THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 136/2022

In the matter between:

RONICA RAGAVAN	**FIRST APPELLANT**
RAVINDRA NATH	**SECOND APPELLANT**
ASHU CHAWLA	**THIRD APPELLANT**

and

OPTIMUM COAL TERMINAL (PTY) LTD (IN BUSINESS RESCUE)	**FIRST RESPONDENT**
JUANITO MARTIN DAMONS N O	**SECOND RESPONDENT**
KURT ROBERT KNOOP N O	**THIRD RESPONDENT**

(Second and third respondents cited in their capacities as joint business rescue practitioners of the first respondent)

ALL AFFECTED PARTIES OF
OPTIMUM COAL TERMINAL (PTY) LTD
AS PER ANNEXURE A
TO THE NOTICE OF MOTION **FOURTH RESPONDENT**

TEGETA EXPLORATION AND
RESOURCES (PTY) LTD
(IN BUSINESS RESCUE) **FIFTH RESPONDENT**

JOHAN LOUIS KLOPPER N O **SIXTH RESPONDENT**

KURT ROBERT KNOOP N O **SEVENTH RESPONDENT**

(Sixth and seventh respondents cited in their capacities as joint business rescue practitioners of the fifth respondent)

ALL AFFECTED PARTIES OF TEGETA
EXPLORATION AND RESOURCES (PTY)
LTD AS PER ANNEXURE B TO THE
NOTICE OF MOTION **EIGHTH RESPONDENT**

Neutral citation: *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* (136/2022) [2023] ZASCA 34 (31 March 2023)

Coram: VAN DER MERWE, MOTHLE, MABINDLA-BOQWANA and MOLEFE JJA and UNTERHALTER AJA

Heard: 13 March 2023

Delivered: 31 March 2023

Summary: Company law – business rescue supervision under Companies Act 71 of 2008 – when a company in business rescue is a creditor of another

company in business rescue – the right to vote on the business rescue plan for the debtor company vests in the business rescue practitioners of the creditor company and not in its board of directors.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Victor J, sitting as court of first instance): judgment reported *sub nom Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* [2022] ZAGPJHC 22; 2022 (3) SA 512 (GJ).

The appeal is dismissed with costs, including the cost of two counsel, in respect of the first, second, third, fifth, sixth and seventh respondents as well as Liberty Energy (Pty) Ltd.

JUDGMENT

Mabindla-Boqwana JA (Van der Merwe, Mothle and Molefe JJA and Unterhalter AJA concurring):

Introduction

[1] The crisp legal question in this appeal has been formulated by the parties as follows:

'When a company in business rescue (Company A) is a creditor of another company in business rescue (Company B), and Company B is a wholly-owned subsidiary of Company A, [*does*] *the right to cast a vote on any matter contemplated under* [*ss*] *151 and 152 of the Companies Act* [*71 of*] *2008,* [*vest*] *in Company A's business rescue practitioners or its board of directors*?' (My emphasis.)

[2] In this case, Company A is the fifth respondent, Tegeta Exploration and Resources (Pty) Ltd (in business rescue) (Tegeta) and Company B is the first respondent, Optimum Coal Terminal (Pty) Ltd (in business rescue) (OCT). The sixth and seventh respondents, Mr Johan Louis Klopper NO and Mr Kurt Robert Knoop NO are Tegeta's business rescue practitioners (the Tegeta practitioners) and the second and third respondents are Mr Juanito Martin Damons NO and Mr Kurt Robert Knoop NO, cited in their capacities as OCT's business rescue practitioners (the OCT practitioners).

[3] In February 2018, OCT and Tegeta were placed under voluntary business rescue. Shortly thereafter, the OCT and Tegeta practitioners were appointed. In October 2021, the OCT practitioners published a business rescue plan (the plan) and notified OCT's affected persons, which included Tegeta as a creditor of OCT, that a meeting to vote on the proposed business rescue plan for OCT would be held on 10 November 2021.

[4] The appellants, as Tegeta's directors contended that they had the right to vote on the plan, while the Tegeta practitioners argued that the right was theirs. The matter served before the Gauteng Division of the High Court, Johannesburg (the high court), which interdicted the holding of the meeting, pending the determination of the right to vote.

[5] The high court answered the legal question in favour of the respondents, holding that the right to vote lay with the Tegeta practitioners who were given full management control under Chapter 6 of the Companies Act 71 of 2008 (the Act). The appellants appeal against this decision with the leave of the high court. All

parties affected by the business rescue process in OCT were cited as the fourth respondent in the high court. Liberty Energy (Pty) Ltd (Liberty) was the only affected party to file an answering affidavit on account of it being a creditor of OCT. It also participates in this appeal as the fourth respondent.

[6] Section 140(1) in Chapter 6 of the Act provides that:

'*During a company's business rescue proceedings*, the practitioner, in addition to any other powers and duties set out in this Chapter –

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may –

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to –

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.' (My emphasis.)

[7] The appellants referred to s 66(1) of the Act, which provides that:

'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[8] Their reliance on this section is to emphasise that under the Act it is the board of directors (the board) that enjoys the plenary powers of the company. They contend that the business rescue process in Chapter 6 of the Act, posits what they styled as a 'hybrid cohabitation model',[1] in which the board continues to play a decisive role in the affairs of the company, together with the practitioner, after it has been placed under supervision and in business rescue.

[9] The appellants base this cohabitation model mainly on s137 read with s 142 of the Act. Section 137(2)*(a)* and *(b)* require each director of the company, during the company's business rescue, to continue with the exercise of their functions but subject to the 'authority of the practitioner'. They have a duty to the company to exercise any management function within the company in accordance with the express instruction or direction of the practitioner. Section 142 deals with the duty of the directors to co-operate and assist the practitioners.

[10] In developing their submissions, the appellants accentuate the difference between 'management' and 'governance'. Insofar as governance is concerned, the contention is that the directors retain the powers in relation to the strategic positioning of the company. As for management, which, they argue, is confined to the day-to-day running of the business of the company, they accept that the practitioners' powers trump those of the directors.

[11] Further to advance this argument, the appellants rely on this Court's decision of *Tayob and Another v Shiva Uranium (Pty) Ltd and Others (Shiva)*, where it was held:

[1] The appellants distinguished it from the models in Chapter 11 of the US Bankruptcy Code of 1978 and Part 5.3A of Australia's Corporations Act 50 of 2001.

'Unless indicated otherwise, "company" must bear its ordinary meaning and the same meaning as in s 129, that is, the company represented by its board. There are no indications to the contrary.'[2]

[12] The appellants further contend that the powers of the practitioners vis-à-vis the board, must be viewed in two phases, that is, before and after the adoption of the plan. According to the appellants, Tegeta is in the first phase because a plan has yet to be adopted. During this phase, so it was argued, business rescue is in limbo and the practitioners must yield to the directors' strategic positioning of the company. In other words, cohabitation is the model that applies before the adoption of the plan. Furthermore, the structural relationship between Tegeta and OCT as well as the fact that one of the practitioners is in both companies, are relevant in the context of this case. The position is however, different post plan, as by then the decision-making powers would be set out in the plan.

[13] The appellant's contentions as to the powers of the board during the process of business rescue must be determined by reference to the proper interpretation of the relevant provisions of the Act. Interpretation of a statute 'is an objective unitary process where 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 . . . The inevitable point of departure is the language used in the provision under consideration'.[3] The approach cannot change depending on the facts of the case.

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[2] *Tayob and Another v Shiva Uranium (Pty) Ltd and Others* [2020] ZASCA 162 para 20.
[3] *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16 para 8.

[14] Whilst s 66(1) of the Act confers original powers on the board to manage the business affairs of the company and to exercise all the company's powers and perform its functions, it operates '*except to the extent that* [*the*] *Act . . . provides otherwise*'. Chapter 6 is one such exception. It installs the practitioner as the authority with full management powers and duties, in charge of the company and mandated to run it for the duration of the business rescue. Counsel for the appellants conceded that the question of who had the right to vote boils down to whether that power fell within the purview of the 'full management control' of the practitioners as contemplated in s 140(1)*(a)*.

[15] As was observed in *Shiva*, the word 'management' is not defined in the Act and therefore it must bear its ordinary meaning.[4] The word 'manage' means 'to be in charge of or to run the company particularly on a day-to-day basis.'[5]

[16] The ordinary meaning of the wide expression 'full management control' itself signifies control of the property of the company. Intrinsic to the power to run the company is management of the company's resources or property, including its assets. The debtors' book forms part of the assets of the company. As a creditor, the vote on the plan of a debtor simply entails a decision over the company's property.

[17] This is reinforced by the context of the Act as illustrated by numerous provisions, which are supportive of the reading that, 'full management control', entails the practitioner's exercise of control over the property of the company. The definition of 'business rescue' in s 128(1)*(b)* of the Act underscores in express terms

[4] *Shiva* fn 2 above para 24.
[5] Ibid. See also *Prinsloo v S* [2015] ZASCA 207; [2016] 1 All SA 390 (SCA); 2016 (2) SACR 25 (SCA) para 46.

the shift of management and control of the company's affairs, business and property from the directors to the practitioner. It stipulates the following:

'"**business rescue**" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

(i) the temporary supervision of the company, *and of the management of its affairs, business and property*;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors, or shareholders than would result from the immediate liquidation of the company.' (My emphasis.)

[18] As can be seen, s 128(1)*(b)*(i) refers to two categories of power, ie 'temporary supervision of the company' and '*management of its affairs, business and property*'. The facilitation of the rehabilitation of a company expressly includes management of property. Everything that has to do with the company's debtors clearly falls within the category of management. A practitioner is defined in the Act as a person appointed 'to oversee a company during business rescue'.[6]

[19] Section 133(1)*(a)* stipulates that '[*d*]*uring business rescue proceedings*, no legal proceedings, including enforcement action, against the company, or *in relation to any property belonging to the company*, or lawfully in its possession, may be commenced and proceeded with in any forum, *except – (a) with the written consent*

[6] Section 128(1)*(d)*.

of the practitioner'. (My emphasis.) This reflects the practitioner's control in relation to the claims by third parties to the property of the company.

[20] In terms of s 134(1)*(a)* during a company's business rescue proceedings, 'the company may dispose, or agree to dispose, *of property* only – (i) *in the ordinary cause of its business*.' Section 134(1)*(b)* provides further that 'any person who, as a result of an agreement made *in the ordinary course of the company's business* before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of the property as contemplated in that agreement. . .' and in terms of s 134(1)*(c)* '. . . no person may exercise *any right in respect of any property* in the lawful possession of the company, *irrespective of whether the property is owned by the company*, *except to the extent that the practitioner consents in writing*'. (My emphasis.)

[21] The practitioner also has powers to investigate the company's affairs, business, property and financial situation and after having done so, consider whether there is any reasonable prospect of the company being rescued, soon after his or her appointment (s 141(1)).

[22] With the full suite of powers over the company's property outlined above, it is difficult to see how the practitioner cannot also have the power to vote on the plan of a debtor company and thereby determine the extent to which a particular debt would be recovered under that plan or not. It is instructive that at the meeting to consider the plan, the creditor votes on the plan which, among other details, contains

the proposal about the property of the debtor company that is available to pay creditors' claims.[7]

[23] The primary purpose of business rescue is to enable the practitioner to prepare and implement a plan 'to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors, or shareholders than would result from the immediate liquidation of the company.'[8]

[24] Whether debts can be recovered and what the assets of the company are, form a crucial part of the process of preparing a plan. The plan must contain information, which includes the property available for distribution to the company's creditors and a three year projected balance sheet.[9] In developing a plan, it would make no sense to exclude the power to vote on the plan of a debtor. If that were to be the case, the practitioner would be unable to meet the requirements of s 141(2)*(a)* and *(b)*, in terms of which he or she has to undertake a proper investigation of the affairs of the company, ie if it is in financial distress and whether there is a reasonable prospect of rescuing it. If it is not in financial distress, to take steps to terminate the business rescue proceedings.

[25] The inability to vote on a debtor company's plan would affect the practitioner's assessment of the company's prospects of rescue and/or the state of its

[7] Section 150(2)(iv).
[8] Section 128(1)*(b)*(iii).
[9] Section 150(2)*(c)*(iv).

financial distress. That would undermine the very purpose of Chapter 6. Thus, the words 'full management control' found in s 140(1)*(a)* must be interpreted as including the power to vote for or against a plan for a debtor company. To give this power to the directors would be subversive of the purpose of the 'full management control' conferred to the practitioner by the Act.

[26] Therefore, whether or not the board retains any power on strategic matters of the company during business rescue is a matter we do not need to determine because, as I have explained, the practitioner enjoys the power to vote as a creditor on the debtor's plan.

[27] It must follow, therefore, that the appellants' reliance on *Shiva* is misplaced. In that matter, the Court had to address a narrow issue of who of the board or an affected person represented 'the company' in appointing a new practitioner in terms of s 139(3) of the Act, in situations where a practitioner dies, resigns, or is removed from office. The Court held that the appointment of a practitioner did not fall within the 'full management powers' or authority of a practitioner. In that case, the power of the board was found in s 139(3) and was not expressly qualified. In other words, that function fell outside the ambit of the authority of a practitioner and could not be subject to the approval of a practitioner as contemplated in s 137(2)*(a)* of the Act. *Shiva*, thus, dealt with a completely different issue.

[28] It follows that the purported differentiation by the appellants in respect of pre- and post-adoption of the plan has no foundation in the provisions of chapter 6. This case is concerned with the creditors' right to vote as contemplated in s 151 read with s 152. The shareholders do not feature. Section 152(3)*(c)* deals with shareholders'

rights. In terms of that section, if the proposed plan alters the rights of any class or classes of the holders of the company's securities, the holders of such rights will be present at the meeting where the plan is being considered. Thus, in that special case, the shareholders are consulted.

[29] For those reasons, the appeal must fail and costs must follow the result. Such costs must include those of the affected creditor, Liberty, which together with the relevant respondents opposed the appeal.

[30] In the result, the following order is made:

The appeal is dismissed with costs, including the cost of two counsel, in respect of the first, second, third, fifth, sixth and seventh respondents as well as Liberty Energy (Pty) Ltd.

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For appellants:	P F Louw SC and L van Gass
Instructed by:	Van der Merwe & Van der Merwe Attorneys, George
	Honey Attorneys, Bloemfontein
For first to third and fifth to seventh respondents:	G D Wickins SC and L V R van Tonder
Instructed by:	Smit Sewgoolam Inc, Johannesburg
	McIntyre Van der Post Inc, Bloemfontein
For Liberty Energy (Pty) Ltd:	P Stais SC and J Brewer
Instructed by:	Andersen Attorneys, Johannesburg
	Webbers Attorneys, Bloemfontein.