* prescribe the maximum industrial price at which any sugar industry product, other than speciality sugar, may be sold.

(b) Such price may vary in respect of different grades, kinds, quantities and qualities of the product concerned, and in respect of different places or areas.

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(2) The Association may by notice in the *Gazette* or by written notice to the person concerned-

(a) impose a surcharge upon any sugar or molasses purchased or otherwise acquired-

(i) by any person or class or category of persons described in the notice;

(ii) for any purpose described in the notice; and

(b) prescribe the manner in which such surcharge shall be collected, the persons by whom it shall be paid, the persons to whom or the fund to which it shall be paid and the purpose for which it shall be utilized.

(3) The Association may in the case of a notice referred to in subsection (1) or (2) revoke or amend the notice by notice in the *Gazette* or by written notice to the person concerned.

7 Penalties

Any penalty which may be prescribed for any contravention of, or failure to comply with, any term of the Agreement, or of any provision of a notice issued under section 6, or of any regulation made under section 10, shall not exceed R100 000, in the case of a fine, or a period of twelve months, in the case of imprisonment, or both such fine and such imprisonment.

8 Jurisdiction of magistrate's court

A magistrate's court shall have jurisdiction to impose any penalty prescribed in terms of this Act.

9 Minister may effect certain amendments to Schedules

The Minister may at the request of the Association, and if he is satisfied that it would be in the interests of the sugar industry and not detrimental to the public interest, by notice in the *Gazette* amend any definition contained in Schedule 1 or 2, or substitute any other definition for any such definition.

10 Regulations

The Minister may, after consultation with the Association, make regulations providing for-

(a) the regulation, control or prohibition of the production, marketing or exportation of sugar or sugar industry products;

(b) the better achievement of the objects and the better administration of the provisions of this Act and of the Agreement or any amendment thereof.

11 Repeals and savings

(1) The Sugar Act, 1936 (Act 28 of 1936), the Sugar Amendment Act, 1955 (Act 17 of 1955), and the Sugar Amendment Act, 1958 (Act 26 of 1958), are hereby repealed.

(2) The Sugar Industry Agreement of 1943 is hereby rescinded.

(3) Any determination made, or any decision or action taken, by any person, body or authority under any Act repealed in terms of

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> subsection (1), and any agreement and any determination or regulation published under any such Act, shall, except in so far as it is inconsistent with any provision of this Act, continue to be of force until it is rescinded or varied under this Act."

[126] The Minister's powers and functions were transferred to the Minister of Trade and Industry by proclamation on 23 August 2019.

[127] The applicants submit that there are a number of textual features of the statutory regime that indicate that the SI Agreement is an agreement *sui generis*.

[128] They submit firstly that it is significant that s 4(1)(a) itself describes the SI Agreement as an agreement. The point they make is that it is not merely that it names the agreement the "Sugar Industry Agreement", but instead that it provides that there shall be "an agreement to be known as the Sugar Industry Agreement". In other words, what is being named the Sugar Industry Agreement is, according to the section, "an agreement". They argue that if the purpose of the provision was to make the SI Agreement something other than an agreement, the provision could have empowered the Minister, for example, to "make regulations to be known as the Sugar Industry Agreement".

[129] They contend next that s 4 must be contrasted with ss 6 and 10, which provide for the making of subordinate legislation. Section 6 empowers SASA to "by notice in the Gazette prescribe" the maximum industrial price at which a sugar industry product may be sold while s 10 empowers the Minister to "make regulations providing for" various issues. These provisions, which contemplate subordinate legislation, are said to stand in sharp contrast to s 4, which simply provides for the Minister to "determine the terms of an agreement", to amend the agreement in specified circumstances, and to publish the agreement in the Gazette for it to become binding. They conclude the submission with the suggestion that the Sugar Act maintains the distinction created under the 1936 Act between regulations prescribed by the Minister, and the SI Agreement, the terms of which are determined by the Minster.

[130] The applicants' case is thus grounded on the proposition that the SI Agreement as a whole is contractual in nature and qualifies as an agreement and

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therefore capable of suspension under the Companies Act. Alternatively, the applicants submit that the payment obligations under the Industry Agreement are *inter partes* obligations and therefore capable of suspension under the Companies Act.

[131] As I have outlined earlier, the applicants rely on certain historical aspects to contend that the SI Agreement is contractual in nature and simply given legislative recognition. The respondents, although each puts it differently, suggest that the applicants fail to adequately consider the language of the instruments which are relevant to this dispute ie. the Sugar Act and the SI Agreement. The argument proceeds with the contention that the applicants also fail to give recognition to the fact that the legislature expressly elected to repeal the 1936 Act and replace it with the Sugar Act, the specific purpose of which was to, *inter alia*, "amend the laws relating to the sugar industry".

[132] To my mind there is indeed a difference. It seems to me that the 1936 Act authorised the Minister to publish "an agreement entered into by" representatives of the various participants in the sugar industry after consensus had been reached within the industry. The Minister was empowered to determine the terms of the agreement only if the industry did not conclude an agreement, and in that case the terms of the agreement would be binding on industry participants "as if it had been an agreement... signed by such grower, miller or refiner". The legislature moved away from this position with the passing of the Sugar Act,. There is no longer any reference in the legislative scheme to the industry participants reaching an agreement. Instead, the Sugar Act confers the power on the Minister to determine the terms of the SI Agreement and impose such terms on the industry. The Sugar Act can therefore be said to part company from the 1936 Act.

[133] It is clear that in s 4(1)(a) of the Sugar Act the Minister is empowered to determine the terms of the SI Agreement on his own after consultation with SASA. The Minister is thus obliged to determine what in "the opinion of the Minister" are to be the terms of the SI Agreement. No consensus is required – only consultation. The concept of "after consultation" does not require agreement, only that serious consideration is given to the view of the party that is to be consulted. In *Public Servants Association of South Africa and Others v Government Employees Pension Fund and Others* [2020]

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ZASCA 126; [2020] 4 All SA 710 (SCA) Navsa JA put it crisply as follows (footnote omitted):

> "[55] I now turn to a consideration of the merits. It is clear that there is a distinction between situations in which a decision, by way of statutory prescripts or binding rules, has to be taken 'in consultation', and where a decision has to be taken 'after consultation'.
>
> The former requires agreement and the latter requires that the decision be taken in good faith, *after* consulting and giving serious consideration to the view of the party that has to be consulted."

[134] The determination of the terms of the SI Agreement is thus up to the Minister.

[135] Then too, in terms of s 4(1)(b) of the Sugar Act the Minister "may at the instance of, or after consultation with, the Association, amend the Agreement if the Minister is satisfied that such amendment is in the interests of the sugar industry and not detrimental to the public interest", and in terms of s 4(1)(c) the "Minister shall publish the Agreement and any amendment thereof by notice in the Gazette, whereupon the Agreement or such amendment shall become binding upon every grower, miller and refiner". As I see it, the SI Agreement self-evidently becomes binding on all millers, growers and refiners once gazetted, whether they like it or not. The obligations contained therein are imposed on all industry members as a matter of law, rather than agreed *inter partes* as a matter of contract or arrangement, and unlike a contractual or *inter partes* arrangement, are not open to being cancelled, amended or suspended by the members themselves. Instead, the SI Agreement operates much like a statutory regime with consequences for non-compliance.

[136] That much is obvious from the offences that may be declared and the penalties that may be prescribed in terms of s 4(3) of the Sugar Act, which provides that the Minister may declare certain conduct as constituting an offence or offences and prescribe penalties after consultation with SASA for a contravention of, or failure to comply with, any term of the SI Agreement. The additional fact that he may do so in the SI Agreement itself is a further obvious pointer to the SI Agreement being a legislative instrument as opposed to a document of consensus imposing contractual obligations. Penalties may not exceed R100 000.00 in the case of a fine, or a period

of twelve months, in the case of imprisonment, or both such fine and such imprisonment.

[137] The applicants' suggestion that it is possible to cleave the payment obligations imposed under the SI Agreement from the rest of the SI Agreement and contend that while the SI Agreement may be subordinate legislation, the payment obligations are somehow *inter partes* obligations within the scope of s 136(2)(a) of the Companies Act, is, in my view, simply wrong.

[138] It is manifestly clear that the payment obligations are not *inter partes*. This is evident from the fact that, in the event of a default, the repayment obligations become an industry obligation by way of statutory levies, levied by SASA on the remaining millers in terms of the SI Agreement. When this regime is contrasted with a contractual *lex commissoria* or the availability of the *exceptio non adimpleti contractus*, the difference again becomes self-evident.

[139] The first and second respondents submit, referencing the Shorter Oxford English Dictionary, that "binding" in the context of s 4(1)(c) means "obligatory (on), coercive". They refer also to Stroud's Judicial Dictionary, 6th edition, where it means "Required: Obligatory" as synonymous with "made binding". They submit also that in context the phrase "binding upon" is synonymous with "unavoidable by" and is distinct from the 1936 Act, which in terms of s 1(4) thereof, made the agreement under that Act binding only upon a subset of parties (growers delivering to a miller with a quota and millers that had signed the agreement). It must follow, the submission concludes, that, irrespective of the nature of the SI Agreement, a suspension of the obligations imposed by it is only permissible if it is also permissible to suspend s 4(1)(c) of the Sugar Act thus rendering the SI Agreement itself "not binding". The argument is compelling. As I canvassed earlier, it must be accepted that the Companies Act does not make provision for a BRP to suspend the operation of an Act of Parliament.

[140] The Minister himself confirms that he is responsible for administering the Sugar Act and determining the provisions of the SI Agreement. He has further confirmed that the Sugar Act reveals a deliberate election by the legislature for a statutory basis of regulation of the sugar industry. In addition the SI Agreement itself

records that the Minister has determined its terms under s 4(1)(a) of the Sugar Act and it records in clause 206 that the Minister was satisfied that the amendments were in the interests of the sugar industry and not detrimental to the public interest. No consensus was required nor recorded.

[141] Add to that the indicator that the obligations under the SI Agreement are statutorily located in the definition section of the Sugar Act which provides that "'this Act' includes the Agreement, a notice issued in terms of section 6 and any regulation made in terms of section 10". It follows, in my view, that the obligations which arise under the SI Agreement arise, by definition, directly from "this Act".

[142] In addition, and although not solely determinative of the question, it bears noting too that on a reading through of the SI Agreement as a whole one is left with the distinct sense that one is considering legislation as opposed to a document recording consensus reached amongst industry role-players.

[143] In addition to that analysis of the Sugar Act and of the SI Agreement, there is also judicial authority for the proposition that the SI Agreement is legislative in nature.

[144] In *Even Grand Trading 51 CC v Tongaat Hulett Limited (South African Sugar Association intervening)* (Unreported Judgment, KwaZulu Natal High Court, Pietermartizburg, 2 November 2012, Case No: AR517/11) the court was seized with an appeal from the Sugar Industry Tribunal. The preliminary issue to be decided was whether the High Court had jurisdiction. To make such a determination it was necessary to consider whether the SI Agreement was an agreement in the ordinary sense of the word That question arose because private parties cannot confer jurisdiction on a High Court that does not naturally have such jurisdiction. The Court (Kruger J with Schaup AJ concurring, sitting as a full bench exercising appellate jurisdiction) held that the SI Agreement was subordinate legislation, by the Minister exercising his powers in terms of National Statute (i.e. the Sugar Act). The analysis and conclusion on this aspect is instructive:

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"[7] The current Sugar Industry Agreement ("the Agreement") referred to Section 4(1)(a) ... was promulgated in 2000. The previous agreement promulgated in 1994, introduced the establishment of a special tribunal - the Sugar Industry Appeals Tribunal. This Tribunal had jurisdiction to hear matters involving the sugar industry between growers, millers and refiners as described in the Act.

[8] Of importance are the provisions of Clause 47 of the Agreement which provides *inter alia*, as follows:

> 'A party to a dispute decided by the Appeals Tribunal in terms of clause 34 may within 21 days of the date of the Appeal Tribunal's decision, appeal to any provincial or local division of the High Court of South Africa having jurisdiction against the Appeals Tribunal's finding by lodging with the registrar of the court concerned a notice of appeal setting out in full the grounds of appeal, in which event –
>
> .....
>
> (d) The appeal shall be prosecuted as if it were an appeal from a judgment of a Magistrate's Court in a civil matter and all rules applicable to an appeal from such a judgment shall *mutatis mutandis* apply to the appeal against the finding of the Appeals Tribunal; and
>
> (e) The court hearing the appeal may -
>
> (i) Confirm the finding of the Appeals Tribunal; or
> (ii) Set aside such finding; or
> (iii) Substitute its own finding for that of the Appeals Tribunal; and
> (iv) Make such order as to costs as it deems to (sic) meet.'

[9] As is evident from the aforementioned, this clause allows an appeal to the High Court to be prosecuted as if the appeal is from a judgment of the Magistrate's Court in a civil matter. It is trite that persons cannot, by agreement, bestow and obligate a High Court to hear and resolve disputes between them by way of an appeal. In **Goldschrnidt and another v Folb and another 1974(1) SA 576 (TPD)**, Heimstra J, in deciding whether an agreement allowing for an arbitration award was valid, held at 577(a):

> 'Private individuals cannot confer jurisdiction on the courts which they do not possess in terms of the common law or of statute; nor can they impose tasks upon the court which they are not legally obliged to perform'.

[10] Is the Sugar Industry Agreement an agreement/contract in the ordinary sense of the word? Section 4(1) provides that the Minister, on his own, shall determine the terms of the agreement after consultation with the necessary role players. It is therefore not an 'agreement' or 'consensus' between the parties. After considering the necessary input from the various stakeholders, the Minister is empowered to determine the terms of the Sugar Industry Agreement, 'in the interest of the sugar industry but not detrimental to the public interest'. (Section 4(1)). It is clearly distinguishable from an agreement between the parties – e.g. an arbitration agreement – which seeks to confer appellate jurisdiction on the High Court.

[11] The agreement is therefore subordinate legislation, by the Minister, exercising his powers in terms of a National Statute – the Sugar Act, 1978

[12] In terms of Section 171 of the constitution, 'all courts function in terms of National legislation, and their rules and procedures must be provided for in terms of National legislation'. 'National legislation' is defined in Section 239 of the Constitution as:

> ' "National Legislation" includes –
> (a) Subordinate legislation made in terms of an Act of Parliament, and
> (b) Legislation that was in force when the Constitution took effect and that is administered by the National Government'.

[13] It is accordingly apparent from the provisions of Section 171 of the Constitution that subordinate legislation made or empowered under National Legislation has the capacity to determine how our courts function, and in particular, to determine its powers and jurisdiction.

[14] In terms of Section 19 of the Supreme Court Act, 59 of 1959 the High Court has jurisdiction over 'all other matters of which it may according to law take cognizance' and had the 'power to hear and determine appeals from all inferior courts within its area of jurisdiction'. In **Daljosaphat Restorations (Pty) Ltd v Kasteelhof CC 2006(6) SA 91 (CPD)** it was held, at paragraph 30 and 31:

> 'Generally the appeal jurisdiction of a High Court is circumscribed by s.19 of the Supreme Court Act 59 of 1959, which in s.19(1)(a)(i) provides for the jurisdiction of a High Court to hear and determine appeals from all inferior courts within its area of jurisdiction.
>
> In addition, appellate power may be vested in the High Court by statute. Here Mr Gamble pointed, by way of example, to s.20 of the Health Professions Council. The Arbitration Act does not accord a similar right of appeal to a High Court. There is no other general power which a High Court may exercise in relation to the hearing of an appeal to it other than from an Inferior court or in terms of a statutory provision. Certainly, a High Court does not have such power in terms of the common law or its inherent jurisdiction.'

[15] Given the conclusion that the Sugar Industry Agreement is subordinate legislation, I am of the opinion that the provisions of Clause 47 of the Sugar Industry Agreement validly confers appellate jurisdiction to the High Court."

[145] The applicants boldly assert that the court in *Even Grand Trading* was not justified by its reasoning and is wrong. They say that the mere fact that the SI Agreement is not an ordinary agreement, and that the Minister is empowered to determine its terms and to publish it in the Gazette, does not convert it into subordinate

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legislation. They argue further, and in any event, that the court was tasked with the narrow question of determining whether the High Court had jurisdiction over disputes dealt with by the Sugar Industry Appeals Tribunal. It is in that context, the applicants say, that *Even Grand Trading* found the SI Agreement to be subordinate legislation. They argue also that in describing the SI Agreement as subordinate legislation, the court in *Even Grand Trading* was not concerned with the payment obligations under the SI Agreement. It limited its scope of inquiry to the jurisdiction-conferring capacity of the SI Agreement, and did not consider or decide whether, even if the Minister's involvement in the SI Agreement makes it capable of conferring jurisdiction on the High Court, the SI Agreement remains, in substance, and for other purposes, an agreement.

[146] That argument is plainly wrong. Firstly, the applicants suggest that the judgment in *Even Grand Trading* is one of the High Court (not an Appeal Court) and submit that thus I am at liberty to hold that the judgment is clearly wrong. Plainly, that I cannot do. Secondly, it is suggested that the court found only part of the SI Agreement to be subordinate legislation. Not only is this directly contrary to the words of the decision itself but it is also illogical to suggest that a single document may in part be subordinate legislation and in another part not be subordinate legislation. I have already found earlier that it is impermissible to cleave the payment obligations imposed under the SI Agreement from the rest of the SI Agreement. That view applies equally here.

[147] In *Sugar Industry Central Board and Another v Hermannsburg Mission and Another* 1983 (3) SA 669 (A) the court (Miller JA writing for the majority) endorsed an earlier finding that the SI Agreements (under the 1936 Act) were subordinate legislation:

> "In *W H Hindson and Co Ltd v Natal Estates Mill Group Board and Others* 1941 NPD 41 at 48 - 49 SELKE J said this:
>
> > 'The sugar industry in Natal is governed by and organised pursuant to a Union statute known as the Sugar Act 28 of 1936, and an agreement called the Sugar Industry Agreement, which has statutory force, and is binding upon substantially all sugar growers, millers and refiners engaged in the industry.
> >
> > The Agreement amounts virtually to a code providing for the organisation of the whole industry upon something of a co-operative basis. So far as is now relevant it

> divides those engaged in the industry into two main classes: *(a)* growers, and *(b)* millers, and it then proceeds by a series of elaborate provisions to establish machinery for regulating and adjusting the respective rights and obligations as between growers and millers, and as between the members of these two classes *inter se*.' "

[148] The 1936 Act essentially provided for a quota system that rendered growers, millers and refiners bound thereby. That it was substantially binding on all sugar growers, millers and refiners engaged in the industry would have been a product of that quota system. Those not in receipt of a quota fell outside the system. I am urged to accept, which I do, the proposition that if the Appellate Division considered the SI Agreement under the 1936 Act to have statutory force, then *a fortiori* the SI Agreement under the Sugar Act is of statutory force; it being binding on all millers, growers and refiners regardless of any quota entitlement or allocation.

[149] The applicants are critical of *Sugar Industry Central Board* and contend that it is not relevant to the instant matter for, *inter alia*, the following reasons:

a Firstly, they submit that the matter concerned the 1936 Act, and the SI Agreement concluded under that Act and did not concern the Sugar Act and the SI Agreement concluded under it.

b. Secondly, and in any event, the court there considered the entirely different question as to whether, in the event of the closure of a mill, the Sugar Industry Central Board (a body distinct from SASA) had jurisdiction to decide upon the mill to which an affected grower could send its cane, and whether the Board was obliged to afford the grower a hearing and explained that the clause was to be interpreted in the context of the Agreement as a whole, and against the background of the role of the Board in the conduct and organisation of the sugar industry. Thus it was argued that it was in that context that the court quoted the earlier decision in *Hindson*.

They conclude with the assertion that *Hindson* therefore confirms that:

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i. the SI Agreement is akin to an industry "code";

ii. SASA operates in a manner akin to a co-operative;

iii. the rights and obligations under the SI Agreement are *inter partes* – they operate as between growers and millers, and as between the members of these two classes *inter se*.

[150] In my view the criticism of *Sugar Industry Central Board* is founded on false premises. On the one hand the argument suggests that the factual questions before the court were different but this is irrelevant. The *ratio decidendi* is the relevant aspect. On the other hand the respondents suggest that the argument seeks to distil from the judgment in *Hindson* a contention that SASA operates in a manner akin to a co-operative, which misunderstands the judgment which says that the industry is organised on a co-operative basis; and from there to bootstrap the argument that because there are rights and obligations operating *inter partes* under the SI Agreement, it qualifies as an agreement for the purposes of s 136(2) of the Companies Act. The argument is a *non sequitur*.

[151] For all those reasons, in my view, the SI Agreement constitutes subordinate legislation.

The alternative constitutional argument

[152] In the alternative to their argument on the interpretation of s 136(2)(a) of the Companies Act, and only in the event that it is found that the obligations imposed under the SI Agreement are not capable of suspension under s 136(2)(a) of the Companies Act, the applicants contend that s 136(2)(a)(i) is unconstitutional.

[153] The first contention is that, so interpreted, s 136(2)(a) is irrational in that the power of suspension conferred on BRPs may in some instances be unable to achieve the purpose sought to be achieved through the enactment of the section, which is the rescue of a financially distressed company.

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[154] The BRPs suggest that the payment obligations under the SI Agreement are fees owed for services rendered by SASA and, in relation to the redistribution proceeds, monies owed by THL to other millers. They contend that those are *inter partes* obligations, not taxes, fines or penalties imposed in the public interest and that the irrationality and unconstitutionality of s 136(2)(a) lies in permitting the suspension of obligations arising from contracts, agreements, or arrangements between private parties, but not permitting the suspension of the self-same kinds of obligations, merely because these obligations are (as the respondents contend, and as is assumed, for present purposes) regulatory in nature. Thus they reject the Minister's opinion that it is rational to exclude those obligations from the remit of s 136(2)(a) because they are statutory in nature contending that whilst the Minister acknowledges that s 136(2) differentiates between "obligations owed under a regulatory regime to a regulatory authority and debts due under a contract to other creditors", they hold the view that he does not identify the legitimate and rational government purpose underpinning that differentiation. Accordingly, it is submitted that differentiation encapsulated by s 136(2)(a) of the Companies Act, on the respondents' interpretation, gives rise to irrational differentiation in breach of s 9(1) of the Constitution.

[155] While the Constitution allows judicial review of legislation, it does so in a circumscribed manner. The reason for this caution was explained in the following terms in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) (footnotes omitted):

> "[6] The Constitution allows judicial review of legislation, but in a circumscribed manner. Underlying the caution is the recognition that courts should not unduly interfere with the formulation and implementation of policy. Courts do not prescribe to the legislative arm of government the subject-matter on which it may make laws. But the principle of legality that underlies the Constitution requires that, in general, the laws made by the legislature must pass a legally defined test of 'rationality'.
>
> > 'The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a Court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a Court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature.'"

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[156] Courts must show respect for legislative choices made by Parliament, especially where complex policy choices are required. That reminder was sounded in *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) (footnotes omitted):

> "[1] Ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament whereas the judicial and the executive authority of the Republic repose in the Judiciary and the Executive respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible.
>
> [2] Turning to the Executive, one of the core features of its authority is national policy development. For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive. Meaning, the Judiciary may, as the ultimate guardian of our Constitution and in the exercise of its constitutional mandate of ensuring that other branches of government act within the bounds of the law, fulfil their constitutional obligations and account for their failure to do so, encroach on the policy-determination domain only when it is necessary and unavoidable to do so.
>
> [3] A genuine commitment to the preservation of comity among the three arms of the State insists on their vigilance against an inadvertent but effective usurpation of the powers and authority of the others. Absent that vigilance in this case, a travesty of justice and an impermissible intrusion into the policy-determination terrain would take place to the grave prejudice of the Executive or even the nation. For, that is bound to happen whenever the eyes of justice are unwittingly focused on peripherals rather than on the fundamentals.
>
> [4] Driven by this reality, we were constrained to sound the following sobering reminder:
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> > 'The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government.
> >
> > Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.' "

[157] In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) it was explained that (footnotes omitted):

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> "[67] Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts. As has been said, '(i)t is not for the court to disturb political judgments, much less to substitute the opinions of experts'."

[158] All that is required for rationality to be satisfied is that:

a. the legislature is seeking to achieve a legitimate government purpose; and that

b. the means chosen to achieve a particular purpose must be reasonably capable of accomplishing that purpose.

The legislature has a wide discretion in choosing the means to achieve its objective. The means selected need not be the best means or the most appropriate means available and courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. See *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51

[159] As explained in *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC) at para 46 (footnotes omitted):

> "Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The test for determining whether s 9(1) is violated was set out by the court in *Prinsloo v Van der Linde* and *Harksen v Lane*. A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious."

[160] It is the objector who challenges the legislative scheme that bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose. See *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at para 19.

[161] Have the applicants come close to meeting that onus? For the reasons the follow I am of the view that they fall short in that regard.

[162] Section 128(1)(b) of the Companies Act provides that the purpose of business rescue is to "facilitate the rehabilitation of a company that is financially distressed" by providing for, among other things, the adoption of a business rescue plan that maximises the likelihood of the company surviving or "results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company". The discussion in paras 100 to 105 above is also relevant here.

[163] Conferring on business rescue practitioners the power to suspend the contractual obligations of a financially distressed company, for the duration of the business rescue proceedings, is manifestly rationally related to the purpose sought to be achieved; namely that of enabling the rescue of the company or securing a better return for its creditors or shareholders.

[164] Whilst immunising a financially distressed company from all obligations, including statutory obligations, may more effectively facilitate the rescue of the company, the legislature must strike a balance between competing objectives and competing interests. I consider the legislature to have correctly determined that this balance is most appropriately struck by permitting the suspension of contractual obligations but not legislative obligations. In my view the exclusion is perfectly rational. It recognises the policy imperative of ensuring that regulatory authorities are enabled to continue to perform their statutorily mandated functions, to the benefit of the industry and public at large. To put it bluntly: if a company cannot comply with its statutory obligations, then it cannot be rescued and must seek liquidation. There is nothing irrational about such a legislative decision, which strikes the appropriate balance between business rescue and the proper functioning of a regulatory regime.

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[165] If the financially distressed company, despite being aided by the ability to suspend contractual obligations, is not able to meet its statutory obligations together with the other obligations it must meet in order lawfully and successfully remain in business, then it falls to be wound up either by immediate liquidation or in business rescue. Business rescue proceedings in which a company is wound down also terminate in liquidation.

[166] Although equally relevant to the earlier discussion on the Companies Act, it serves just as well here to refer to *Diener NO v Minister of Justice and Correctional Services and Others* 2019 (4) SA 374 (CC) (footnotes omitted):

> "[54] The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit to stakeholders upon liquidation (if inevitable). It is stated expressly in s 7*(k)* of the Companies Act that one of the purposes of the Act is to 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders'. It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees, and shareholders. The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders. In addition, a secondary purpose is to achieve a better outcome on liquidation or disinvestment, whereby '[t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth a lot more if preserved, or even sold, as a going concern than if the parts are sold off piecemeal'. At the same time, where it is not viable to rescue a company, it should be liquidated and its business sold. Business rescue can only begin where there is a reasonable prospect of saving the company. This was highlighted in *KJ Foods*, where the Supreme Court of Appeal quoted with approval the High Court in *DH Brothers Industries*, which stated that —
>
> > 'Chapter [6] as a whole reflects "a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction" *but only of viable companies, not of all companies placed under business rescue*.'
>
> This is in line with the ultimate aim of balancing the rights and interests of all relevant stakeholders."

[167] The fact that statutory obligations must continue to be discharged and are not capable of suspension, even if it were held to result in such obligations being preferred over the rights of certain creditors, cannot by that result alone result in "irrationality". The legislative choice to retain the imperative for a company in business rescue to discharge its statutory obligations in business rescue, while creating

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breathing space through the suspension of contractual obligations, is a perfectly rational means to serve the purpose of the provisions of business rescue.

[168] The respondents submit that the applicants ignore the evidence of the Minister (the Minister is responsible for administering both the Companies Act and the Sugar Act). The Minister explains that the objective of s 136(2)(a) of the Companies Act is to differentiate between contractual obligations, which in a sense are private agreements between parties and which can be suspended, and statutory obligations, which have a bearing on the public and/or on industries and which cannot be suspended. He explains that this approach "enables a balance between private and public interests".

[169] The Minister also explains that the exclusion of statutory obligations from the scope of s 136(2) is based on a policy imperative of ensuring that regulatory authorities are enabled to continue to perform their statutorily mandated regulatory functions. He further explains that the Legislature is faced with the responsibility of carefully weighing trade-offs when making policy choices, such as this, and that the Legislature took a policy decision to maintain statutory obligations over the rescue of companies, and that the Legislature's policy decision is that an appropriate balance is struck between permitting the suspension of contractual obligations but not statutorily imposed obligations owing under a regulatory regime.

[170] Finally, the Minister explains that the Legislature's policy choice behind the exclusion is that the proper functioning of the regulatory body would be disrupted and such a regulator would be unable to properly operate and achieve its regulatory purpose if companies in business rescue could opt out of their statutory obligations owing to it.

[171] The respondents argue, correctly in my view, that the Minister's evidence is not properly rebutted by the applicants. The applicants say that the Minister's affidavit compromises largely legal argument, but that is not so. His affidavit contains his evidence for why Parliament chose as it did and he has – under oath and as the executive Minister in charge of the statutory scheme – explained the rational choices that Parliament made.

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[172] The applicants' second contention concerning the constitutionality of section 136(2)(a) is that, so interpreted, the section arbitrarily distinguishes between organs of state and other creditors thus violating section 9(1) of the Constitution. The contention is that organs of state are entitled to demand immediate payment of obligations owed to them while obligations owed to other creditors may be suspended, and that there is no rational basis for this distinction.

[173] The test used to determine whether statutory provisions amount to unequal treatment by the law was set out *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC). The Court explained, dealing there with s 8 of the Interim Constitution:

> "[43] Where s 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of s 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of s 8(1)."

[174] *Weare* recognised that s 9(1) of the Constitution presents a low threshold. In *Phaahla v Minister of Justice and Correctional Services and Another* 2019 (2) SACR 88 (CC) it was explained (footnotes omitted):

> "[48] It is important to note that when conducting a rationality enquiry, the court must focus only on whether the differentiation is arbitrary or not rationally connected to a legitimate government purpose. It is not for the court to decide if there is a better means to achieve the object of the differentiation. When considering whether there is a rational link to the achievement of a legitimate government purpose –
>
> > '(t)he question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.' "

[175] The argument that a statutorily imposed obligation necessarily involves performance in favour of an organ of state is not correct and in my view the applicants' argument is founded on a false premise. The facts of this matter reveal that not all statutory obligations involve organs of state.

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[176] In my view, as was correctly argued by the respondents, an obligation owed to an organ of state may be suspended under s 136(2)(a) if the obligation arises under a contract or agreement. Similarly, an obligation owed to persons other than organs of state in terms of a legislative scheme may not be suspended under s 136(2) of the Companies Act. It is the nature of the obligation imposed and not the identity of the actor to whom the obligation is owed which is of importance for the purposes of s 136(2) of the Companies Act. There is thus no distinction made in s 136(2)(a) between organs of state and other creditors, let alone an arbitrary one.

[177] It is plain that in the absence of any differentiation between persons or categories of persons, there can be no violation of s 9(1) of the Constitution. There is thus no need to embark upon the second leg of the enquiry – namely, whether the differentiation bears a rational connection to a legitimate government purpose. In any event, even if I were to find that s 136(2) differentiates between private parties and regulatory bodies, such differentiation is neither arbitrary nor capricious.

[178] The legislature did not legislate for the suspension of legislative obligations by business rescue practitioners and that decision is evidently rational. As I have found, in the present case, the nature of the obligation is statutory, which arises out of subordinate legislation.

[179] In the applicants' heads of argument, a further argument is raised with regard to the ranking of regulatory authorities. The applicants argue that the inability to suspend statutory obligations will create a preference for regulatory authorities in business rescue which contradicts its concurrent ranking in liquidation. The respondents (particularly RCL Foods) complain that this is impermissible because by raising a new basis for suggesting that s 136 is irrational for the first time in its written submissions, the applicants deprived the respondents of an opportunity of responding thereto in answer.

[180] In any event, the argument misconceives the nature of post-commencement debts which cannot be compromised by BRPs. Such debts are to be considered as post-commencement finance. In *Henque 3935 CC t/a PQ Clothing*

Outlet (In Business Rescue) v Commissioner, South African Revenue Service 2023 (6) SA 260 (GJ) post-commencement finance was dealt with thus:

> "[5] One of the innovations of the Companies Act is to be found in ch 6 thereof, where the concept or practice of business rescue is introduced into our law. In terms of s 128(1)*(b)* of the Companies Act, business rescue is a 'proceeding' that is designed to 'facilitate the rehabilitation' of an entity that is financially distressed, by (i) temporarily appointing a business rescue practitioner (BRP) who supervises and manages the affairs of the entity; (ii) placing a temporary moratorium on the rights of claimants against the entity or against any 'property' in the possession of the entity — the full extent of the moratorium is further elaborated upon in s 133 of the Companies Act; and (iii) allowing for a business rescue plan (the plan) to be developed. By placing a temporary moratorium on the rights of claimants, the Companies Act ring-fences the debts of the entity that have accrued prior to the commencement of business rescue. It is these debts that the plan would focus upon to 'rehabilitate' or 'rescue' the entity. Sections 151 and 152 of the Companies Act provide for the plan to be tabled at a meeting of the creditors for adoption. In cases where the plan adopted by the creditors affects the rights of shareholders or members, as in this case, then the plan would have to be tabled at a meeting of these shareholders or members for their approval of the adoption. Should the plan be adopted and approved (in the case where approval is necessary), in terms of s 152(4) it is binding on all creditors, regardless of whether a creditor was at the meeting or not. Finally, in terms of s 154(2), no creditor, including Sars, if owed unpaid taxes which were due and payable pre- the commencement of business rescue, can enforce the debt, except in terms of the plan. Post-commencement debts — referred to as 'Post-commencement finance' in the Companies Act — are an altogether different species. They are dealt with in terms of s 135 of the Companies Act. They are not affected or compromised by the plan. Salaries earned by employees during the business rescue proceedings constitute post-commencement finance. Any taxes, such as income tax arising from post-commencement profits, skills development levies (SDL) or VAT on post-commencement sales, for example, too, would constitute post-commencement finance. All post-commencement finance has to be settled before any pre-commencement debts can be considered."

[181] The suspension of statutory obligations under the SI Agreement post-commencement therefore results in the preference of SASA in the rescue of THL. This is a consideration which the practitioners ought to take into account when determining whether the business is capable of rescue or whether a better return will result in liquidation. The ranking, however, has no bearing on the constitutionality of the Companies Act and will have to be dealt with in the business rescue plan.

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[182] Insofar as the applicants seek final reading-in relief to cure the alleged constitutional defect in the Companies Act, that relief will result in business rescue practitioners being able to suspend and cancel statutory obligations as well as reduce statutory claims to general damages under ss 136(2)(b) and 136(3) respectively.

[183] In other words, practitioners will be afforded expansively broad powers in circumstances where the legislature evidently did not want to ascribe such powers. The reading-in relief thus amounts to a severe intrusion on the legislative realm and impermissibly transforms the scope and nature of s 136 of the Companies Act as a whole. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) the principle was articulated as follows (footnotes omitted):

> "[65] In fashioning a declaration of invalidity, a Court has to keep in balance two important considerations. One is the obligation to provide the 'appropriate relief' under s 38 of the Constitution, to which claimants are entitled when 'a right in the Bill of Rights has been infringed or threatened'. Although the remedial provision considered by this Court in *Fose* was that of the interim Constitution, the two provisions are in all material respects identical and the following observations in that case are equally applicable to s 38 of the Constitution:
>
> > 'Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effect remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.' (Footnote omitted.)
>
> The Court's obligation to provide appropriate relief must be read together with s 172(1)*(b)* which requires the Court to make an order which is just and equitable.
>
> [66] The other consideration a Court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature. Whether, and to what extent, a Court may

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interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case."

[184] At the hearing counsel for the applicants accepted that the reading-in originally sought was over-broad and that it created the equal opposite and contended then for an amended dual reading-in in the following terms (the reading-in suggested is inserted in ***underlined bold italics***:

> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—
>
> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any ***inter partes*** obligation of the company that—
>
> (i) arises under an agreement ***or regulatory regime*** to which the company was a party at the commencement of the business rescue proceedings; and
>
> (ii) would otherwise become due during those proceedings;

[185] In my view that change makes absolutely no difference to the argument.

[186] Caution is demanded regarding the granting of reading-in relief – particularly final reading-in relief, which must only be resorted to sparingly. See *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC) at paras 82 to 85.

[187] The alternate constitutional challenge therefore fails.

The permanent stay of RCL Foods's complaint

[188] RCL Foods referred a complaint to the Sugar Appeal Tribunal ("**the Tribunal**") on a priority basis. RCL Foods requested the Tribunal to determine the nature of the payment obligations imposed on millers under the SI Agreement and whether such obligations could be unilaterally suspended thereunder.

[189] Clause 35 of the SI Agreement provides that:

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> "[s]ubject to the provisions of this agreement relating to the determination of particular disputes, if any dispute arises between any persons upon whom this agreement is binding, insofar as the dispute relates to the subject matter, application, any right or obligation arising out of, or the interpretation of this agreement . . ., the Appeals Tribunal shall have jurisdiction, exclusive of any court of law, to determine such dispute." (emphasis added.)

[190] The complaint brought by RCL Foods related to obligations arising out of the SI Agreement and/or the interpretation of the SI Agreement. RCL Foods contends that the Tribunal was thus the appropriate forum to determine the complaint and that contrary to the applicants' assertions, RCL Foods did not seek declaratory relief regarding the proper interpretation of s 136(2)(a) of the Companies Act before the Tribunal. The declaratory relief sought in the complaint was limited to the nature of the obligations under the SI Agreement.

[191] The applicants' position was that the SI Agreement was contractual and therefore capable of suspension. RCL Foods believed that the SI Agreement was not contractual, and accordingly sought relief confirming the nature of the SI Agreement. The Tribunal had jurisdiction to determine that dispute because it involved the interpretation of the SI Agreement itself.

[192] It was only clarified in correspondence between the parties after the institution of RCL Foods' complaint that the practitioners were of the view that THL's payment obligations under the SI Agreement were capable of suspension under s 136(2)(a) of the Companies Act even if they were not contractual in nature. In other words that the practitioners could suspend even statutory obligations.

[193] RCL Foods's complaint was then "stayed by agreement to allow the present application to proceed". The BRPs did not take any formal steps in RCL Food's complaint before the proceedings were stayed in the Tribunal.

[194] Notwithstanding all of that, the applicants seek an order striking out or a permanent stay of RCL Foods's complaint, and the costs incurred by them in respect of RCL Foods' complaint.

[195] Considering the mutual stay before the Tribunal, an application for the striking out or permanent staying of RCL Foods' complaint is without foundation. Instead, the applicants ought to have approached the Tribunal for such an order rather than agree to a stay of proceedings.

[196] RCL Foods' complaint to the Tribunal was also not precluded by the general moratorium on legal proceedings against a company in business rescue for the reason that it was not sought against a company in business rescue, as required in s 133(1) of the Companies Act. Rather, RCL Foods requested the Tribunal to determine the nature of the obligations under the SI Agreement and did not seek any relief against THL.

[197] In any event, an order for the permanent stay of proceedings is an extra-ordinary remedy that has far-reaching consequences. A court's power to permanently stay proceedings is exercised in a circumscribed manner and only in exceptional circumstances where the interests of justice dictate such a stay. See *Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1979 (3) SA 1331 (W) at 1338.

[198] In the present matter, no allegation has been raised that suggests the complaint was launched vexatiously nor that the interests of justice dictate the permanent stay of the complaint. The applicants' main contention is that the Tribunal lacked jurisdiction to entertain the dispute – a complaint best addressed before the Tribunal itself. In the circumstances, no case has been made out for a permanent stay.

[199] The applicants' request for costs in the complaint is even more difficult to comprehend, given that the applicants did not even so much as formally oppose the complaint. In any event, the Tribunal has the power to grant costs awards, and the applicants ought to approach the Tribunal to recover whatever costs it may establish have been wasted (which would evidently be none given their non-involvement in the proceedings).

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[200] The relief sought concerning RCL Foods' complaint to the Tribunal is without merit.

Costs

[201] The applicants and RCL Foods employed the services of multiple counsel and each sought the costs of three counsel. The other respondents were represented by one or two counsel and sought costs accordingly. I consider it appropriate to award costs of two counsel only, where more than one counsel was employed.

The early Order

[202] On the morning of 29 November 2023 the parties represented at the hearing were notified that this judgment would be delivered at 14h00 on Monday, 4 December 2023. It was indicated that I was in a position then to issue the Order that follows, and that I was prepared to do so if there was unanimous consent thereto by all the parties represented at the hearing. That consent was forthcoming and the Order was issued at 14h00 on 29 November 2023.

The Order

[203] The application is dismissed with costs, such costs to include the costs of two counsel where so employed.

Vahed J

Case Information:

Date of Argument:	13 & 14 September 2023
Date Order Made:	29 November 2023
Date of Judgment:	04 December 2023

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7th Respondent's Counsel	B Manca SC (with M Du Plessis SC, D Robertson & C Kruyer)
Instructed by:	Webber Wentzel Johannesburg Ref Ms L Kahn
Locally represented by:	Stowell Incorporated Pietermaritzburg Ref: Ms S Myhill
8th Respondent's Counsel:	F A S Snyckers SC (with A J D'Oliveira)
Instructed by:	Cox Yeats Umhlanga Ridge Ref: Mr T Scheepers

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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

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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.
>
> - 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).
>
> - 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

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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

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> 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

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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;

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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
Applicants' Counsel:	A Subel SC (with I Goodman SC)
Instructed by:	Werksmans Attorneys Johannesburg Ref: Mr T Boswell
Locally represented by:	EVH Inc Attorneys Umhlanga Ref: W2409/0005
1st & 2nd Respondents' Counsel:	P J Wallis SC (with L K Olsen)
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
7th Respondent's Counsel	B Manca SC (with M Du Plessis SC, D Robertson & C Kruyer)
Instructed by:	Webber Wentzel Johannesburg Ref Ms L Kahn
Locally represented by:	Stowell Incorporated Pietermaritzburg Ref: Ms S Myhill
8th Respondent's Counsel:	F A S Snyckers SC (with A J D'Oliveira) (Heads of Argument prepared by G Woodland SC with C Morgan)
Instructed by:	Cox Yeats Umhlanga Ridge Ref: Mr T Scheepers

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 945/2024

In the matter between:

TONGAAT HULETT LIMITED (IN BUSINESS RESCUE)	**FIRST APPELLANT**
TONGAAT HULETT SUGAR SOUTH AFRICA (PTY) LTD (IN BUSINESS RESCUE)	**SECOND APPELLANT**
TREVOR JOHN MURGATROYD N.O.	**THIRD APPELLANT**
PETRUS FRANCOIS VAN DEN STEEN N.O.	**FOURTH APPELLANT**
GERHARD CONRAD ALBERTYN N.O.	**FIFTH APPELLANT**
and	
SOUTH AFRICAN SUGAR ASSOCIATION	**FIRST RESPONDENT**
S.A. SUGAR EXPORT CORPORATION (PTY) LTD	**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 (PTY) LTD	**SEVENTH RESPONDENT**
ILLOVO SUGAR (SOUTH AFRICA) (PTY) LTD	**EIGHTH RESPONDENT**

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UMFOLOZI SUGAR MILL (PTY) LTD	**NINTH RESPONDENT**
GLEDHOW SUGAR COMPANY (PTY) LTD	**TENTH RESPONDENT**
HARRY SIDNEY SPAIN N.O.	**ELEVENTH RESPONDENT**
UCL COMPANY (PTY) LTD	**TWELFTH RESPONDENT**
ALL REGISTERED GROWERS	**THIRTEENTH TO TWENTY-THREE THOUSANDTH RESPONDENTS**
THE AFFECTED PERSONS IN THL'S BUSINESS RESCUE	**TWENTY-THREE THOUSANDTH AND FIRST RESPONDENT AND FURTHER RESPONDENTS**

Neutral citation: *Tongaat Hulett Limited and Others v South African Sugar Association & Others* (945/2024) [2025] ZASCA 190 (15 December 2025)

Coram: DAMBUZA, GOOSEN, SMITH and COPPIN JJA and BASSON AJA

Heard: 12 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 15 December 2025.

Summary: Sugar Act 9 of 1978 – nature of Sugar Industry Agreement – whether an agreement within the meaning of s136(2) of the Companies Act 71 of 2008 – Companies Act – interpretation of s 136(2) – Constitutional Law – whether s 136(2) of the Companies Act 71 of 2008 (the Companies Act) contravenes the principle of equality enshrined in s 9 of the Constitution.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Vahed J sitting as court of first instance):

1 The appeal is dismissed.

2 The appellants are to pay the costs of appeal of the first, second, third, fourth, seventh, eighth and twelfth respondent. Such costs are to include the costs of two counsel where so employed.

JUDGMENT

Smith JA (Dambuza, Goosen and Coppin JJA and Basson AJA):

Introduction

[1] This appeal concerns the interpretation of s 136(2) of the Companies Act 71 of 2008 (the Companies Act). This provision allows a business rescue practitioner temporarily to suspend a company's payment obligations under pre-existing agreements during business rescue proceedings. The main issue is whether the Sugar Industry Agreement (SI Agreement), which was promulgated by the Minister in terms of s 4 of the Sugar Act 9 of 1978 (the Sugar Act), qualifies as an 'agreement' under s 136(2)(*a*) of the Companies Act, thereby permitting the suspension of payment obligations owed under it while business rescue is in progress. Unless specified otherwise, all statutory references in this judgment pertain to the Companies Act.

[2] Given the large number of parties in the KwaZulu-Natal Division of the High Court, Durban (the high court) proceedings – totalling more than twenty-three thousand and one respondents – a comprehensive description of each would unnecessarily encumber the judgment. Accordingly, I focus on outlining the principal parties and reference others only when necessary to provide relevant context.

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[3] The first and second appellants are Tongaat Hulett Limited (in business rescue) (THL) and Tongaat Hulett Sugar South Africa (Pty) Limited (in business rescue) (THSSA), respectively. Both are public companies in business rescue. THSSA is a wholly owned subsidiary of THL. I refer to them collectively as THL. The third, fourth and fifth appellants are the joint business rescue practitioners (the rescue practitioners) of THL.

[4] The first respondent is the South African Sugar Association (SASA), a juristic entity incorporated in terms of s 2 of the Sugar Act. The second respondent is the S.A. Sugar Export Corporation (Pty) Limited (SASEXCOR). The third respondent is the Minister of Trade, Industry and Competition (the Minister).

[5] The fourth respondent is the South African Sugar Millers' Association NPC (SASMA). All domestic sugar millers and refiners are required to be members of SASMA, which represents all domestic millers and refiners in sugar industry engagements, negotiations, agreements, and arrangements, including when it participates in SASA matters.

[6] The fifth and sixth respondents are the South African Cane Growers' Association NPC (SACGA) and the South African Farmers' Development Association NPC (SAFDA), respectively. All domestic sugarcane growers must join either SACGA or SAFDA, which represent them in industry discussions and participation in SASA. Under SASA's Constitution, SACGA and SAFDA have equal representation. Together, they are called 'the Growers' Section' and are parties to the SI Agreement and related arrangements.

[7] The seventh respondent (RCL Foods Sugar & Milling (Pty) Ltd (RCL Foods)), the eighth respondent (Illovo Sugar (South Africa) (Pty) Ltd (Illovo Sugar)), the ninth respondent (Umfolozi Sugar Mill (Pty) Ltd (Umfolozi Sugar)), the tenth respondent (Gledhow Sugar Company (Pty) Ltd (Gledhow Sugar)), and the twelfth respondent (UCL Company (Pty) Ltd (UCL)) are sugar milling companies that operate their own production mills. Illovo Sugar, UCL and Gledhow Sugar also operate as sugar refiners. They are all

members of SASMA. The eleventh respondent is the business rescue practitioner of Gledhow Sugar.

[8] The thirteenth to twenty-three thousandth respondents are members of SACGA and SAFDA and comprise all the registered sugar cane growers. The twenty-three thousandth and first respondents and further respondents are the affected persons in THL's business rescue.

[9] On 26 October 2022, the board of THL determined that the company was financially distressed and resolved to commence business rescue proceedings. At that time, THL owed significant debts to SASA under the SI Agreement. On 24 February 2023, THL's rescue practitioners decided to suspend payment obligations to SASA, contending that such payments threatened the possibility of rescuing the company. This suspension was invoked under s 136(2)(*a*).

[10] The respondents disputed the rescue practitioners' entitlement to suspend those payment obligations. They contended that the SI Agreement is not an 'agreement' within the meaning of s 136(2)(*a*) and that THL's obligations under the SI Agreement are statutorily imposed and are therefore incapable of suspension under that section.

[11] The appellants consequently applied to the high court for an order declaring that s 136(2)(*a*), read with the definition of 'agreement' in s 1, empowers the rescue practitioners to suspend any of THL's payment obligations, which arise under the SI Agreement. Alternatively, they sought an order confirming the rescue practitioners' power to suspend any local market redistribution charges, and the interest thereon, that become due in terms of the SI Agreement and would otherwise become due during the business rescue proceedings.

[12] In the further alternative, the appellants asserted that s 136(2)(*a*) is under-inclusive and irrational, thereby contravening the rule of law as established in s 1 of the Constitution, which sets out foundational values, including the supremacy of the

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Constitution and the rule of law. The appellants argue that by failing to treat all creditors equally, the section undermines the principle of equality before the law and fails to provide a rational basis for differentiating between creditors. Section 9(1) of the Constitution enshrines the right to equality, stating that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. The appellants assert that s 136(2)(*a*) creates an arbitrary distinction among creditors, thereby violating the provisions of s 9(1) of the Constitution.

[13] The high court handed down its judgment on 4 December 2023, dismissing the application with costs. The high court found that: (a) properly interpreted, s 136(2) excludes statutory obligations; (b) the SI Agreement constitutes subordinate legislation; (c) SASA is a statutory regulatory body; and (d) s 136(2) does not contravene s 9(1) of the Constitution. Subsequently, on 6 May 2024, the high court refused the appellants' application for leave to appeal. They afterwards successfully petitioned for leave to appeal to this Court.

[14] On appeal to this Court, the appellants asserted that the high court misinterpreted s 136(2)(*a*), which, when correctly construed, authorises business rescue practitioners to suspend any *inter partes* obligation that would otherwise hinder the possibility of rescuing the company. They maintain that the SI Agreement establishes definite rights and obligations among participants in the sugar industry, thereby fitting the criteria for an agreement subject to suspension under the relevant provision. According to them, the respondents' interpretation would produce the anomalous outcome of treating SASA as a preferred creditor without any statutory justification for such status.

[15] Furthermore, the appellants argue that the respondents' interpretation would render the section under-inclusive, irrational, and unconstitutional. On the interpretation proposed by the respondents, the section would arbitrarily distinguish between debts owed to private individuals and those owed to regulatory bodies, even when these debts arise from similar obligations. Such an approach could also compromise the intent and effectiveness of the business rescue provisions within the Companies Act.

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[16] In assessing the impact of s 136(2)(*a*) on the rights and obligations arising from the SI Agreement, several key legal questions arise. These questions are central to determining whether the payment obligations under the SI Agreement may be suspended during business rescue proceedings and thus have significant implications for the rights and responsibilities of industry participants. They are the following:

a) What is the legal nature of an 'agreement' as defined in the Companies Act and does it include obligations imposed by law?

b) Having established the meaning of 'agreement', does the SI Agreement fall within the scope of an agreement contemplated by section 136(2)(*a*), and is it therefore susceptible to suspension by a business rescue practitioner?

c) Is SASA established as a statutory regulatory body, or is it an association formed by private agreement among participants in the sugar industry?

d) If the Court determines that the term 'agreement' in section 136(2)(*a*) excludes liabilities arising from the SI Agreement, does this interpretation contravene section 9 of the Constitution, which guarantees equality before the law?

[17] The submissions advanced by the parties must be evaluated in light of the pertinent facts, the organisational framework of the South African sugar industry, the historical context related to the Sugar Act's enactment and the statutory scheme of business rescue proceedings in the Companies Act. The high court's judgment, reported as *Tongaat Hulett Limited (In Business Rescue) and Others v South African Sugar Association and Others*,[1] provides a comprehensive summary of these matters. As none of the parties have challenged that summary, it is unnecessary to repeat that level of detail here. I will therefore set out only those facts required to clarify the findings and final order.

Factual background

[18] The South African sugar industry is a cornerstone of the national economy, generating about R24 billion in annual revenue. It provides direct employment to roughly

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[1] *Tongaat Hulett Limited (In Business Rescue) and Others v South African Sugar Association and Others* [2023] ZAKZDHC 93; [2024] 1 All SA 509 (KZD).

65,000 people, with another 270,000 holding jobs indirectly – many of whom live in rural communities where alternative employment opportunities are scarce. The sustainability and productivity of this sector are thus crucial for both economic stability and social well-being. The industry is organised into growers, represented by either SACGA or SAFDA, and millers, represented by SASMA. These groups collaborate under the supervision of SASA to manage industry-wide interests.

[19] Under the SI Agreement, participants like THL and other millers are required to pay two main types of charges: (a) industry levies – fees that fund activities benefiting the entire sector, and (b) local market redistribution payments. Redistribution payments are made by millers who produce more sugar than their allocated quota; these payments are collected by SASA and redistributed among millers to balance market allocations and ensure fairness. SASA's authority to impose these levies and payments is grounded in the Sugar Act and the SI Agreement, which also empower SASA to set pricing formulas aimed at supporting shared industry objectives.

[20] The SI Agreement also governs how revenue from the domestic market is divided. After deducting industry levies, the remaining 'net divisible proceeds' are split between growers (who receive 64%) and millers (who receive 36%). Growers are paid based on the RV price – a price determined by the recoverable sugar content in their cane, ensuring they are compensated fairly for the quality of their crop. Millers are assigned quotas that dictate how much raw sugar they can contribute to the domestic market. If a miller produces more than their allocated quota, they must make redistribution payments to SASA, as described above. Any surplus sugar that cannot be sold domestically is exported, and profits from these exports are distributed according to each miller's quota allocation.

[21] THL is South Africa's oldest sugar milling company, responsible for over a quarter of domestic sugar production and 40% of the country's refined sugar supply. In 2021, THL's activities contributed approximately R11 billion to the national GDP. However, the company is experiencing severe financial distress.

[22] As an overproducer, THL's output exceeds its domestic quota, obliging it to make significant redistribution payments to SASA. All THL's sugar is currently sold domestically, which has led to underperformance in exports – a factor that further complicates the company's financial situation. This situation has sparked a dispute between THL and SASA regarding the underlying causes of THL's overproduction. THL maintains that its overproduction is not voluntary but rather a consequence of other millers reducing their refining capacity, which, according to THL, forced it to process additional cane to prevent waste and support growers. This argument highlights the interconnectedness of operations in the sector and the ripple effects of capacity changes by one player. By contrast, SASA attributes THL's overproduction to its own business decisions, arguing that strategic choices about production and sales should have accounted for industry quotas and market conditions.

[23] With mounting debts totaling about R10.4 billion owed to roughly 1,000 creditors and all its assets pledged as security, THL's prospects for recovery have become increasingly uncertain. The company's board chose voluntary business rescue as preferable to liquidation. This decision is acknowledged by all respondents as necessary to preserve value for stakeholders and potentially safeguard jobs, especially in vulnerable rural communities.

[24] The business rescue practitioners took control of THL with only two months left in the sugar season. They continued operations but, invoking s 136(2)(*a*), suspended certain payments, including those due to SASA, while seeking new financing to ensure ongoing processing. The suspension of these payments created immediate uncertainty for growers and millers, as it threatened the flow of funds that underpin both industry stability and employment in affected communities.

[25] From September 2022, THL stopped making payments required under the SI Agreement, triggering a dispute about whether such payments could legally be withheld during business rescue. SASA expressed concern that non-payment by THL could have far-reaching impacts on the broader industry, including the financial health of other millers

and growers. It responded by establishing a dedicated task team to monitor the situation and propose solutions.

[26] By January 2023, THL indicated it was unable to meet impending obligations for redistributions, interest, and levies. SASA insisted that these commitments remained enforceable and, in response to THL's non-payment, withheld export proceeds that would otherwise have been due to THL. SASA then demanded payment of more than R176 million in industry levies. THL, however, confirmed it was suspending these payments in reliance on s 136(2). This impasse increased financial pressure on both THL and the wider industry, raising concerns about ongoing support for rural employment and the stability of sector-wide revenue sharing.

[27] As of 31 March 2023, the exact amounts owed by THL remained contested. They are, however, considered immaterial to the immediate dispute. The business rescue practitioners announced that payments for new obligations would resume from April 2023, while historical debts would be addressed through the business rescue plan – a strategy aimed at balancing the interests of current operations with the need to resolve past arrears. THL began repaying current charges and levies from April 2023, but most debts predating this period remained outstanding, continuing to pose risks for suppliers, employees, and industry partners.

[28] On 31 March 2023, SASA imposed a special levy – an additional charge on industry participants designed to cover specific shortfalls – requiring other millers to contribute extra funds. This levy had the potential to reduce the profits of other millers, illustrating how the financial distress of a major player can have negative knock-on effects for the entire sector.

[29] On 31 May 2023, the business rescue practitioners published a business rescue plan that did not make provision for payment of any outstanding industry levies or redistribution payments under the SI Agreement. Instead, these obligations were classified as unsecured debt, placing SASA in the position of an unsecured creditor and

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suspending the debt pending confirmation by the high court. This omission and the apparent suspension of THL's obligations for the duration of business rescue prompted other industry participants – including RCL Foods, SASMA, and Illovo Sugar – to file an urgent application in the high court to prevent the adoption of the plan.

[30] Following service of the application, the business rescue practitioners obtained creditor consent to postpone the meeting convened to consider the plan. On 14 June 2023, creditors holding 85 percent of total claims against THL voted unanimously to allow the rescue practitioners to amend the plan in light of new developments. It appears that the plan remains subject to further changes.

[31] Given these developments and the contentious treatment of SASA's claims under the proposed business rescue plan, the dispute ultimately turned on the legal implications of THL's suspended obligations during business rescue. This brings the focus squarely to the interpretation of s 136(2), which governs the suspension and potential cancellation of contractual obligations in the context of business rescue proceedings.

Interpretation of s 136(2) of the Companies Act

[32] I now address the core issue in this appeal, which concerns the correct interpretation of section 136(2). That section provides:

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

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

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

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

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company contemplated in paragraph (a)'.

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