REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 010700/2023

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

13/12/2023
DATE SIGNATURE

In the matter between:

MANGO AIRLINES SOC LIMITED (*IN BUSINESS RESCUE*)	First Applicant
SIPHO ERIC SONO N.O.	Second Applicant
NATIONAL UNION OF METALWORKS OF SOUTH AFRICA (INTERVENING)	Third Applicant

and

THE MINISTER OF PUBLIC ENTERPRISES	First Respondent
THE DEPARTMENT OF PUBLIC ENTERPRISES	Second Respondent
SOUTH AFRICAN AIRWAYS SOC LTD	Third Respondent
THE MINISTER OF FINANCE	Fourth Respondent
NATIONAL TREASURY	Fifth Respondent

THE INTERNATIONAL AIR SERVICES COUNCIL Sixth Respondent

THE AIR SERVICES LICENSING COUNCIL Seventh Respondent

THE AFFECTED PERSONS OF MANGO AIRLINES SOC LIMITED (IN BUSINESS RESCUE) Eighth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 December 2023.

LEAVE TO APPEAL JUDGMENT

PHOOKO AJ

INTRODUCTION

[1] This is an application for leave to appeal brought by the First, Second, Fourth, and Fifth Respondents[1] against the whole judgment and order of the court *a quo* delivered on 06 September 2023. The order reads as follows:

(a) NUMSA is granted leave to intervene as co-applicant.

(b) NUMSA's late filing of its heads of argument is condoned.

(c) It is declared that the First Respondent's failure to take a decision in respect of the application submitted by the Applicants and the Third Respondent in terms of section 54(2) of the PFMA is unlawful and constitutionally invalid.

(d) The First Respondent's failure to determine the section 54(2) PFMA

[1] To avoid confusion, the parties shall be referred to as they appear in the main application.

application is reviewed and set aside.

(e) The First Respondent is directed within 30 days after the service of the Court order, to take a decision in respect of the section 54(2) application and communicate the outcome thereof to the Applicants and the Third Respondent, including furnishing such reasons for the decision made, failing which the Applicants and the Third Respondent may assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA.

(f) The First, Second, Fourth, and Fifth Respondents are ordered to pay the costs of this application, including the costs of two counsels, jointly and severally.

[2] The application for leave to appeal is opposed by the First, Second, and Third Applicants.

THE ISSUES

[3] The issues to be determined are whether there are reasonable prospects that, if leave to appeal is granted, the appeal would succeed and/or whether there are compelling reasons why an appeal should be heard.

APPLICABLE LEGAL PRINCIPLES

[4] It is now settled in our law that the threshold for the granting of leave to appeal has been raised in that leave to appeal may only be granted if the appeal would have a reasonable prospect of success.[2] The possibility of another court holding a different view no longer forms part of the test of whether to grant leave to appeal.[3]

[5] It was held in *Mont Chevaux Trust v Tina Goosen & 18 Others* that *"the use of the word "would" in the new statute indicates a measure of certainty that another*

[2] Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 ("the Superior Courts Act").
[3] *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para 6.

court will differ from the court whose judgment is sought to be appealed against".[4] Consequently, 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"*.[5]

[6] Section 17(1)(a)(ii) of the Superior Courts Act also provides for the granting of leave to appeal where there is a compelling reason to do so. This was affirmed in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* where the court held that:

> "…[L]eave 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…"

[7] In light of the above, these are the yardsticks for evaluating the submissions of the parties in ascertaining whether the evidence and/or submissions before this Court indicate that there is a reasonable prospect that the appeal, if leave to appeal is granted, would succeed and/or that there are compelling reasons why an appeal should be heard.

GROUNDS FOR APPEAL

[8] The grounds for leave to appeal can be summarised as follows:

[8.1] The court *a quo* misdirected the enquiry because the parties that pursued the challenge against the Public Enterprises Minister ("the PE Minister") are not legislatively authorised to be parties in section 54(2) applications proceedings.

[8.2] The court *a quo* misdirected the enquiry into the conflicting provisions of the Public Finance Management Act 1 of 1999 ("the PFMA") and the Companies Act 71 of 2008 ("the Companies Act").

[8.3] The court *a quo* misdirected the enquiry into the ripeness of the section

[4] Ibid.
[5] *S v Smith* 2011 (1) SACR 567 (SCA) at para 7. *See also MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at para 17.

54(2) application.

[8.4] The court *a quo* misdirected its enquiry when it found that the PE Minister's refusal to make a decision was irrational and unlawful.

[8.5] The application for leave to appeal raises a novel and material issue of public importance.

[8.6] The judgment of the court *a quo* is materially contradictory, as it conflates different juristic persons, and incorrectly interprets applicable legislation.

[8.7] The court *a quo* failed to have regard to the evidence before it which indicated that South African Airways ("SAA"), the PE Minister and National Treasury had inter alia agreed that the application was incomplete.

[8.8] The court *a quo* conflated SAA and Mango, and failed to consider the guarantee conditions.

[8.9] The court *a quo inter alia* elevated the amended business rescue plan to a status above the empowering statute, section 54(2) of the PFMA.

[8.10] The court *a quo* incorrectly interpreted section 54(3) of the PFMA.

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

[9] The First and Second Respondents *inter alia* submitted that the application for leave to appeal raises *"novel and material issues of public importance"* over who is authorised to submit the section 54(2) application when a State entity seeks to dispose of its assets.

[10] They further argued that NUMSA lacked *locus standi* to represent its former employees. In addition, they argued that the BRP also lacked *locus standi*. To advance their case, they contended that the court *a quo inter alia* adopted an *"interpretation that failed to constrain the wide powers conferred on the BRP by extending the scope of their application and in complete disregard of the*

provisions of the PFMA".

[11] The First and Second Respondents further averred that the delegation of powers by the SAA Board to the BRP was not approved by the Treasury as required per the provisions of section 49(3) of the PFMA.

[12] The First and Second Respondents further averred that the court *a quo* failed to appreciate the conflict between the PFMA and the Companies Act in so far as it relates to the powers of the BRP and the accounting authority in the submission of the section 54(2) application.

[13] They further contended that the PFMA prevails over the Companies Act in the event of a conflict between the two legislations. Consequently, they argued that the court misdirected its enquiry when it preferred the *"interpretation that prevails sections 152(2) and 152(3) of the Companies Act which empower the BRP to institute the section 54(2) application over the PFMA".*

[14] According to the First and Second Respondents, an *"interpretation that seeks to prefer the powers of the BRP over the Board of SAA in a process regulated by the PFMA is untenable and inconsistent with the rules of statutory interpretation".*

[15] The First and Second Respondents submitted that the finding by the court *a quo* that the BRP was jointly entitled to submit the section 54 application and that the Minister of PE's failure to make a decision was irrational and invalid is at odds with the statutory context of the PFMA, and inconsistent with the Constitution. The basis for this is that affording the BRP powers to also submit the section 54(2) application negates *"the involvement and participation of a shareholder in such a polycentric process"*. To this end, they argued that SAA had undertaken to submit information to the relevant authority.

[16] In light of the above, the First and Second Respondents submitted that there was a reasonable prospect of success on appeal, if leave to appeal is granted and/or that there were compelling reasons such as novelty and public importance for the appeal to be heard.

FOURTH AND FIFTH RESPONDENTS' SUBMISSIONS

[17] To a certain extent, the Fourth and Fifth Respondents' submissions were similar to those of the First and Second Respondents. They could be summarised along the lines that the court *a quo* failed to have regard to the evidence before it which indicates that SAA, the PE Minister, and the National Treasury had *inter alia* agreed that the section 54(2) application was incomplete, had to be resubmitted and that the 30-day period had not commenced.

[18] According to the Fourth and Fifth Respondents, there was no valid application, and therefore the right to a decision does not arise until such time that a valid application has been completed. Relying on *Dykema v Malebane and Another*[6], they contended that "…*ordinarily*, *the right to a decision arises from a validly submitted application*".

[19] Furthermore, they averred that the court *a quo* conflated SAA with Mango by finding that Mango and the PE Minister may extend the 30-days period, that the agreement to extend the 30-day period was invalid as it excluded the BRP, and that the BRP was authorised to state that there would be no further information from his side because *"he had full control and management of the affairs of Mango".* To this end, they *inter alia* asserted that the *"conflation is erroneous"* in that it *inter alia "conflates the asset-holder/public entity (SAA) with the asset (Mango) in contravention of the [PFMA]".*

[20] According to the Fourth and Fifth Respondents:

> "Section 54(2) of the PFMA obliges the accounting authority for the public entity that intends to conclude a transaction for the *"disposal of a significant shareholding in a company"* to make the application. This is not Mango — it is SAA. Therefore it is SAA that must submit the application and not Mango. It is also SAA that enjoys the benefits of the deeming provision in section 54(3) of the PFMA and not Mango.

[6] 2019 (11) BCLR 1299 (CC) at para 59.

> Only SAA (and its accounting authority, its board) may submit the application in terms of section 54(2) of the PFMA.
>
> SAA, which is the relevant public entity in terms of section 54(2) and (3) had agreed on an extension of the time period with the PE Minister.
>
> The SMF need not have included the BRP as it related to the assets of the asset holder — SAA — not the asset itself — Mango."[7]

[21] The Fourth and Fifth Respondents further contended that the reliance on Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others[8] and the amended business rescue plan amongst other things to rule that the BRP and Mango have *locus standi* was erroneous because:

> *"*Section 54(2) of the PFMA provides that the accounting officer of the public entity that intends to conclude the transaction to dispose of its shareholding (i.e. SAA's Board) must submit relevant particulars to the executive authority. The PFMA is binding unless and until it is declared inconsistent with the Constitution. The BRP is not the accounting authority of the public entity and therefore is not entitled to submit relevant particulars to the PE Minister."[9]

[22] Based on the above, they submitted that section 54(2) was worded in a peremptory form, in that the *"accounting authority for the public entity must"* submit the relevant information to the executive authority for approval. Therefore, they contended that where the application is not submitted by the accounting authority of the public entity, the submission of the application is a nullity. To bolster their argument, they further averred that the court *a quo "elevated the latter documents [and amended business rescue plan] to a status above the empowering statute – section 54(2) of the PFMA"* and thus disregarded the status of the PFMA.

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[7] Heads of argument at para 19.

[8] 2023 (4) SA 78 (SCA)

[9] Heads of argument at para 27.

[23] The Fourth and Fifth Respondents submitted that the court *a quo* contradicted itself when it held that the Applicants could not ask the court *a quo* to issue a declarator that they may assume approval has been granted and that it could not decide whether the application had been validly submitted, yet it ordered the PE Minister to make a decision.

[24] They further averred that the court *a quo* failed to have regard to the evidence before it in that SAA, the PE Minister, and the National Treasury had *inter alia* agreed that the 30-days period had not commenced.

[25] The Fourth and Fifth Respondents further averred that the court *a quo* noted but failed to engage with the submissions regarding the guarantee conditions.

[26] Based on the above, the Fourth and Fifth Respondents submitted that there was a reasonable prospect of success on appeal, if leave to appeal is granted and/or that there were compelling reasons such as novelty and public importance for the appeal to be heard.

FIRST AND SECOND APPLICANT'S SUBMISSIONS

[27] Counsel for the Applicants' submissions were to a large extent similar to those made in the main application. This included submissions that provide that the powers of BRP and his *locus standi* emanated from the amended business rescue plan which was binding on all parties to it.

[28] Furthermore, the Applicants *inter alia* contended that the full management control which devolves to the BRP of a private company included the status of an "accounting officer" under the PFMA and that the court correctly relied on the *Ragavan* decision.

[29] The Applicants also averred that the BRP *"possess the authority and duty to implement the business rescue plan"* as per section 152(5) of the Companies Act.

[30] In addition, the Applicants further contended that the PE Minister was made

aware that there was no further information that would be provided to him and had to work with what he had before him.

[31] Ultimately, the Applicants contended that the Respondents have *"not shown any irreconcilable conflict between the provisions of the PFMA and the Companies Act*" Consequently, they argued that *"the provisions of section 5(4)(b)(i)(ee) of the PFMA do not apply or oust the BRPs powers in section 140(1)".*

[32] Therefore, the Applicants submitted that the Respondents have failed to meet the requisite threshold for the granting of leave to appeal as there were no reasonable prospects of success and/or compelling reasons to grant leave to appeal.

THIRD APPLICANT'S SUBMISSIONS

[33] NUMSA's submissions were brief and mainly echoed those of the Applicants. In addition, they related to NUMSA's application for condonation for the late filing of their heads of argument and *locus standi*.

[34] According to NUMSA, their delay was occasioned by circumstances that were beyond their control as their junior counsel had left for New York for a work-related function and only returned to South Africa on 15 October 2023. Furthermore, NUMSA *inter alia* submitted that its lead counsel was also abroad as a delegate of the Legal Practice Council and only returned to South Africa on 6 November 2023.

[35] Furthermore, NUMSA averred that they had conveyed their challenges to the Respondents and none of the parties objected to their requests for indulgence. Consequently, NUMSA filed their heads of argument on 17 November 2023 which was 7 days later contrary to the court directives.

[36] Furthermore, they contended that their *locus standi* cannot be challenged at this stage as this is a matter that ought to have been challenged at the commencement of the proceedings, in the main application in the form of an

interlocutory application.

[37] Finally, NUMSA averred that the Fourth and Fifth Respondents had opted to abide by the decision of the court *a quo* and therefore had waived their right of appeal in so far as NUMSA's *locus standi* is concerned.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[38] This judgment does not intend to re-write and or repeat every aspect of the judgment of the court *a quo* but to deal with certain aspects because some of the issues raised here have been comprehensively dealt with in the decision of the court *a quo*.

[39] With regards to *locus standi*, the court *a quo* sufficiently addressed this aspect in its judgment of 06 September 2023 and *inter alia* relied on the *Ragavan* case regarding the powers of the BRP in the context of a company undergoing business rescue proceedings. Furthermore, the evidence before the court *a quo* enormously supported the submission to the effect that the BRP has *locus standi* because the PE Minister once approved a section 54(2) application submitted[10] by the BRP about the business rescue of a wholly owned subsidiary, Denel SOC Limited ("Denel").[11] Therefore, I do not deem it necessary to deal with it here.

[40] Concerning the submission that the court *a quo* contradicted itself when it held that it could not issue a declarator that the Applicants may assume that approval has been granted in terms of section 54(3) and that it could not decide whether the section 54(2) application had been validly submitted yet it ordered the PE Minister to make a decision, in my view the Fourth and Fifth Respondents have selectively read the judgment of the court *a quo*. That Court had identified that the evidence before it revealed that the BRP, who was tasked with the full control and management of the affairs of Mango Airlines and preparation of the section 54(2) application had amongst other things, resubmitted the section 54(2) application on 28 November by SAA which:

[10] Caselines 001, item 24.
[11] Caselines 001, item 25.

> "reflected the consensus reached between Mango [Airlines] and the Board of SAA" as per the PE Minister's concerns in the letter of 26 October 2022 about ensuring alignment between the Board and the BRP."[12] (emphasis added)

[41] In addition, the court *a quo* observed that the BRP had declined the PE Minister's *"courtesy request for additional information"*[13] and asked him to decide the section 54(2) application based on the information that was already presented before him. The court *a quo* posed a question to counsel for the First and Second Respondent concerning:

> "…what should happen to the submitted section 54(2) application as the Applicants have made it clear that they will not provide the requested additional information? His response was that no decision will be taken and that the Applicants are at liberty to explore other options."[14] (emphasis added)

[42] In my view, counsel was aware that a decision on whether to approve or decline the section 54(2) application had to be made. Indeed, even though the court *a quo* had found that it could not declare that a valid application had been made, the evidence placed before it was sufficient to show that there was an application submitted. I fail to understand the contradiction submitted by the counsel for the First and Second Respondents.

[43] I have extensively dealt with these aspects in my judgment of 06 September 2023 and need not repeat them here, save to indicate that the evidence before the court *a quo* was far from supporting the Respondents' case in that the BRP had no legal standing to attend to the section 54(2) application and/or to respond to the request for further information from the PE Minister.

[44] Regarding the argument that when a section 54(2) application is not submitted by the "accounting authority" of the public entity, the submission of the application

[12] High Court judgment at para 180.
[13] Ibid.
[14] Ibid.

is null. This is a new argument that has been raised for the first time in this application for leave to appeal by the Fourth and Fifth Respondents. It is now settled law that a party must stand or fall by averments made in his/her founding/answering affidavit.[15]

[45] Ultimately, this Court is again compelled to refer to one of the letters that formed part of the evidence before the court *a quo* where the PE Minister directly dealt with the BRP in approving the section 54(2) application for Denel. Coincidentally, the person who was the BRP in Denel also happens to be the same BRP in the present matter. There, the PE Minister *inter alia* responded to the BRP's application[16] and said that *"I grant Denel approval to conclude transaction falling under Section 54(2)…"*.[17] When counsel for the Fourth and Fifth Respondent was asked to comment about the Denel matter where the PE Minister engaged with the BRP in a section 54(2) application, she responded that it was a mistake and/or it was not supposed to be so, hence they now seek the courts to provide legal certainty. This Court is not persuaded by the said submission.

[46] With regards to NUMSA's application for condonation for the late filing of their heads of argument, in my view NUMSA's reasons were satisfactory and therefore an application for condonation was granted. However, NUMSA's conduct in these proceedings and the other two applications that are related to this one deserves attention. In all these cases, NUMSA has been consistently in one way or another late in either the filing of the heads of arguments or the launching of its application to intervene. Whilst the reasons for the lateness have been proffered, and accepted, the repeated lateness, and failure to comply with court directions are unfortunate. The less said about this, the better.

[47] With regards to NUMSA's *locus standi*, the First and Second Respondents conceded that they cannot challenge NUMSA's *locus standi* at this advanced stage of the proceedings. They had opted to abide by the decision of the court *a quo* in so far as *locus standi* is concerned. Furthermore, NUMSA's *locus standi*

[15] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.
[16] Caselines 001, item 24.
[17] Caselines 001, item 25.

has been comprehensively dealt with in the judgment of the court *a quo*. This therefore settles NUMSA's *locus standi* in these proceedings.

[48] In so far as the guarantees are concerned, this Court accepts the Applicant's submission in that the guarantee of R5.006 billion related to the period between 1 September 2012 to 30 September 2014 to enable SAA to certify its annual financial statements as a going concern and that the Fourth and Fifth Respondents *"did not allege the continued validity of the guarantee at the time of this application"*. Consequently, it was not necessary for the court *a quo* to engage with this aspect.

[49] In my view, the submissions made by the Respondents to a large extent replicate submissions made in a matter concerning a company that is not undergoing business rescue proceedings, and not under the full control and management of the BRP. The submissions completely ignore the fact that the amended business rescue plan authorises the BRP to act on behalf of SAA, prepare and submit the section 54(2) application.

[50] I agree with the Fourth and Fifth Respondent's submissions regarding the submission that the PFMA allows a "public entity" to assume that the section 54(2) application has been approved by operation of section 54(3) of the PFMA and no one else, so far as they relate to a public entity. I am also mindful and accept that, as per the Respondents' submissions, both Mango and SAA are public entities.[18] This is where my association with their submission ends.

[51] In my view, even if the court *a quo* had erred in *inter alia* finding that the Applicants (Mango and the BRP) may assume approval in terms of section 54(3) of the PFMA, it is still within the BRP's authority to assume the said approval by virtue of his powers flowing from the amended business rescue plan and the articulated legal position above regarding his powers in business rescue proceedings.

[52] As indicated earlier, the BRP has a clear mandate to act on behalf of SAA.

[18] See First and Second Appellants heads of argument in the leave to appeal at para 99.

Furthermore, there is nothing apparent from the reading of section 54(2) that prohibits the delegation of power of the "accounting authority" to the BRP. In fact, the "accounting authority" of SAA which is its board of directors[19], through being part and parcel of a process that eventually culminated in the adoption of an amended business rescue plan which entrusted the BRP to act on behalf of SAA puts this matter to rest. Furthermore, the First and Second Respondents had long recognised and appreciated that the Applicants may make use of the deeming provision. I say so because this is evident where they *inter alia* stated that:

> "..[T]he deeming provisions is in place to protect applicant's where the Minister of PE and the National Treasury (including the Minister of Finance) is unresponsive for a continuous period of 30 days….[20]
>
> Therefore, the invocation of the deeming provisions by the applicants' are premature and the application's urgency cannot factually and legally be premised on the invocation of the deeming provision…."[21]

[53] The above paragraphs point me to one conclusion, the Respondents knew that the Applicants had the authority to deal with the section 54(2) application. The reference to "premature" suggests that at some stage, the Applicants could invoke such deeming provisions. In addition, if one considers these paragraphs having regard to the Denel matter, this prior conduct put in evidence undermines the Respondents' case as pleaded before the court *a quo*. In my view, submissions made for leave to appeal on this matter do not affect the finding of the court *a quo* which held that the BRP may assume approval in terms of the provisions of section 54(3).

[54] The First and the Second Respondents did not raise the challenge to the effect that the delegation of powers to the BRP by the SAA Board was subject to approval by the Treasury as per the provisions of section 49(3) of the PFMA in

[19] See section 49(2) of the PFMA.
[20] First and Second Appellant's answering affidavit in the main application at para 31.
[21] Ibid at para 32.

their answering affidavit. However, this argument somehow found its way into their heads of argument during the trial proceedings before the court *a quo* and in this Court. This is a belated submission. As stated earlier, a party must stand and fall by the averments made in their pleadings.

[55] Regarding the erroneous finding regarding the agreement and that the issue was not before the Court, I need not say more save to indicate that the Applicants had *inter alia*:

> "...noted a concerning pattern relating to the purported multiple extensions imposed by the PE Minister and the SAA Board in respect of the running of and or the commencement date of the 30 day period…[22]
>
> …SAA was not afforded an independent entitlement to interfere in the process of choosing an appropriate purchaser…[23]
>
> ...The tasking of SAA to conduct a further due diligence which results in its recommending the transaction for PFMA approval was inappropriate for several reasons including that it was contrary to the [Amended Business Rescue] plan."[24] (own emphasis added)

[56] In light of the above, it cannot be said that the aspect of the agreement, in so far as it relates to the extension of the 30-days period, was not before the court *a quo*. It was argued by the Fourth and Fifth Respondents in the main application that the extension was valid because of the agreement entered into between the parties to extend the 30-day period.[25] However, counsel for the Applicants averred that the said agreement was invalid and contrary to the Amended Business Rescue Plan. In my view, the *"applicant's founding affidavit contains sufficient allegations for the establishment of his case"*.[26]

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[22] Applicant's founding affidavit at para 123.
[23] Ibid at para 25.
[24] Ibid at para 129.3.

[25] See also Fourth and Fifth Respondnet's Answering affidavid in the main application at para 30.
[26] *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369B.

[57] In any event, the exclusion of the BRP is contrary to the established norm created in Denel, it undermines the powers of the BRP in business rescue proceedings and disregards the binding nature of a lawfully adopted business rescue plan. The powers of a shareholder such as the SAA are limited in business rescue proceedings especially when a business rescue plan has been adopted. As was correctly found in *Minister of Communications and Digital Technologies and Another v South African Post Office SOC Ltd and Others*[27] where *Van der Schyff* J held that:

> "A critical element of the business rescue process is that an independent restructuring professional, the business rescue practitioner, is appointed and tasked with developing and implementing a business rescue plan in the best interest of all affected parties. Shareholders, in the case of SOE's, Government, have minimal decision-making power in the process. Business rescue practitioners of SOEs must balance their duties with the Public Finance Management Act 1 of 1999 (the PFMA) and find a way to move within the different accountability and responsibility matrixes of the PFMA and the Companies Act." (own emphasis added and footnotes omitted).

[58] Counsel for the Fourth and Fifth Respondents submitted that the business rescue proceedings were now complete and that the section 54(2) application was a separate aspect. I disagree. The converse is true. One cannot divorce the two processes. They are interconnected. The facts of this case speak for themselves. The business rescue proceedings are on hold. The BRP powers remain in force, and he *inter alia* acts on behalf of all stakeholders including SAA to try and rescue Mango Airline. However, the fact that he has powers, does not entail that he can do as he pleases. The BRP has to act within the ambit of the amended business rescue plan, these duties include the preparation of the section 54(2) application, within the confines of the applicable law.

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[27] [2023] ZAGPPHC 534 at para 23.

[59] This Court is placed in a difficult position. The Respondents require the court to prefer the provisions of the PFMA over those of the Companies Ac where a conflict arises. The difficulty is that the Respondents in the main proceedings and in this application for leave to appeal have failed to identify or direct this Court to the nature of the conflict that exists between the two statutes, that bring the PFMA and the Companies Act. When counsel for the Fourth and Fifth Respondents were asked about the conflict, she responded that it was argued during oral argument in the main application. This is incorrect. A simple perusal of the parties' answering affidavits or heads of argument contains nothing whatsoever that shows such a conflict or reference to conflicting provisions of the PFMA and the Companies Act. The Fourth and Fifth Respondents merely go as far as stating that:

> "Unlike most statutes, the PFMA contains a conflict provision. This provision elevates the PFMA above all other statutes. Section 3(3) states that where there is conflict between the PFMA and any other legislation, the PFMA prevails. This means that it holds precedence over any provision of the Companies Act."[28]

[60] The same applies to the First and Second Respondents, they did not refer or direct the court[29] *a quo* to any form of conflict between the Companies Act and the PFMA. At most it was submitted that:

> "…we submit that section 5 of the Companies Act provides that in the event of a conflict between the PFMA and Companies Act, that the PFMA takes precedence…"[30]

[61] For the first time in this application for leave to appeal, the Fourth and Fifth Respondents submit that *"we demonstrate that an irreconcilable conflict exists*

[28] Fourth and Fifth Respondent's heads of argument in the main application at para 19.
[29] Ibid, para 12.3, 38, 40. Nothing in these paragraphs stipulates the nature of the conflict or identifies such a conflict.
[30] First and Second Respondents' heads of argument in the court *a quo* at para 12.3.

between the two pieces of legislation…".[31] These new and belated arguments do not in any way assist the Respondent's case.[32] This notwithstanding, the court *a quo* went to great lengths to investigate where a conflict arises and came to the conclusion that in this instance the provisions of the two statutes can be read in a manner that is consonant with both.

[62] Concerning NUMSA's review application and the triggering of the operations of the 30-days period, these aspects have been dealt with in the judgment of the court *a quo*. Therefore, this Court does not deem it necessary to deal with them again.

[63] Regarding an interpretation that excludes the involvement and participation of a shareholder and that SAA had undertaken to submit to the relevant authority, the Respondents seek this Court to approve SAA's attempt to unilaterally change a binding amended business rescue plan. Such a move would be tantamount to amending and endorsing a completely new business rescue plan on behalf of the affected parties without their consent. In *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty-Five (Pty) Ltd*,[33] the Supreme Court of Appeal, *albeit* in a different context, stated that:

> "…the only plan which practitioners can implement is one adopted by creditors in accordance with s 152 of the Companies Act' … [and] … The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting…" (own emphasis added).

[64] A lawfully adopted business rescue plan is binding on all creditors and shareholders. If the board of directors of SAA is no longer satisfied with certain aspects of the amended business rescue plan, their recourse is available elsewhere. Consequently, their argument has no merit and ought to be rejected in its entirety.

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[31] Ibid at paras 3.2, 3.3, 13, 17.3, and D.
[32] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H – 636D.
[33] At paras 18 and 19.

[65] Regarding the submission that the court *a quo* elevated the powers of the BRP under the Companies Act above those of the PFMA, I disagree. The court *a quo inter alia* held that *"the PFMA and the Companies Act are capable of being interpreted in such a way that a conflict, if any, between the two statutes is avoided".*[34] The court went further to hold that:

> "…[T]hey are capable of being reconciled as per the provisions of section 5(4) of the Companies Act. By approving this approach in the Amended Business Rescue Plan, the Board of SAA, while aware that section 54(2) of the PFMA only allows the "accounting authority" to make the submission under the PFMA noted the role of the BRP appointed under the Companies Act in the process of preparing and submitting the application in terms of section 54(2) of the PFMA. This alone defeats the argument that now purports to exclude the BRP in jointly preparing and submitting the section 54(2) application and/or the argument that allowing the provisions of the PFMA to prevail must mean the exclusion of the BRP in the preparation and submission of the application. The argument suggesting that the Applicants incorrectly seek to rely on and enforce rights and duties flowing from the Companies Act in a section 54(2) process that is regulated by the PFMA also falls to be rejected. The provisions of both statutes apply concurrently, and this was approved by the parties concerned in the Amended Business Rescue Plan.[35]
>
> This would solve any potential conflict between the two statutes unless they are incapable of being reconciled. In this case, there has been no form of conflict shown. Therefore, the argument to the effect that there is a conflict between the provisions of the PFMA and the Companies Act stands to fail."[36]

[66] Concerning compelling reasons why the appeal should be heard, I agree with

[34] Judgment of the High Court at para 197.
[35] Ibid at para 198.
[36] Ibid at para 199.

counsel for the First, Second, Fourth, and Fifth Respondents in that this case raises a novel issue. However, novelty alone especially where no conflict whatsoever has been identified between the two purported conflicting statutes is not a license for leave to appeal to be granted. Furthermore, whilst the case raises an important question of law and is of public importance, the merits unfortunately suggest otherwise.[37] At the very least, the Denel matter in my view provides useful guidance. The PE Minister has never sought to review his decision in Denel. This remains persuasive guidance.

[67] I have carefully considered the helpful and well-prepared written and oral submissions of the parties, the judgment of the court *a quo*, all the evidence that was presented before it, and the bar for leave to appeal. Consequently, I am persuaded by counsel for the Applicants that the Respondents have failed to meet the requisite threshold for leave to appeal to be granted because the appeal would not have reasonable prospects of success in the substantive application.

[68] In my view, the Respondents' case does not meet the requirements of any of the categories mentioned under section 17 of the Superior Courts Act, one of them being there being no reasonable prospects of success.

[69] There is no basis on which to find that the costs of the application for leave to appeal should not follow the results.[38]

ORDER

[70] I, therefore, make the following order:

(a) NUMSA's late filing of their heads of argument is condoned.

(b) The First, Second, Fourth and Fifth Respondents' application for leave to appeal against the judgment and order of this Court dated 6 September 2023 under the above case number are dismissed with costs including the costs of

[37] *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para 2.
[38] *Neuhoff v York Timbers Ltd* 1981 (1) SA 666 (T).

two counsel, to be paid by the First, Second, Fourth, and Fifth Respondents, jointly and severally.

PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the 1st and 2nd Applicants:	Adv IV Maleka SC, and Adv T Scott
Instructed by:	Instructed by Cliffe Dekker Hofmeyer Inc
Counsel for the Third Applicant:	Adv R Tulk SC and Adv NL Chesi-Buthelezi
Counsel for the First and	
Second Respondents:	Adv Mphaga SC, Adv D Mtsweni, and
Instructed by:	State Attorney, Pretoria
Counsel for the Fourth and	
Fifth Respondents:	Adv K Pillay SC, and Adv N Nyembe
Instructed by:	State Attorney, Pretoria
Counsel for the Sixth to Eighth	
Respondents:	n/a
Instructed by:	n/a
Date of Hearing:	28 November 2023
Date of Judgment:	13 December 2023