THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 35/2014

In the matter between:

PANAMO PROPERTIES (PTY) LTD	**FIRST APPELLANT**
LIEBENBERG DAWID RYK VAN DER MERWE NO	**SECOND APPELLANT**

and

JAN HENDRIK NEL NO	**FIRST RESPONDENT**
CHARMAINE NEL NO	**SECOND RESPONDENT**
(in their capacities as trustees of the JAN NEL TRUST IT 660/86)	
THE COMPANY AND INTELLECTUAL PROPERTY COMMISSION OF THE RSA	**THIRD RESPONDENT**
TREVOR PAYNE	**FOURTH RESPONDENT**
PINK PARROT INVESTMENTS (PTY) LTD	**FIFTH RESPONDENT**
FIRSTRAND BANK LIMITED	**SIXTH RESPONDENT**

Neutral Citation: *Panamo Properties (Pty) Ltd v Nel and Another NNO* (35/2014) 2015 ZASCA 76 (27 May 2015)

Coram: NAVSA ADP, MAJIEDT, WALLIS and ZONDI JJA and DAMBUZA AJA

Heard: 14 May 2015

Delivered: 27 May 2015

Summary: Business rescue proceedings – resolution by company in terms of s 129(1) of Companies Act 71 of 2008 – non-compliance by company with further requirements of ss 129(3) and (4) of the Act – effect – s 129(5) of the Act – non-compliance does not automatically result in the business rescue being terminated – such non-compliance a ground for bringing an application to court to set aside the resolution in terms of s 130(1)*(a)*(iii) of the Act – a court will only set aside such resolution if it is otherwise just and equitable to do so in terms of s 130(5) of the Act – the business rescue terminates in terms of s 132(2)*(a)*(i) of the Act once an order setting aside the resolution has been granted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Khumalo J, sitting as court of first instance):

1 The appeal is upheld with costs.

2 Paragraphs 2 and 3 of the order of the court below are set aside and replaced by the following:

'The application is dismissed.'

3 Paragraph 4 of the order of the court below is renumbered as paragraph 3.

4 The order granted on the counter application is set aside.

JUDGMENT

Wallis JA (Navsa ADP, Majiedt and Zondi JJA and Dambuza AJA concurring)

[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'.[1] 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.[2] 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.

[2] The Jan Nel Trust (the Trust) is the sole shareholder of the first appellant, Panamo Properties (Pty) Ltd (Panamo). Its trustees, Mr and Mrs Nel, who are also the directors of Panamo, represent it in these proceedings. Panamo is a property-owning company owning a large property in Roodepoort. Mr and Mrs Nel's home is situated on a portion of the property, and the balance is let to various commercial tenants. The property was mortgaged in favour of Firstrand Bank Ltd, but Panamo fell into arrears and judgment was taken against it for amounts totalling some

[1]Section 7(2)*(k)* of the Act.
[2]See the definition of 'business rescue' in s 128*(b)* of the Act.

R3.3 million, plus interest and costs. The hypothecated property was declared executable.

[3] In order to prevent a sale of the property and afford the Nels time to resolve Panamo's financial problems, the Trust resolved on 19 August 2011 to place Panamo in business rescue. A little over two years later, in September 2013, the Trust sought an order declaring that the original resolution to place Panamo in business rescue had lapsed and consequently that the entire business rescue process was a nullity. That was after the appointment of a business rescue practitioner, (Mr van der Merwe the second appellant); the adoption of a business rescue plan; and the sale of the property pursuant to that plan. It is undisputed that the sole purpose behind the application was to prevent the sale of the property and to prolong Mr and Mrs Nel's occupation of their home.

[4] In advancing its case the Trust relied on its failure – and hence the failure of the Nels as the moving spirits behind both the Trust and Panamo – to comply with various requirements prescribed by ss 129(3) and (4) of the Act. In some instances the non-compliance lay in doing things after the expiry of the prescribed statutory period for them to be done. In others it consisted of straightforward non-compliance with the statutory injunction. The argument on behalf of the Trust was that s 129(5)*(a)* of the Act stipulates that the consequences of such non-compliance are that the resolution to begin business rescue lapses and is a nullity, and hence the entire process of business rescue in relation to Panamo had been a fruitless exercise as the underpinning for it fell away in October 2011. Khumalo J upheld these contentions and issued a declaratory order that the resolution to commence business rescue had lapsed and was a nullity, and a further order that the appointment of Mr

van der Merwe as business rescue practitioner in respect of Panamo was void. The appeal is with her leave.

[5] In reaching that conclusion, Khumalo J expressed her frustration at the straitjacket that she thought s 129(5)*(a)* imposed upon her. She quite correctly regarded the approach of the Trust as opportunistic. She said that the Nels had 'strung along' the other parties to the business rescue process and delayed bringing the application until, for selfish reasons, they realised that there was no other way in which to prevent the transfer of the property to the purchaser. Her conclusion was that the Nels 'have acted to the company's detriment with a disastrous outcome'. I agree and would go further to describe their conduct as a stratagem involving a wholly undesirable exploitation of legal technicalities for their own advantage. However, if Khumalo J's construction of s 129(5) is correct, that situation was unavoidable. The issue in this appeal is whether she was correct.

[6] The counter argument advanced by Mr van der Merwe, on his own behalf and on behalf of Panamo, is that s 129(5)*(a)* does not have this drastic effect. It must, so he contended, be read in the light of the provisions of s 130 of the Act, which deal with the circumstances in which a court may be asked to set aside a resolution to place a company under business rescue. According to the argument, those provisions limit both the time within which a resolution to place a company under business rescue may be challenged and, if such an application is brought timeously, the parties who may bring such an application. Lastly he submitted that an application would only succeed if the court thought it just and equitable to set aside the resolution and bring the business rescue process to an end.

[7] In this case the Trust had not purported to bring an application in terms of s 130(1). The time for bringing such an application had passed before the Trust sought to challenge the validity of the resolution, and its *locus standi* to bring such an application was doubtful. Furthermore, it would not have been just and equitable in the light of the facts relating to the business rescue proceedings for a court to have granted such an order Those facts included the numerous attempts by the Nels to stultify those proceedings and the considerable financial prejudice, both actual and contingent, to Mr van der Merwe and potentially to creditors, that would ensue from terminating the business rescue. Accordingly he submitted that the application should have been dismissed.

[8] A resolution of these issues requires a consideration of the relevant provisions of ss 129 and 130 of the Act. But first it is necessary to place them in their proper setting in the Act. Business rescue is a process aimed at avoiding the liquidation of a company if it is feasible to do so. There are two routes through which a company may enter business rescue, namely, by way of a resolution of its board of directors (s 129(1)) or by way of a court order (s 131(1)). We are concerned with the former.

[9] Under s 129(1) the board of a company may resolve to begin business rescue proceedings if it has reasonable grounds for believing that the company is financially distressed[3] and there appears to be a reasonable prospect of rescuing the company. Such a resolution may not be adopted if liquidation proceedings have been initiated against the

[3]Defined in s 128*(f)* in the following terms:
'"**financially distressed**", in reference to a particular company at any particular time, means that—
(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;'

company.[4] Once a resolution is taken it only becomes effective when it is filed with the Companies and Intellectual Property Commission, Republic of South Africa (CIPCSA).

[10] After the resolution has been filed with CIPCSA the company is obliged to take certain steps. They are set out in ss 129(3) and (4) of the Act.[5] It is common cause that in this case there was a degree of non-compliance with these provisions. Thus, the statutory notice sent to creditors of Panamo was not accompanied by a sworn statement of the facts relevant to the grounds on which the board resolution was founded; Mr van der Merwe was not appointed within the prescribed time period; and, the notice of his appointment was not published to all affected parties. These are the shortcomings on which the Nels based their application.

[4]Section 129(2)*(a)*.
[5]These provide as follows:
'(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and

(b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)*(b)*, a company must—

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.'

[11] Before examining s 129(5), on which the court below based its judgment, it is worth noting that s 130 expressly deals with objections to a company resolution to begin business rescue. Its provisions relevant to this case read as follows:

'(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129;

…

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—

(a) subsection (1)*(a)* to set aside that resolution; or

(b) …

unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.'

[12] Some aspects of this section are worth highlighting. Firstly, it provides in s 130(1) for three grounds upon which an application to set aside the resolution may be brought. The first two are that the grounds for passing such a resolution set out in s 129(1) are absent, and the third is that the procedural requirements of s 129 have not been observed. In other words, the first two bases for challenging a resolution mirror the grounds for passing the resolution set out in s 129(1), and the third raises the issue of non-compliance with the obligations imposed on the

company by s 129 consequent upon passing the resolution and filing it with CIPCSA. That seems sensible. If the grounds for passing such a resolution are not present then it is appropriate to have a mechanism for setting it aside. If the procedural requirements to be followed once a resolution has been passed and filed with CIPCSA are not followed, that may indicate that there is no genuine intention to follow the process through to a successful conclusion and it is appropriate for there to be a mechanism to set it aside.

[13] Secondly, the time for bringing such an application is restricted. An application to set aside the resolution may be brought at any time after the date of adoption of the resolution but, once a business rescue plan has been adopted, the time for challenging a resolution is past. Whatever flaws may have been present before that time become of purely historical importance thereafter.

[14] Thirdly, some people are excluded from the ranks of those who are entitled to bring a challenge to a resolution and seek to have it set aside. A director of the company who voted in favour of such a resolution is precluded from bringing such an application, unless they can show that in doing so they acted in good faith on information furnished to them that was false or misleading. In other words there is no room for a director simply to have a change of heart in the light of altered circumstances. A director who opposed the resolution is not so restricted, whether they bring the application as a shareholder or as a creditor. No doubt that is why the resolution can be challenged at any time after it is first passed, even if it has not yet been filed with CIPCSA. A dissentient director may immediately challenge the resolution and argue that there is no reasonable ground for believing that the company is financially distressed or, if it is,

that there is no reasonable prospect of rescuing it. In addition the section clearly contemplates that such a director, or any other affected person, may bring such an application on the basis that there has been non-compliance with the procedural requirements of s 129. That fact immediately indicates that the lapsing and nullity arising from such non-compliance may be less than absolute.

[15] These points are pertinent because the application by the Trust, directed at setting aside the resolution, sidestepped two of these constraints. First, it was brought after the adoption of the business rescue plan, which would not be permissible in an application under s 130. Second, in substance, if not form, Mr and Mrs Nel, the persons who, as the directors of Panamo, passed the resolution to place it under business rescue, brought the application. They would not have been entitled to bring an application under s 130 and it is an open question whether s 130(2) would permit them to do so by making the Trust the applicant rather than themselves.[6] However, if they were permitted to do so, that would clearly be contrary to the underlying purpose of s 130(2), which is that those responsible for placing the company in business rescue should not be entitled to challenge that decision merely because they have changed their minds, much less because it suits their private interests to do so. Assuming that they could nonetheless bring an application, this is undoubtedly a factor that would have weighed heavily with a court faced with such an application, in considering what was just and equitable under s 130(5)*(a)*(ii).

[6]The problem is not confined to trusts. If the only shareholder of a company was itself a company, which appointed its own shareholders and directors as the directors of the subsidiary, it would seem contrary to the purpose of s 130(2) to permit the company, represented by the same individuals, to bring an application to set the resolution aside.

[16] The Trust argued that it was not obliged to follow the route of an application to court under s 130(1)*(a)*(iii), because such a challenge was unnecessary in the light of s 129(5)*(a)*, which reads as follows:

'(5) If a company fails to comply with any provision of subsection (3) or (4)—

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity …'

It contended that the effect of its non-compliance with the provisions of sub-sections (3) and (4) of s 129 was that the resolution commencing business rescue in relation to Panamo lapsed and became a nullity, thereby bringing the business rescue proceedings to an end. This was so irrespective of the fact that the non-compliance flowed from the Trust's own failures to comply with these requirements and without any need to invoke the provisions of s 130.

[17] Arguments such as those raised in this case have featured in a number of decisions of the various divisions of the High Court. The first of these appears to be *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS*,[7] where Fabricius J concluded that:

'It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of s 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to "substantial compliance".'

[7] *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS* (GNP case no 72522/11). The decision was followed in *Madodza (Pty) Ltd (in business rescue) v ABSA Bank Ltd* (GNP Case 38906/12), *Homez Trailers and Bodies (Pty) Ltd (under supervision) v Standard Bank of South Africa Ltd* (GNP case no 35201/2013) and *ABSA Bank Ltd v Ikageng Construction (Pty) Ltd* (GNP Case no 61235/2014). In *Newton Global Trading (Pty) Ltd v Corte* [2014] ZAGPPHC 628 para 12 it was held that the nullity dates back to the date of the original resolution and could not be remedied by a further resolution.

Although he did not say so expressly, the learned judge appears to have been of the view that an inevitable consequence of the resolution having lapsed would be that the business rescue process would terminate.

[18] This approach has been followed in several other cases including the present one. It has not, however, been universally accepted. In *Ex Parte Van den Steen NO*,[8] Rautenbach AJ held that Fabricius J was dealing only with non-compliance with time limits in regard to the appointment of a business rescue practitioner and not to other aspects of sub-sections (3) and (4). He accordingly held that, where there had been substantial compliance with those provisions, s 129(5) did not operate to nullify the resolution. In *ABSA Bank v Caine NO*[9] Daffue J pointed out that Fabricius J had not given consideration to the provisions of s 130(1) *(a)*(iii) and that his construction led to anomalies as between s 129 and s 130.

[19] The observation by Daffue J is undoubtedly correct. It finds an echo in the following passage from *Henochsberg*, where the author identified the very type of problem that has arisen in the present case:[10]

'The practical consequences of the resolution that "lapses and is a nullity" are uncertain … From the wording of the section it would appear that the resolution lapses and becomes a nullity automatically, without any intervention from outside parties. From a practical perspective this could create a number of problems,

[8]*Ex Parte Van den Steen NO (Credit Suisse Group AG Intervening)* 2014 (6) SA 29 (GJ). Also *MAN Financial Services SA (Pty) Ltd v Blouwater Boerdery CC* (GNP case no 72522/2012).
[9]*ABSA Bank Ltd v Caine NO, In Re: Absa Bank Ltd v Caine NO* [2014] ZAFSHC 46 paras 24 to 26. To similar effect was *Vincemus Investments (Pty) Ltd v Louhen Carriers CC* 2013 JDR 0881 (GNP), when the proceedings were adjourned, but on the adjourned date the approach in *Advanced Technologies* was followed. See *Vincemus Investments (Pty) Ltd v Louhen Carriers CC* (GNP case no 16550/2013 dated 5 November 2013).
[10]Piet Delport and Quintus Vorster (authors) with other contributors *Henochsberg on the Companies Act 71 of 2008* (looseleaf, Issue 9) at 461.

especially if this has been done intentionally by the company in order to gain the protection of Chapter 6 for a brief period of time, only to exit the procedure due to the resolution lapsing and becoming a nullity at a later date. This could also have unintended consequences where non-compliance with the notice and publication requirements have been minor and unintentional … It is not clear whether non-compliance in such circumstances means that the business rescue process lapses and becomes a nullity, even if the business rescue plan has already been adopted and is in the process of being implemented.'

As regards the relationship between s 129(5)*(a)* and s 130(1)*(a)*(iii) the author comments[11] that: 'It is difficult to align the apparent automatic lapsing of a business rescue resolution under the provisions of s 129(5) with this provision [ie with s 130(1)*(a)*(iii)]'.

[20] The approach of Fabricius J appears to leave no room for the operation of s 130(1)*(a)*(iii). There is no point in bringing an application to set aside a resolution on the grounds of non-compliance with the procedural requirements of s 129 if that resolution has already lapsed and been rendered a nullity and the process of business rescue has, as a result, come to an end. In order to address this problem counsel submitted that s 129(5)*(a)* deals with non-compliance with the requirements of ss 129(3) and (4), while s 130(1)*(a)*(iii) operates in respect of non-compliance with other procedural requirements in s 129.

[21] I do not accept this argument for the simple reason that I do not think that the expression 'procedural requirements' in s 130(1)*(a)*(iii) extends to any matter beyond the steps set out in ss 129(3) and (4). The phrase 'procedural requirements' must refer to obligations of an administrative or procedural nature imposed upon the company. The steps that have to be taken under ss 129(3) and (4) fall naturally in this

[11] *Henochsberg*, supra, at 462(4).

category. But counsel submitted that it extended to the need in terms of s 129(1) for a resolution of the board of the company to commence business rescue as well as to the filing of the resolution with CIPCSA in terms of s 129(2) that is a prerequisite for the resolution to take effect and business rescue to commence.

[22] Counsel derived support for the first submission from *D H Brothers*,[12] where a resolution to commence business rescue was passed without the board of directors being properly constituted. The court said that this amounted to a failure to comply with the procedural requirements of s 129(1) of the Act. In my view that was incorrect. The consequence of the board not having been properly constituted, (which was not what occurred in the present case), would be that the resolution was not a resolution of the board of directors. As such it was a nullity and ineffective for the purpose of commencing business rescue proceedings. Equally, in the absence of such a resolution, there was nothing to set aside in terms of s 130(1)*(a)*(iii). The court in *D H Brothers* could and should have made a declaration to that effect, but in doing so it would not have been acting in terms of s 130(1)*(a)*(iii).

[23] The passing of a resolution to commence business rescue cannot readily be described as a procedural requirement. It is merely the substantive means by which the company may take that step. The board is under no obligation at all to take such a resolution, although, if it is financially distressed, it may be obliged to inform shareholders and creditors of the reasons for not doing so (s 129(7)). It cannot then be described as a 'requirement', much less a procedural requirement. The other suggestion by counsel, that filing the resolution with CIPCSA is a

[12] *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) para 16.

procedural requirement non-compliance with which may support an application in terms of s 130(1)*(a)*(iii), suffers from a similar flaw. If the board passes a resolution, but it is not filed with CIPCSA, then business rescue does not commence and the resolution is ineffective for any purpose. No point would be served in setting it aside.

[24] There are no other procedural requirements in s 129 in relation to which a circumscribed s 130(1)*(a)*(iii) could operate and none were suggested to us. The obvious and sensible meaning of the expression 'procedural requirements' in s 130(1)*(a)*(iii) is that it refers to the procedural requirements in ss 129(3) and (4). But, if the resolution lapses and becomes a nullity in consequence of such non-compliance, and this brings an end to the business rescue process, as has been held in the High Court judgments mentioned above, no purpose would be served by a provision that empowered a court to set it aside.

[25] The language of s 129(5)*(a)* at first reading may suggest that there is an absolute and immediate nullity of the resolution if there is non-compliance with the requirements of ss 129(3) and (4). How then is a court to deal with the anomaly that such a reading appears to create? In my view the problem falls to be solved by having regard to certain basic principles of statutory interpretation.

[26] In *Endumeni*[13] I ventured to summarise the current approach to statutory interpretation in the following way:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the

[13]*Natal Joint Municipal Pension Fund v Endumeni Municipality* [2013] ZASCA 13; 2012 (4) SA 593 (SCA); [2012] 2All SA 262 9SCA0 para [18].

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

[27] When a problem such as the present one arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. In doing so certain well-established principles of construction apply. The first is that the court will endeavour to give a meaning to every word and every section in the statute and not lightly construe any provision as having no practical effect.[14] The second and most relevant for present purposes is that if the provisions of the statute that appear to conflict with one another are capable of being reconciled then they should be reconciled.[15] Is it then possible to reconcile s 129(5)*(a)* and s 130(1)*(a)*(iii)? In my view it is possible without doing damage to the language used by the legislature.

[14]*Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436; *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) at 678C - F

[15]*Minister of Interior v Estate Roos* 1956 (2) SA 266 (A) at 271B-C; *Amalgamated Packaging Industries Ltd v Hutt* 1975 (4) SA 943 (A) at 949H.

[28] It is helpful to start with what the Act says about the termination of business rescue proceedings. The relevant provision for present purposes is s 132(2)*(a)*(i), which provides that business rescue proceedings end when the court sets aside the resolution that commenced those proceedings. In other words, when a court grants an order in terms of s 130(5)*(a)* of the Act, the effect of that order is not merely to set the resolution aside, but to terminate the business rescue proceedings. *A fortiori* it follows that until that has occurred, even if the business rescue resolution has lapsed and become a nullity in terms of s 129(5)*(a)*, the business rescue commenced by that resolution has not terminated.[16] Business rescue will only be terminated when the court sets the resolution aside. The assumption underpinning the various high court judgments to the effect that the lapsing of the resolution terminates the business rescue process is inconsistent with the specific provisions of the Act. None of those judgments referred to s 132(2)*(a)*(i).

[29] Once it is appreciated that the fact that non-compliance with the procedural requirements of s 129(3) and (4) might cause the resolution to lapse and become a nullity, but does not terminate the business rescue, the legislative scheme of these sections becomes clear. The company may initiate business rescue by way of a resolution of its board of directors that is filed with CIPCSA. The resolution, and the process of business rescue that it commenced, may be challenged at any time after the resolution was passed and before a business rescue plan is adopted on the grounds that the preconditions for the passing of such resolution are not present.[17] If there is non-compliance with the procedures to be followed

[16] The distinction between the resolution having lapsed and the business rescue proceedings having ended appears to be recognised in s 129(6), although that section may itself give rise to some practical difficulties that do not arise here and can be left for another occasion.

[17]The language of ss 130(1)*(a)*(i) and (ii) suggests that the time when the preconditions are not present is when the application is brought, but I refrain from deciding that point as it is unnecessary to do so.

once business rescue commences, the resolution lapses and becomes a nullity and is liable to be set aside under s 130(1)*(a)*(iii). In all cases the court must be approached for the resolution to be set aside and business rescue to terminate. That avoids the absurdity that would otherwise arise of trivial non-compliance with a time period, eg the appointment of the business rescue practitioner one day late as a result of the failure by CIPCSA to licence the practitioner timeously in terms of s 138(2) of the Act, bringing about the termination of the business rescue, but genuine issues of whether the company is in financial distress or capable of being rescued having to be determined by the court. There is no rational reason for such a distinction.

[30] The reason for wanting consistency, in all instances where the question of setting aside a resolution to commence business rescue arises, is apparent from s 130(5)*(a)* of the Act. That section deals with the circumstances in which the court may set aside a resolution and reads as follows:

'(5) When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may—

(a) set aside the resolution—

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so.'

[31] It has been suggested that the effect of the inclusion of sub-para (ii) in this section is to introduce a fourth ground for setting aside a resolution to commence business rescue in addition to those set out in s 130(1)*(a)*.[18] I do not think that is correct. This appears to me to be yet another case in

[18] *DH Brothers Industries (Pty) Ltd v Gribnitz NO* supra para 18.

a long line, commencing with *Barlin*,[19] in which the legislation uses the disjunctive word 'or', where the provisions are to be read conjunctively and the word 'and' would have been more appropriate.[20] Where to give the word 'or' a disjunctive meaning would lead to inconsistency between the two subsections it is appropriate to read it conjunctively as if it were 'and'. This has the effect of reconciling s 130(1)*(a)* and s 130(5)*(a)* and limiting the grounds upon which an application to set aside a resolution can be brought, whilst conferring on the court in all instances a discretion, to be exercised on the grounds of justice and equity in the light of all the evidence, as to whether the resolution should be set aside.

[32] Insofar as it may be suggested that the use of the word 'otherwise' in s 130(5)*(a)*(ii) points in favour of this furnishing a separate substantive ground for setting aside the resolution I do not agree. In my view the word is used in this context to convey that, over and above establishing one or more of the grounds set out in s 130(1)*(a)*, the court needs to be satisfied that in the light of all the facts it is just and equitable to set the resolution aside and terminate the business rescue. It is not being used in contradistinction to the statutory grounds, but as additional thereto. This is consistent with the meaning 'with regard to other points' given in the Oxford English Dictionary.[21]

[33] So construed the different sections are not only harmonious but also sensible and practical in their application. Under s 129 the company initiates the business rescue process and takes the procedural steps that must be followed. Under s 130 an affected person, excluding, save in special circumstances, a director who voted in favour of the resolution,

[19]*Barlin v Licencing Court for the Cape* 1924 AD 472 at 478.
[20]*Ngcobo v Salimba CC; Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para 11; *SATAWU v Garvas* 2013 (1) SA 83 (CC) para 143; *S v Sengama* 2013 (2) SACR 377 (SCA).
[21]OED 2nd ed, (1989) Vol X at 985, sv 'otherwise' (meaning 3).

may, during the period from the date of the resolution until the date of acceptance of a business rescue plan, apply to set the resolution aside either on substantive or procedural grounds. Such an application is made to court and the applicant must not only establish the statutory grounds, but also satisfy the court that it is just and equitable that the resolution be set aside. If the court grants such an order that brings the business rescue to an end.

[34] One further point in favour of this approach is that it largely precludes litigants, whether shareholders and directors of the company or creditors, from exploiting technical issues in order to subvert the business rescue process or turn it to their own advantage. Once it is recognised that the resolution may be set aside and the business rescue terminated if that is just and equitable, the scope for raising technical grounds to avoid business rescue will be markedly restricted even if it does not vanish altogether. That result is consistent with the injunction in s 5 of the Act that its provisions be interpreted in such a manner as to give effect to the purposes set out in s 7, one of which, as I said at the outset, 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.

[35] For those reasons I am of the opinion that the high court erred in its approach and should have dismissed the application. Accordingly the following order is made:

1 The appeal is upheld with costs.

2 Paragraphs 2 and 3 of the order of the court below are set aside and replaced by the following:

‘The application is dismissed.’

3 Paragraph 4 of the order of the court below is renumbered as paragraph 3.

4 The order granted on the counter application is set aside.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellants: B M Gilbert
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Lovius Block, Bloemfontein

For respondent: J Vorster
Instructed by: Magda Kets Inc, Pretoria;
Du Plooy Attorneys, Bloemfontein.