THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 945/2024

In the matter between:

TONGAAT HULETT LIMITED (IN BUSINESS RESCUE)	**FIRST APPELLANT**
TONGAAT HULETT SUGAR SOUTH AFRICA (PTY) LTD (IN BUSINESS RESCUE)	**SECOND APPELLANT**
TREVOR JOHN MURGATROYD N.O.	**THIRD APPELLANT**
PETRUS FRANCOIS VAN DEN STEEN N.O.	**FOURTH APPELLANT**
GERHARD CONRAD ALBERTYN N.O.	**FIFTH APPELLANT**
and	
SOUTH AFRICAN SUGAR ASSOCIATION	**FIRST RESPONDENT**
S.A. SUGAR EXPORT CORPORATION (PTY) LTD	**SECOND RESPONDENT**
MINISTER OF TRADE, INDUSTRY AND COMPETITION	**THIRD RESPONDENT**
SOUTH AFRICAN SUGAR MILLERS' ASSOCIATION NPC	**FOURTH RESPONDENT**
SOUTH AFRICAN CANE GROWERS' ASSOCIATION NPC	**FIFTH RESPONDENT**
SOUTH AFRICAN FARMERS' DEVELOPMENT ASSOCIATION NPC	**SIXTH RESPONDENT**
RCL FOODS SUGAR & MILLING (PTY) LTD	**SEVENTH RESPONDENT**
ILLOVO SUGAR (SOUTH AFRICA) (PTY) LTD	**EIGHTH RESPONDENT**

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

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

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

Heard: 12 November 2025

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

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

ORDER

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

1 The appeal is dismissed.

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

JUDGMENT

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factual background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Interpretation of s 136(2) of the Companies Act

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

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

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

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

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

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

[33] In terms of the definition of 'agreement' in s 1 of the Companies Act, it 'includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties.'

[34] These provisions should be construed in accordance with the recognised principles of interpretation. The proper approach to legislative interpretation in our law requires courts to ascertain and give effect to the intention of the legislature, as expressed in the wording of the statute, while also considering the context, purpose, and underlying values of the Constitution. In this regard, the purposive approach is favoured, ensuring that statutory provisions are read holistically and in a manner that promotes the spirit, purport, and objects of the Bill of Rights.[2]

[35] The Constitutional Court, in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* (*Hyundai Motor Distributors*),[3] affirmed that interpretation must be consistent with constitutional values and that ambiguity must be resolved in a way that best promotes those values.[4] Similarly, this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] emphasised that statutory interpretation is a unitary exercise, requiring consideration of language, context, and purpose together.[6] These authorities underscore the importance of a contextual, purposive, and constitutionally aligned approach to legislative interpretation.

[36] It is a fundamental tenet of our law of statutory interpretation that legislation must, wherever possible, be read in a manner that is consistent with the Constitution. This principle, often referred to as the doctrine of constitutional compliance, has become a cornerstone of modern interpretive methodology in South Africa. It requires courts to

---

[2] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.
[3] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) (*Hyundai Motor Distributors*).
[4] Ibid para 22.
[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[6] Ibid para 19.

favour an interpretation of statutory provisions that upholds, rather than undermines, constitutional rights and values.

[37] Section 39(2) of the Constitution specifically directs that when interpreting any legislation, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights. This interpretive injunction means that if a statutory provision is reasonably capable of more than one meaning, the meaning that is consistent with the Constitution should be preferred. Therefore, courts are not permitted to adopt an interpretation that would render the provision unconstitutional if a constitutionally compliant construction is reasonably possible.

[38] This approach was articulated by the Constitutional Court in *Hyundai Motor Distributors*, as follows:

'Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such interpretative approach can be reasonably ascribed to the section.'

[39] The Constitutional Court further emphasised that ambiguity is not a prerequisite for the application of this principle – wherever a statute is reasonably capable of a meaning that avoids constitutional invalidity, that meaning ought to be adopted. This ensures that legislative intent is realised as far as possible without encroaching upon constitutional rights.

Context and purpose

[40] Given the legal principles outlined above, s 136(2) must also be interpreted within the broader framework of Chapter 6 of the Companies Act, which regulates business rescue proceedings. That chapter sets out the statutory framework for business rescue proceedings in South Africa. Its provisions empower business rescue practitioners temporarily to suspend or apply for the cancellation of certain company obligations arising from agreements concluded before the commencement of business rescue proceedings.

[41] The primary purpose of business rescue proceedings, as set out in s 128(1)(*b*), is to facilitate the rehabilitation of a financially distressed company by providing for the temporary supervision of the company, a temporary moratorium on legal proceedings against it, and the development and implementation of a business rescue plan to maximise the likelihood of the company continuing on a solvent basis. Where this is not possible, the aim is to achieve a better return for the company's creditors and shareholders than would result from immediate liquidation.

[42] In *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*,[7] this Court clarified that business rescue is not intended to delay inevitable liquidation, but rather to provide an opportunity for viable restructuring or, at the very least, to secure a more advantageous outcome for stakeholders.[8] This reflects a policy preference for rescue and rehabilitation over liquidation, aligning with broader constitutional values of fairness and the protection of economic activity. The overall aim of business rescue is to facilitate the rehabilitation of financially distressed companies, protect the interests of stakeholders, and ensure that decisions made during business rescue proceedings are just, reasonable, and aligned with legislative intent.

[43] Business rescue places a company under the temporary control of registered practitioners, who assume full management authority as outlined in s 140. If rescue appears feasible, these rescue practitioners must draft a plan for creditors and other voting stakeholders detailing debt repayment strategies and steps to meet the goals of s 128(1)(*b*). In addition, s 136(2)(*a*), establishes a general pause on legal actions against the company or its assets, with exceptions.

[44] In addition to s 136(2)(*a*), the other relevant provisions are: s 133, which establishes a general pause on legal actions against the company or its assets, with exceptions; s 134(1)*(c)* which prohibits persons from exercising rights over property in the

---

[7] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA).
[8] Ibid para 22.

lawful possession of the company, without the written consent of the business rescue practitioner; and s 135(1) which ensures that monies due to employees during the business rescue process are prioritised and repaid at the end of the business rescue process.

The high court's findings

[45] The high court determined that, according to conventional rules of grammar and syntax, the terms 'arrangement' or 'understanding' must be interpreted as requiring an agreement between two or more parties, which is intended to establish rights and obligations among those parties. The fundamental characteristics of all these instruments is mutual assent and an intention to establish rights and obligations *inter partes*. This definition is applied exclusively on a horizontal basis, such that rights and obligations conferred vertically by the state through legislation are excluded from its scope

The parties' submissions

[46] The appellants argue that s 136(2) empowers business rescue practitioners to suspend any obligation arising between parties under agreements, including the SI Agreement, when a company enters business rescue. This is so regardless of the source of the obligation, provided it arises from an agreement. They maintain that the Act defines 'agreement' broadly, encompassing contracts, arrangements, and understandings – even those without all the usual elements of a contract – so the power to suspend is wide-ranging.

[47] They criticise the high court for interpreting 'agreement' too narrowly and assert that their interpretation better supports the business rescue objectives of the Companies Act. They clarify that they only seek to suspend THL's specific payment obligations under the SI Agreement – not the entire agreement – including industry levies and redistribution payments, which they say are debts between millers, not regulatory charges.

[48] The appellants argue further that these obligations do not have preferential status in business rescue and SASA should not be prioritised over other creditors, in line with

the Company Act's ranking of claims. Finally, they rely on the sugar industry's regulatory history, asserting that SASA is an industry association, not a regulator, and that the SI Agreement is a contractual arrangement formalised by legislation, and does not constitute regulatory law.

[49] The respondents support the high court's view that, although the Companies Act offers a broad definition of an agreement, every element within that definition depends on consensus or mutual assent. They argue that the section's wording clearly requires consensus for an arrangement to qualify as an 'agreement' under the Companies Act. It is trite that mutual assent is a foundational requirement for the existence of a valid agreement under South African law. No alternative interpretation is supported by the text. If the legislature intended to allow agreements without consensus, it would have stated this explicitly. Therefore, suggesting that consensus is not required simply because the section does not use the word 'consensus' ignores the ordinary meaning of 'agreement'.

Discussion and analysis

[50] It is established law that an agreement is generally understood to require at least some minimum manifestation of mutual assent between two or more parties.[9] The Shorter Oxford Dictionary variously defines the term 'agreement' to mean 'a coming into accord; a mutual understanding; a covenant, or treaty' and 'a contract, duly executed and binding'. The definition in the Companies Act includes 'any contract, arrangement, or understanding between two or more parties that purports to create rights and obligations between or among those parties,' which inherently presupposes some form of consensus. Thus, on every conceivable textual interpretation, the term presupposes some measure of mutual assent.

---

[9] *Conradie v Rossouw* 1919 AD 279 at 320 to 321, where the following was stated:
'This disposes of the exception. According to our law if two or more persons, of sound mind and capable of contracting, enter into a lawful agreement, a valid contract arises between them enforceable by action. The agreement may be for the benefit of the one of them or of both (Grotius 3.6.2). The promise must have been made with the intention that it should be accepted (Grotius 3.1.48); according to Voet the agreement must have been entered into serio ac deliberate animo [with serious and deliberate intend]. And this is what is meant by saying that the only element that our law requires for a valid contract is consensus, naturally within proper limits - it should be in or de re licita ae honesta [in a matter that is lawful and honest].'

[51] I disagree with the appellants' assertion that the inclusion of the terms 'any' and 'including' indicates an intent to extend the definition of agreement beyond instruments of a contractual nature arising from mutual consent. It is established law that the word 'includes' in statutory definitions can mean either 'including but not limited to' or the equivalent of 'means', depending on the context.[10] On the appellants' interpretation, 'agreement' would encompass the SI Agreement as well as liabilities created therein. This interpretation fails to recognise that the Companies Act defines 'agreement' as instruments entered into between two or more parties, which serve to establish rights and obligations between those parties, or purports to do so.

[52] The assertion that the definition of an agreement under the Companies Act should encompass instruments where there is no mutual assent is manifestly fallacious. Typically, an agreement refers to an arrangement between two or more parties established through mutual assent. While the statutory definition may include other instruments that also reflect characteristics of consensus, such as an 'arrangement' or 'understanding', it does not necessarily follow that the inclusion of these concepts implies that instruments lacking mutual assent were intended to be covered by the definition. Therefore, despite the breadth of the statutory language, the core requirement of consensus remains. Other than the fact that it is called an 'agreement', the SI Agreement – a statutory instrument imposed by the Minister under s 2 of the Sugar Act after consultation with SASA – lacks the fundamental characteristics of a covenant established through mutual assent.

[53] The language of the section – although broad – nevertheless assumes that parties are consciously entering into a relationship intended to create binding rights and obligations. For example, a shareholders' agreement that sets out voting rights or procedures for appointing directors exemplifies an 'arrangement' or 'understanding' under s 136, as it results from the consensus of private parties and their mutual assent. In contrast, obligations imposed directly by government regulation, such as statutory requirements for tax payments, are not the product of mutual agreement but are 'vertical'

---

[10] *Estate Brownstein v Commissioner for Inland Revenue* 1957 (3) SA 512 (A).

in nature – meaning they are imposed by the state upon individuals or entities. Thus, a person or entity may be a party to a contract, but not to legislation itself.

[54] This interpretation is further supported by the provisions of s 133(1)(*f*).[11] By its express terms, this provision establishes a moratorium on legal proceedings against a company in business rescue, shielding it from litigation and enforcement actions that could disrupt the rescue process. This moratorium is designed to give the company breathing space, allowing the business rescue practitioner to develop and implement a plan for recovery without the immediate threat of creditors' claims. However, section 133(1)(*f*) creates a specific exception to this general rule: "nothing in this section precludes a regulatory authority from instituting enforcement proceedings in the execution of its duties, after giving written notification to the business rescue practitioner." For the reasons which I explain below, SASA qualifies as a regulatory authority.

[55] The clear language of the exemption ensures that regulatory authorities – entrusted with oversight and enforcement in the public interest – are not impeded from carrying out their statutory responsibilities, such as maintaining market integrity, public safety, or compliance with regulatory frameworks. The relationship between s 133 and s 136 thus becomes pivotal in the statutory interpretation of the latter provision. Section 136(2)(a), which empowers business rescue practitioners to suspend obligations under agreements, cannot logically extend to overriding the exemption provided by s 133(1)(*f*). Allowing such an override would undermine the legislative intent to preserve regulatory oversight during business rescue. The anomaly arises because s 133(1)(*f*) deliberately excludes regulatory enforcement from the moratorium, recognizing the necessity of continued statutory compliance and protection of the public interest, whereas s 136(2)(*a*)

---

[11] That section provides, in relevant part:
'General moratorium on legal proceedings against company–
(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
. . .
(*f*) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.'

is meant to facilitate the restructuring of contractual obligations – not statutory duties. If business rescue practitioners could use s 136(2)(*a*) to suspend obligations that regulatory authorities are empowered to enforce under s 133(1)(*f*), it would create a practical conflict: regulatory compliance could be frustrated, and the statutory purpose of the regulatory exemption would be nullified. This would erode the balance between enabling corporate recovery and maintaining essential public oversight, a result clearly not contemplated by the legislature. Therefore, the interpretation advanced by the appellants, which suggests s 136(2)(*a*) could be used to circumvent the regulatory exemption in s 133(1)(*f*), is not only textually unsupported but also inconsistent with the broader statutory scheme and its underlying objectives.

[56] In summary, I find that the definition of an agreement under the Companies Act contemplates a covenant concluded by parties through mutual assent, creating rights and obligations *inter partes*. Statutory instruments imposed by government do not meet this definition because they lack consensus. Liabilities imposed by statute, or subordinate legislation, therefore fall outside the scope of s 136(2).

Are liabilities arising from the SI Agreement subject to suspension under s 136(2)(*a*)?

The Sugar Act

[57] The regulation of the South African sugar industry operates within a comprehensive statutory framework designed to safeguard the interests of growers, millers, and refiners. Central to this regulatory landscape is the SI Agreement, which governs market access, pricing mechanisms, and the allocation of industry revenues. Therefore, determining whether the agreement qualifies as a statutory instrument requires an examination of public interest factors, the sector's historical evolution, and the key provisions contained in both the SI Agreement and the Sugar Act.

[58] There are compelling public interest and industry considerations for the regulation of the sugar industry through legislation. First, growers of sugar cane face a highly concentrated market: they have only one channel through which to sell their cane in

volume, and this market is divided among just six millers. Second, in addition to these risks, the global sugar market is characterised by significant distortions. Accordingly, the price regulation mechanism outlined in the SI Agreement is essential for supporting the continued viability of local producers. Third, without statutory regulation, individual growers, especially small-scale farmers, would be at a significant disadvantage in negotiations with millers due to their limited market and financial power. This imbalance could enable millers to impose unjustifiably low prices on growers. Statutory regulation through the SI Agreement addresses this challenge by providing for a fair sharing of earnings and enabling more balanced supply agreements. The provisions of the Sugar Act should be interpreted with consideration of these essential factors.

[59] Before outlining the provisions of the Sugar Act, it is important first to review those of its predecessor, the Sugar Act 28 of 1936 (the 1936 Act), to establish historical context. The enactment of the 1936 Act represented a significant development in sugar industry regulation, promoting coordinated efforts among growers, millers, and refiners during a period when industry stability was essential for economic advancement.

[60] The provisions of the 1936 Act gave legislative recognition to the cooperative and contractual arrangements between millers and growers. Unlike the current Sugar Act, the 1936 Act primarily vested in the Minister the power to publish an agreement concluded by the industry role players. Section 1 of the 1936 Act authorised the Minister to publish in the Gazette an agreement entered into between representatives of growers, millers and refiners if such an agreement had been approved by at least 90% of the growers who together had produced not less than 90% of the cane grown in South Africa during that time, and if it was in the public interest.

[61] It was only if no agreement under s 1 of the 1936 Act had either been concluded or published that the Minister was authorised under s 2 of the Act to determine the terms of an agreement between growers, millers and refiners, if it was in the interests of the sugar industry. On publication, the agreement became binding on every grower, miller and refiner that received a quota in respect of the manufacture of sugar, ‘as if it had been

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

[62] In terms of s 6 of the 1936 Act, the Minister could, by notice in the Gazette, prescribe specific prices, quantities, and grades of sugar. In terms of s 8 of that Act, publication in the Gazette of any agreement or amending agreement served as prima facie proof of the terms of the agreement, and of the compliance with prerequisites to its conclusion. Publication thus served an evidentiary purpose, providing certainty as to the terms of the agreement.

[63] The cooperative framework established by the 1936 Act laid the foundation for later regulatory measures, including those found in subsequent versions of the Sugar Act. This legislative approach influenced the ongoing governance of the industry, ensuring that future statutory frameworks continued to facilitate cooperation and certainty among industry participants.

[64] The Sugar Act marked a significant transformation in the regulation of the industry. It sets out the legal framework for the regulation and governance of the South African sugar industry, consolidating earlier legislation and providing for matters incidental to the industry's operation.

[65] The Sugar Act defines key terms, including 'Agreement' (referring to the SI Agreement under s 4), 'Association' (SASA established under s 2), and, importantly, stipulates that 'this Act' includes the SI Agreement itself, notices issued under s 6 of the Sugar Act, and regulations made under s 10 of the Act. The SI Agreement is therefore accorded the same status as the regulations.

[66] In terms of s 2 of the Sugar Act, SASA is established as a juristic person. Its constitution's terms are to be published by the Minister in the Gazette, and any amendments must also be published. The Registrar of Companies registers the Association as a statutory body.

[67] Section 4 of the Sugar Act provides that the Minister, after consulting SASA, determines the terms of the SI Agreement.[12] The SI Agreement is binding on all industry participants (growers, millers, refiners) and is published in the Gazette. The SI Agreement's scope includes designation of agricultural products subject to its terms; regulation and control (or prohibition) of production, marketing, and exportation; confiscation or destruction of products in contravention; and formulas for determining prices paid by millers to growers.

[68] Importantly, s 4(2)*(g)* of the Sugar Act provides that the SI Agreement must include the right of the Association to impose levies upon growers, millers and refiners for the purpose of giving effect to the terms of the SI Agreement and for the purpose of enabling SASA to fulfil its obligations in accordance with its constitution.[13]

[69] SASA may prescribe maximum industry prices for sugar products through notice in the Gazette, and these prices may vary by grade, type, or location. All growers, millers, and refiners are to be treated equally under the SI Agreement, unless expressly provided otherwise for specific classes or categories. SASA can impose surcharges on purchases or acquisitions of sugar or molasses, specifying the methods of collection, payment, and

---

[12] Section 4 provides:
'Sugar Industry Agreement –
(1)(*a*) The Minister shall after consultation with the Association determine the terms of an agreement to be known as the Sugar Industry Agreement, which shall provide for, and deal with, such matters relating to the sugar industry as are, in the opinion of the Minister, in the interests of that industry but not detrimental to the public interest.
(b)(i) The Minister may at the instance of, or after consultation with, the Association, amend the Agreement if the Minister is satisfied that such amendment is in the interests of the sugar industry and not detrimental to the public interest.
(ii) Unless the Association requests otherwise, an amendment may be made with retrospective effect to a date not earlier than the date of commencement of the year during which the amendment is published under paragraph *(c)*.
(c) The Minister shall publish the Agreement and any amendment thereof by notice in the Gazette, whereupon the Agreement or such amendment shall become binding upon every grower, miller and refiner.'
[13] Section 4(2) provides:
'Without derogating from the generality of subsection (1)*(a)*, the matters with reference to which the Minister may provide for, and deal with, in the Agreement, shall include –
(*g*) the imposition of levies upon growers, millers and refiners for the purpose of giving effect to the terms of the Agreement and for the purpose of enabling the Association to fulfil any obligation incurred by it in accordance with its constitution.'

use of surcharges. Notices regarding prices or surcharges may be revoked or amended as needed. It is also noteworthy that, within this context, SASA is authorised under s 4(2)(*d*) of the Sugar Act to establish a formula for determining the price that millers must pay to growers for sugar cane or any other agricultural product.

[70] As stated, the SI Agreement also regulates the local market redistribution proceeds, which constitute amounts collected by SASA for pooling and sharing amongst millers. This revenue-sharing framework is structured to facilitate a fair allocation of domestic market earnings among growers, millers, and refiners, thereby shielding these stakeholders from the uncertainties and risks associated with the export market.

The high court's findings

[71] The high court found that the SI Agreement constitutes subordinate legislation and that, *a fortiori*, SASA is a regulatory body established by statute. This finding was based, amongst others, on the following considerations: (a) the fact that the Minister is entitled in terms of s 4(1)(a) of the Sugar Act to determine the terms of the SI Agreement on her own after consultation with SASA; (b) the Minister's powers to prescribe penalties for non-compliance with provisions of the SI Agreement in terms of s 4(3) of the Sugar Act; (c) judicial authority for the proposition that the SI Agreement is legislative in nature; and (d) the definition of 'this Act' in the Sugar Act which includes the SI Agreement, according it the same status as regulations promulgated under the Sugar Act.

The parties' submissions

[72] The appellants submit that two textual elements of the Sugar Act suggest that the SI Agreement constitutes a *sui generis* agreement. They contend that s 4(1)(*a*) of the Sugar Act refers to the SI Agreement explicitly as an 'agreement'. Had the legislative intent been to establish something other than an agreement, the provision would have authorised the Minister, for instance, to promulgate regulations identified as the SI Agreement.

[73] Second, the appellants submit that a comparison between s 4, on the one hand, and ss 6 and 10 of the Sugar Act, on the other, supports their argument, as the latter sections clearly confer authority for the creation of subordinate legislation. Specifically, s 6 of the Sugar Act authorises SASA, through publication in the Gazette, to set the maximum industry price for sugar industry products, while s 10 enables the Minister to formulate regulations addressing various matters. According to the respondents this distinction is significant because it demonstrates that s 4 does not grant similar powers, thereby limiting the scope for subordinate legislation under its provisions. They argue that unlike ss 6 and 10, which explicitly provide mechanisms for regulatory action, s 4 lacks such language, indicating a narrower legislative intent and reinforcing the point that the SI Agreement is *sui generis* rather than a legislative instrument.

[74] The respondents argue that the Sugar Act was intentionally designed as a statutory regulatory framework to govern the sugar industry. Under s 4 of the Sugar Act, the Minister holds the authority to determine and amend the terms of the SI Agreement after consulting with SASA, and these terms are imposed as a matter of law upon all industry participants upon publication in the Gazette. Compliance with the SI Agreement is thus mandatory for growers, millers, and refiners, with penalties for non-compliance, highlighting the legislative — not contractual — nature of the SI Agreement.

[75] The respondents further contend that the SI Agreement operates like a statutory regime, with the Minister empowered to prescribe offences and penalties for breaches, thereby ensuring sectoral regulation in line with public and developmental interests. The SI Agreement is intended to create a fair and competitive environment by addressing unique challenges in the sugar industry, such as global market distortions, power imbalances, and regional economic dependency. The regulatory measures within the SI Agreement — such as quality standards and pricing benchmarks – are designed to support the sector and broader societal objectives.

[76] The respondents support the high court's determination that, while the Companies Act provides a broad definition of an agreement, the rights and obligations established

under the SI Agreement are not private law rights and obligations derived from mutual agreement. Instead, these rights and obligations carry the force of law and cannot be suspended by a rescue practitioner.

Discussion and analysis

[77] The legislative scheme, as articulated in the Sugar Act, specifically delineates the extent to which statutory provisions govern the rights and obligations of industry participants and establishes the regulatory authority of SASA. The question then arises whether the SI Agreement constitutes subordinate legislation or, as contended by the appellants, is merely an agreement between the sugar industry role players. The answer to this question determines if business rescue practitioners have the power to suspend obligations arising from the SI Agreement under s136(2)(*a*).

[78] As stated earlier, s 1 of the Sugar unambiguously confers upon the SI Agreement the same status as regulations promulgated thereunder. This, in my view, is a compelling indicator that the obligations under the SI Agreement are statutory in nature.

[79] Moreover, in accordance with s 4(1)(*a*) of the Sugar Act, the Minister determines the terms of the SI Agreement following consultation with SASA. Unlike the 1936 Act, which required the Minister to publish an agreement negotiated by industry stakeholders, the current Sugar Act expressly grants the Minister the authority to set the terms of the SI Agreement, after consulting with SASA. It is well-established in our jurisprudence that the phrase 'after consultation with' does not require consensus. In *Premier, Western Cape v President of the Republic of South Africa* (*Premier, Western Cape*),[14] the Constitutional Court affirmed that a Minister may exercise his or her powers following the requisite consultation.[15] Consequently, while the Minister is obligated to seek input from SASA, there is no requirement to adopt its recommendations if the Minister considers them contrary to the best interests of the sugar industry.

---

[14] *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999 (3) SA 657 (CC); 1999 (4) BCLR 383 (*Premier, Western Cape*).
[15] Ibid para 85.

[80] Section 4(1)(*c*) of the Sugar Act stipulates that, once published by the Minister in the Gazette, the SI Agreement or any amendments thereto become binding on all growers, millers, and refiners. Thus, the enforceability of the SI Agreement within the industry is not contingent upon the consent or agreement of any individual stakeholder.

[81] Considering this statutory context and applying the test articulated by this Court in *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another*,[16] it is, in my view, clear that the SI Agreement constitutes subordinate legislation. First, the SI Agreement has a general application, extending to the entirety of the sugar industry. Second, it pertains to the implementation of a particular policy, specifically, the regulation of the sugar industry to serve the interests of both industry stakeholders and the broader national economy. Third, its provisions are prospective in nature, establishing consequences for all industry stakeholders following their publication in the Gazette. Fourth, the SI Agreement is designed to remain in effect indefinitely, subject only to amendments promulgated by the Minister. Finally, it requires formal publication in the Gazette before acquiring the force of law, and provides for additional administrative measures, such as the prescription of penalties in terms of s 4(3) to ensure its effectiveness. These distinctive features of subordinate legislative instruments set the SI Agreement apart from other forms of administrative action.

[82] This conclusion also significantly impacts the enforceability of s 136(2)*(b*) regarding liabilities associated with the SI Agreement. That section permits a practitioner, with court approval, to 'entirely, partially, or conditionally cancel any obligation' as referred to in subsection 2(*a*). However, as stated, the language and intent of this provision are confined to obligations arising under agreements to which the company is a party; it does not, and cannot, authorise the cancellation or suspension of statutory obligations or legislative instruments. The principle of legality dictates that subordinate legislation, once promulgated, derives its force from an Act of Parliament and cannot be unilaterally set aside by a business rescue practitioner. This interpretation is consistent with foundational

[16] *Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* [2013] ZASCA 70; [2013] 3 All SA 435 (SCA); 2014 (3) SA 251 (SCA) para 28.

constitutional principles and was affirmed in *Premier, Western Cape*, where the Constitutional Court emphasised the distinction between administrative and legislative powers and the limits of delegated authority.[17]

[83] Section 133(1)*(*f) is also of significant importance in this context. As previously discussed, the provision permits enforcement actions by regulatory authorities during business rescue, thereby ensuring that regulatory compliance and enforcement are not subordinated to business rescue proceedings. This upholds the precedence of public law obligations over private arrangements.

[84] This statutory context naturally leads to the question of SASA's status and role as a regulatory authority within the sugar industry. Contrary to the appellants' assertions, SASA's regulatory status is firmly anchored in legislative history, statutory text, and authoritative case law. Section 1 defines a 'regulatory authority' to include any entity established by national or provincial legislation responsible for regulating an industry or sector thereof. SASA is not a mere association acting for the interests of its members; rather, it is a statutory body incorporated by the Sugar Act, with its constitution promulgated by Ministerial notice in the Gazette. The legislative framework explicitly vests SASA with regulatory functions, including the administration and enforcement of the SI Agreement, which itself constitutes subordinate legislation.

[85] This conclusion is further supported by several judgments in which courts have affirmed the statutory character of the SI Agreement. In *Sugar Industry Central Board and Another v Hermannsburg Mission and Another* 1983 (3) SA 669 (A)[18] this Court endorsed an earlier finding that the SI Agreements (under the 1936 Act) were subordinate legislation:

'In *W H Hindson and Co Ltd v Natal Estates Mill Group Board and Others* 1941 NPD 41 at 48-49 SELKE J said this:

[17] *Premier, Western Cape* para 8.

[18] *Sugar Industry Central Board and Another v Hermannsburg Mission and Another* 1983 (3) SA 669 (A) at 690 C-G.

"The sugar industry in Natal is governed by and organised pursuant to a Union statute known as the Sugar Act 28 of 1936, and an agreement called the Sugar Industry Agreement, which has statutory force, and is binding upon substantially all sugar growers, millers and refiners engaged in the industry.

The Agreement amounts virtually to a code providing for the organisation of the whole industry upon something of a co-operative basis. So far as is now relevant it divides those engaged in the industry into two main classes: *(a)* growers, and *(b)* millers; and it then proceeds by a series of elaborate provisions to establish machinery for regulating and adjusting the respective rights and obligations as between growers and millers, and as between the members of these two classes *inter se*."'[19]

[86] In *Even Grand 51 CC v Tongaat Hullet Ltd*, [20] the court considered whether the SI Agreement could confer appellate jurisdiction. In answering this question, the court had to consider the legal nature of the SI Agreement. The court found that the SI agreement is clearly distinguishable from an agreement between the parties – e.g. an arbitration agreement – which seeks to confer appellate jurisdiction on the High Court. The court held that the agreement is therefore subordinate legislation, by the Minister, exercising his powers in terms of the Sugar Act.

[87] The appellants criticised the high court's reliance on this judgment, arguing that, although finding that the SI Agreement constitutes subordinate legislation, the judgment dealt with the issue of jurisdiction and does not address key issues such as payment obligations under the SI Agreement or whether the SI Agreement created *inter partes* obligations relevant to the Companies Act and business rescue provisions. They submit that the judgment is manifestly wrong and, in any event, this Court is not bound by it.

[88] However, despite these criticisms, the reasoning in *Even Grand* remains pertinent and instructive. The court there clarified that the SI Agreement is not an ordinary contract formed by consensus among parties, but rather a form of subordinate legislation enacted by the Minister under statutory authority, with terms determined in the public interest after

[19] Ibid at 690C-E.
[20] *Even Grand 51 CC v Tongaat Hullet Ltd* Unreported Judgment, 2 November 2012, Case No: AR517/11.

stakeholder consultation. This distinction underscores that the SI Agreement's obligations are imposed by law, not mutual agreement, and thus are not subject to suspension or cancellation as if they were merely contractual obligations between private parties.

[89] In *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs*,[21] this Court examined the legal status of the Waste Management Plan promulgated under the National Environmental Management: Waste Act 59 of 2008. The Court held that the Plan, once published in the Government Gazette by the Minister, constituted subordinate legislation rather than a mere contractual arrangement. This meant its provisions were binding on all industry participants, regardless of their individual consent, and could not be unilaterally suspended or cancelled by private parties. The Court emphasised that statutory obligations arising from such subordinate legislation serve public interests and are subject to regulatory oversight, distinguishing them from private contractual agreements.

[90] In summary, a holistic reading of the statutory framework, informed by legislative history and jurisprudence, demonstrates that the SI Agreement's obligations are statutory in nature, immune from unilateral cancellation by business rescue practitioners, and subject to enforcement by SASA as a regulatory authority. The cumulative effect of these provisions is to ensure that public law obligations and regulatory oversight remain paramount, thereby safeguarding the integrity and orderly functioning of the sugar industry.

[91] Once this conclusion is reached, the appellants' contention that the payment obligations in the SI Agreement arise from a consensual agreement between participants in the sugar industry cannot be sustained. These obligations are not the result of consensus among industry participants. Instead, they are imposed as a matter of law and become binding upon promulgation by the Minister. As stated, no mutual assent or

[21] *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* [2019] ZASCA 1; [2019] 2 All SA 1 (SCA); 2019 (3) SA 251 (SCA).

agreement among the industry participants – or between the industry as a whole and the Minister – is required for the SI Agreement and its obligations to acquire legal force.

[92] Two additional issues raised by the appellants remain for consideration. First, they contend that even if this Court determines that the industry levies imposed by SASA are not subject to suspension due to their statutory nature, the local market redistribution proceeds, which are essentially payment obligations owed between millers, are fundamentally different. According to the appellants, these obligations, at the very least, constitute *inter partes* responsibilities arising from agreements or arrangements among participants in the sugar industry. They can therefore be suspended by a rescue practitioner during business rescue proceedings under s 136(*a*).

[93] In my view, this submission is untenable. The SI Agreement constitutes a statutory instrument that assigns liabilities to all participants within the sugar industry. The responsibility for redistribution payments is determined by SASA pursuant to its regulatory authority and is analogous to the imposition of industry levies. Accordingly, neither obligation may be suspended by a business rescue practitioner under s 136(2)(*a*).

[94] Secondly, the appellants argue that accepting the respondents' interpretation would inappropriately grant SASA and industry participants a preference during business rescue proceedings. Such a preference is not contemplated or provided for by the Companies Act and is inconsistent with the order of claims in liquidation processes. In my view, even if s 136(2)(*a*) affords such a preference, it aligns with the overarching framework of business rescue under the Companies Act and accords with the objectives of the Sugar Act. The constitutional considerations pertaining to this argument are addressed below.

Constitutional challenge

The high court's findings

[95] The high court disagreed with THL's submission that the exclusion of statutory obligations from the scope of s 136 arbitrarily differentiates between organs of state and

other persons or entities. It found that 'it is the nature of the obligation imposed and not the identity of the actor to whom the obligation is owed which is of importance for the purposes of s 136(2) of the Companies Act.' The section therefore does distinguish between organs of state and other creditors.

[96] The high court also rejected THL's argument that the inability to suspend statutory obligations will create a preference for regulatory authorities in business rescue, contradicting its concurrent ranking in liquidation. It found that this 'is a consideration which the practitioners ought to take into account when determining whether the business is capable of rescue or whether a better return will result in liquidation.' The High Court found that the ranking therefore has no bearing on the constitutionality of s 136.

The parties' submissions

[97] The appellants have advanced the following constitutional challenge in their founding papers: first, they argue that s 136(2)(*a*) is under-inclusive and, as a result, irrational or unconstitutional. Second, they contend that it is irrational and arbitrary to allow creditors who are organs of state to demand immediate payment of debts solely on that basis.

[98] To succeed with their constitutional challenge, the appellants must establish that s 136(2) contravenes the provisions of s 9 of the Constitution, the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.[22]

[99] The appellants argue that the section arbitrarily distinguishes between debts owed to private parties and those owed to regulatory bodies, even when the obligations are of the same nature. Such differentiation is not grounded in any legitimate purpose or rational basis, resulting in inconsistent application of legal rights and obligations, and undermining the constitutional guarantee of equal treatment before the law.

---

[22] *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 para 48.

[100] To support this view, the appellants provide examples where statutory obligations, though imposed by law, are essentially private in character. These include statutory duties related to company management, municipal service fees, collective bargaining agreements, and debts within sectional title schemes. In each case, the obligations arise from legislative instruments but pertain to private or internal arrangements, not the exercise of public power or the fulfilment of broader public interests. The appellants argue that statutory origin alone does not justify elevating these obligations above those arising from purely private contracts.

[101] Specifically in the context of the SI Agreement, the appellants emphasise that payment obligations – such as fees for services rendered by SASA or redistribution of proceeds among industry participants – are contractual or quasi-contractual in nature. They are not public taxes or penalties serving the public interest but are instead obligations between defined parties within the industry. As such, the appellants contend, there is no rational or legitimate justification for affording these types of debts preferential protection over similar private obligations.

[102] The appellants maintain that not all obligations to regulatory bodies are public in nature – many are private or contractual and should not be given preferential protection. They assert that granting regulatory bodies priority in business rescue proceedings, as suggested by the respondents, creates unjustified and inconsistent treatment of creditors, contradicting the intent of the business rescue framework and the established creditor hierarchy. The appellants join issue with the high court's analogy between the SI Agreement obligations and statutory taxes, emphasising that the SI Agreement debts benefit industry participants rather than serve public interests, and should not take precedence over other creditor claims.

[103] The respondents assert that the Sugar Act establishes a statutory regulatory framework for the sugar industry, with the Minister empowered to determine and amend the terms of the SI Agreement. They contend that when the legislature promulgated the

Sugar Act, it deliberately chose a statutory framework to regulate the sugar industry, rather than relying on the law of contract as the applicants contend.

Analysis and discussion

[104] Section 9 of the Constitution guarantees the rights to equal protection, non-discrimination, and substantive equality. In terms of s 9(1), all individuals are equal before the law and are entitled to equal protection and benefit of the law. This provision mandates that persons in similar circumstances should receive similar treatment and be afforded identical rights.[23]

[105] In *Prinsloo v Van der Linde and Another*,[24] the Constitutional Court explained that a statutory distinction is under-inclusive if it fails to include all persons who are similarly situated, and that such differentiation will be arbitrary and unconstitutional if it is not rationally connected to a legitimate governmental purpose.[25] Similarly, in *Harksen v Lane NO and Others*,[26] the Constitutional Court set out the approach to equality challenges, emphasising that a law that distinguishes between people in a way that is not rationally connected to a legitimate purpose may be unconstitutional, particularly if it arbitrarily excludes persons who are in fact similarly situated.

[106] It is important to note that this principle does not require uniform treatment for all individuals in every circumstance, nor does every legal distinction constitute inequality. Section 9(1) of the Constitution does not prohibit differentiation *per se*; rather, if a challenged provision distinguishes between categories of people, the state must act rationally and differentiate only in a manner that serves a legitimate governmental objective. Arbitrary regulation or the expression of unjustifiable preferences would contravene the rule of law and the foundational principles of the constitutional state.[27]

---

[23] *Van der Walt v Metcash Trading Limited* [2002] ZACC 4; 2002 4 SA 317 (CC); 2002 (5) BCLR 454 para 24.
[24] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) (*Prinsloo*).
[25] Ibid para 24.
[26] *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) (*Harksen*) para 42.
[27] *Prinsloo* paras 24-25.

Differentiation must, therefore, bear a rational connection to a legitimate governmental purpose, failing which it would violate s 9(1) of the Constitution.

[107] When s 9(1) of the Constitution is invoked to challenge a statutory provision, two main questions arise: first, does the impugned provision create distinctions between categories of persons? Secondly, if differentiation exists, is there a rational link between the distinction made and the legitimate governmental aim it seeks to achieve? If such differentiation is justified, it does not amount to a violation of s 9(1) of the Constitution.[28] In addressing the second enquiry, two further considerations are necessary: identifying the legitimate purpose underlying the differentiation and assessing whether a rational relationship exists between the distinction and its intended purpose.

[108] An obligation owed to an organ of state may be suspended under s 136(2) if it arises from a contract or agreement. In contrast, obligations that stem from legislative schemes and are owed to individuals other than organs of state do not qualify for suspension under this provision. The crucial criterion in applying s 136(2) is thus the nature of the obligation imposed, rather than the identity of the person upon whom it is imposed. Importantly, s 136(2)(*a*) does not distinguish between organs of state and other creditors.

[109] Given that there is no differentiation among persons or categories within the scope of s 136(2)(*a*), no violation of s 9(1) of the Constitution occurs. As a result, it is unnecessary to consider whether any such differentiation bears a rational connection to a legitimate governmental objective.

[110] However, the appellants also contended before both the high court and this Court that s 136 contravenes s 9(1) of the Constitution by arbitrarily differentiating between debts owed to private individuals and those owed to regulatory bodies, even when the debts arise from identical obligations. Their submission rested on the Minister’s acknowledgement that s 136(2) distinguishes between obligations owed under a

---

[28] *Harksen* para 50.

regulatory regime to regulatory authorities and contractual debts owed to other creditors. However, the Minister asserted that s 136(2) does not differentiate between organs of state and private entities; rather, it distinguishes between regulatory obligations owed to authorities and contractual debts owed to other creditors. Both organs of state and private entities may possess debts arising either from contracts or from regulatory authorities operating within a regulatory framework. Thus, the relevant distinction is based exclusively on the source of the obligation – whether it derives from a regulatory regime or a contractual arrangement.

[111] Furthermore, the Minister provided justification for excluding statutory obligations from s 136(2)(*a*), demonstrating its rational connection to a legitimate governmental purpose. In this regard, the Minister has shown compelling social and economic reasons for protecting statutory obligations from the reach of rescue practitioners' power under the section. It is common ground that the exclusion seeks to protect, not only organs or state industry role players, but also has broader public interest objectives. The legislature is faced with the responsibility carefully to weigh tradeoffs in making policy choices. Its policy decision to maintain the statutory obligations imposed by regulatory authorities in the interests of their regulatory objectives over the rescue of companies in the more limited interests of their creditors and shareholders, cannot be impugned on the grounds of rationality.

[112] While the absence of rationality would render the impugned measure unconstitutional, in assessing rationality, the court's focus should be confined to determining whether the differentiation is arbitrary or lacks a rational link to a legitimate government purpose, without evaluating potentially superior alternatives. Courts should not scrutinise the policy choices of the legislature under the pretence of an irrationality review. The inquiry is limited to determining whether the government can articulate a logical and reasonable justification. The Constitutional Court in *Weare and Another v Ndebele NO and Others*, explained that:

'The question is not whether the government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious.'[29]

[113] Moreover, the exemption of statutory obligations from suspension under s 136(2)(*a*) is directly connected to the purpose for which the power was conferred. It also aligns with the goals of the business rescue framework in Chapter 6 of the Companies Act. These goals include rescuing financially troubled companies or ensuring better returns for creditors and shareholders. Section 136(2)(*a*) permits rescue practitioners to suspend contractual obligations while excluding statutory obligations, which are imposed by law with broader implications for industry regulation and the public interest. This distinction ensures that, although distressed companies may receive relief from certain private agreements, statutory requirements essential to the stability and fairness of – in this case – the sugar sector, remain intact. Even if this sometimes limits the possibility of fully rescuing a distressed company or maximising returns to creditors, the broader public and regulatory interests take precedence. Thus, the section advances a balance between private concerns and the overarching public interest in sustaining the industry.

[114] Ultimately, the legislative decision to exclude statutory obligations from suspension during business rescue is a rational policy choice, supporting the orderly functioning of industries and broader economic and societal interests. As I stated earlier, the related exemption for regulatory authorities in s 133(1) further ensures that statutory duties can continue to be enforced during business rescue. Accordingly, the constitutional challenge to s 136(2)*(a)* cannot be sustained.

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

1 The appeal is dismissed.

---

[29] *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (1) SA 600 (CC); 2009 (4) BCLR 370 (CC) para 46; See also: *Albutt v Center for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 3 SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) para 51.

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

J E SMITH
JUDGE OF APPEAL

Appearances:

For the Appellants:	A Subel SC, I Goodman SC and M Mbikiwa
Instructed by	Werksmans Attorneys, Johannesburg
	MDP Attorneys, Bloemfontein
For the first & second respondents:	PJ Wallis SC and LK Olsen
Instructed by:	Garlicke & Bousfield, La Lucia
	Honey Attorneys, Bloemfontein
For the third respondent:	LN Harris SC and M Mtshali
Instructed by:	The State Attorney, Durban
	The State Attorney, Bloemfontein
For the fourth and twelfth	
Respondents:	AJ Troskie and S Powell
Instructed by:	Garlicke & Bousfield, La Lucia
	Neuhoff Attorneys, Bloemfontein
For the seventh Respondent:	B Manca SC, D Robertson and C Kruyer
Instructed by:	Webber Wentzel Attorneys, Johannesburg
	McIntyre Van der Post, Bloemfontein
For the eighth Respondent:	FAS Snyckers SC and AJ D'Oliveira
Instructed by:	Cox Yeats Attorneys, Umhlanga
	Symington De Kok Attorneys, Bloemfontein.