

**GROUND-BREAKING JUDGMENT AS
COURT CLARIFIES THE PROCEDURAL
REQUIREMENTS IN SECTION 129 OF
THE COMPANIES ACT 71 OF 2008**

***Panamo Properties v Nel NNO*
2015 (5) SA 63 (SCA)**

1 Introduction

The judgment of the Supreme Court of Appeal (SCA) in *Panamo Properties v Nel NNO* (2015 (5) SA 63 (SCA)) is important because it clarifies certain controversial provisions of the Companies Act 71 of 2008 (hereinafter “the Act”) regarding the interpretation and application of section 129(1) of the Act, and the non-compliance by a company with the further requirements of sections 129(3) and (4), as well as the effect of section 129(5). In a number of cases in the various divisions of the High Court, it has been held that, where a company is placed in business rescue pursuant to a resolution of its board of directors, but thereafter fails to comply with the procedural requirements of section 129, the effect is to cause the business-rescue proceedings to terminate (see generally Rushworth “A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008” 2010 *Acta Juridica* 377). The reason for this was said to flow from the provisions of section 129(5), which provide that non-compliance with procedural formality, in terms of sections 129(3) and (4), results in the resolution placing the company under business rescue lapsing and becoming a nullity. The SCA held that non-compliance does not automatically result in the business rescue being terminated. Non-compliance is a ground for applying to court to set aside the resolution in terms of section 130(1)(a)(iii). But such resolution will be set aside only if it is otherwise just and equitable to do so, in terms of section 130(5), and the business rescue terminates in terms of section 132(2)(a)(i) once an order setting aside the resolution has been granted.

2 Facts

The Jan Nel Trust (the Trust) is the sole shareholder of the first appellant, Panamo Properties (Pty) Ltd (Panamo). Its trustees, Mr and Mrs Nel, who are also the directors of Panamo, represented the Trust in the proceedings. Panamo is a property-owning company owning a large property in Roodepoort. Mr and Mrs Nel’s home is situated on a portion of the property, and the balance is let to various commercial tenants (par 2). The property was mortgaged in favour of Firstrand Bank Ltd, but Panamo fell into arrears,

and judgment was taken against it for amounts totalling some R3.3 million, plus interest and costs. The hypothecated property was declared executable (par 2).

The Trust resolved on 19 August 2011 to place Panamo in business rescue. This decision was made in order to prevent the sale of the property, as well as to afford the Nels the time to resolve Panamo's financial problems (par 3). In September 2013, the Trust sought an order declaring that the original resolution to place Panamo in business rescue had lapsed, and consequently that the entire business-rescue process was a nullity (par 3). This was subsequent to the business-rescue practitioner (Mr Van der Merwe, the second appellant) being appointed, and subsequent to the adoption of the business-rescue plan and the sale of the property pursuant to that plan. It was undisputed that the sole purpose behind the application was to prevent the sale of the property, and prolong Mr and Mrs Nel's occupation of their home (par 3).

2 1 *Proceedings in the court a quo*

The argument on behalf of the Trust in the court *a quo* was that the Nels had failed to comply with the requirements prescribed by sections 129(3) and (4) of the Act. The argument as it went, was that section 129(5)(a) of the Act stipulates that the consequences of such non-compliance are that the resolution to begin business rescue lapses and is a nullity, and hence the entire process of business rescue in relation to Panamo had been a fruitless exercise as the underpinning for it fell away in October 2011 (par 4). The argument advanced by Mr Van der Merwe on his own behalf and on behalf of Panamo, was that section 129(5)(a) of the Act does not have this drastic effect. Mr van der Merwe argued that the provisions of section 129(5)(a) must be read in light of section 130 of the Act which in effect deals with the circumstances in which a court may be asked to set aside a resolution to place a company under business rescue. According to the argument, those provisions limit both the time within which a resolution to place a company under business rescue may be challenged and, if such an application is brought timeously, the parties who may bring such an application too. Mr Van der Merwe also submitted that an application would only succeed if the court thought it just and equitable to set aside the resolution, and bring the business-rescue process to an end (par 6).

Khumalo J in the court *a quo* stated that the Nels had "strung along" the other parties to the business-rescue process, and delayed bringing the application until, for selfish reasons, they realized that there was no other way in which to prevent the transfer of the property to the purchaser. According to the Judge the actions by the Nels were a detriment to the company, and had resulted in a disastrous outcome. Khumalo J accordingly held that the resolution to commence business-rescue proceedings and place Panamo under supervision of a business-rescue practitioner, had lapsed and was a nullity. Khumalo J held further that the appointment of Mr Van der Merwe as the business-rescue practitioner was void (*Nel NO v Panamo Properties (Pty) Ltd* 2013 JDR 2330 (GNP) par 26–38).

3 Issue

The SCA had to consider whether there was non-compliance with the procedural requirements in section 129 of the Act and, if so, what is the implication on the business-rescue resolution. The SCA had to further determine whether the business-rescue resolution would lapse and be nullified as a result of the non-compliance. The court had to consider whether the provisions of section 130(1) and (2) and (5)(a) of the Act can be invoked in these circumstances, and if in the affirmative, would an affected party be able to apply to court to set aside the business-rescue resolution as per the provisions of section 130(2) of the Act (par 1–2).

4 Judgment

Wallis JA, (Navsa ADP, Majiedt and Zondi JJA, and Dambuza AJA, concurring) held that the termination of business-rescue proceedings is specifically dealt with in section 132(2) of the Act (par 28). The provision itself does not state that the lapsing of the initiating resolution will cause the business-rescue process to terminate (par 28). Instead section 132(2)(a)(i) states that business rescue is terminated on the setting aside of the initiating resolution. Wallis JA, held that section 130 of the Act provides for an affected party to apply to court for the initiating resolution to be set aside in certain circumstances, including non-compliance with the procedural requirements which are set out in section 129 of the Act (par 29). Wallis JA, held that the court will only grant and order setting aside the initiating resolution if it were satisfied on a consideration of all the circumstances, and if it were just and equitable to do so (par 32).

Wallis JA stated that this approach is favoured because it largely precludes litigants, whether shareholders and directors of the company, or creditors, from exploiting technical issues in order to subvert the business-rescue process, or turn it to their own advantage (par 34). According to the Judge once it is recognised that the resolution may be set aside, and that it is just and equitable for the business rescue to be terminated, the scope for raising technical grounds to avoid business rescue will be greatly restricted (par 34). The appeal was accordingly upheld with costs (par 35).

5 Discussion

The Act creates a system of corporate or business rescue that is appropriate to the needs of the modern South African economy. Section 7(k) of the Act states that one of the purposes of the Act is to provide for the efficient rescue and recovery of financially-distressed companies, in a manner that balances the rights and interests of all relevant stakeholders. From the definition of “business rescue” in section 128(1)(b) it is clear that any one of two outcomes of business rescue will be seen as a successful rescue of an ailing company. The primary objective of the business-rescue procedure is to ensure that the company will be able to return to trade on a sound financial footing after the business-rescue plan has been implemented (Joubert “Reasonable Possibility *Versus* Reasonable Prospect: Did Business

Rescue Succeed in Creating a Better Test than Judicial Management?" 2013 *Journal of Contemporary Roman-Dutch Law* 554; and Cassim *et al Contemporary Company Law* 2ed (2012) 861). There are two routes through which a company may enter business rescue, namely, by way of a resolution of its board of directors (s 129(1)), or by way of a court order (s 131(1)). This case is concerned with the former.

Section 129 of the Act provides that:

- (1) Subject to subsection (2)(a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that –
 - (a) the company is financially distressed; and
 - (b) there appears to be a reasonable prospect of rescuing the company.
- (2) A resolution contemplated in subsection (1) –
 - (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
 - (b) has no force or effect until it has been filed.
- (3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must –
 - (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and
 - (b) appoint a business rescue practitioner who satisfies the requirements of section 138, and who has consented in writing to accept the appointment.
- (4) After appointing a practitioner as required by subsection (3)(b), a company must –
 - (a) file a notice of the appointment of a practitioner within two business days after making the appointment; and
 - (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.
- (5) If a company fails to comply with any provision of subsection (3) or (4) –
 - (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
 - (b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.
- (6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2).
- (7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section."

Under section 129(1) the board of a company may resolve to begin business-rescue proceedings if it has reasonable grounds for believing that the company is financially distressed, and there appears to be a reasonable prospect of rescuing the company (par 9). Such a resolution may not be

adopted if liquidation proceedings have been initiated against the company. Once a resolution is taken it only becomes effective when it is filed with the Companies and Intellectual Property Commission, Republic of South Africa (CIPCSA) (par 9; and see also Delpont and Vorster (authors, with other contributors) *Henochsberg on the Companies Act 71 of 2008 Issue 11* (2011) 460).

Once the resolution has been filed with the CIPCSA the company is obliged to take certain steps (see s 129(3) and (4) above). In this case it was common cause that there was a degree of non-compliance with these provisions (par 10). The statutory notice sent to the creditors of Panamo was not accompanied by a sworn statement of the facts relevant to the grounds on which the board resolution was founded; Mr Van der Merwe was not appointed within the prescribed time period; and, the notice of his appointment was not published to all affected parties. The Nels based their application on these shortcomings (par 10).

Section 130 of the Act expressly deals with objections to a company resolution to commence business rescue. The provisions that are relevant to the present case are as follows:

- “(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order –
- (a) setting aside the resolution, on the grounds that –
 - (i) there is no reasonable basis for believing that the company is financially distressed;
 - (ii) there is no reasonable prospect for rescuing the company; or
 - (iii) the company has failed to satisfy the procedural requirements set out in section 129;
 - ...
 - (2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of –
 - (a) subsection (1)(a) to set aside that resolution; or
 - (b) ...
 unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.”

Section 130 provides for three grounds upon which to set aside a business-rescue resolution. The first two relate to a situation where the grounds for passing such a resolution, as set out in section 129(1) are absent, and the third is that the procedural requirements of section 129 have not been observed (par 12). In other words, the first two bases for challenging a resolution mirror the grounds for passing the resolution, set out in section 129(1), and the third raises the issue of non-compliance with the obligations imposed on the company by section 129 consequent upon passing the resolution and filing it with CIPCSA (par 12). According to Wallis JA, if the grounds for passing such a resolution are not present then it is appropriate to have a mechanism for setting it aside. If the procedural requirements to be followed once a resolution has been passed and filed

with CIPCSA are not followed, that may indicate that there is no genuine intention to follow the process through to a successful conclusion, and it is appropriate for there to be a mechanism to set it aside (par 12).

There are time constraints for bringing such an application. An application to set aside the resolution may be brought at any time after the date of adoption of the resolution, but, once a business-rescue plan has been adopted, the time for challenging a resolution is past. Wallis JA, stated that whatever flaws may have been present before that time, become of purely historical importance thereafter (par 13).

Certain people are excluded from challenging a resolution and having it set aside. A director of a company, for instance who voted in favour of such a resolution, is precluded from bringing such an application, unless they can show that in doing so they acted in good faith on information furnished to them that was false or misleading (par 14). It is not open for a director to simply have a change of heart in the light of altered circumstances. A director, on the other hand who opposed the resolution, is not so restricted, whether he/she has brought the application as a shareholder or as a creditor. This is the reason why the resolution can be challenged at any time after it has first been passed, even if it has not yet been filed with CIPCSA (par 14). A dissentient director may immediately challenge the resolution, and argue that there is no reasonable ground for believing that the company is financially distressed or, if it is, that there is no reasonable prospect of rescuing it. In addition the section clearly contemplates that such a director, or any other affected person, may bring such an application on the basis that there has been non-compliance with the procedural requirements of section 129. That fact immediately indicates that the lapsing and nullity, arising from such non-compliance, may be less than absolute (par 14).

The application by the Trust aimed at setting aside the resolution, was brought after the adoption of the business-rescue plan, which would not be permissible in an application under section 130. In addition to this Mr and Mrs Nel, the persons who as the directors of Panamo, passed the resolution to place it under business rescue, brought the application to set aside the resolution (par 15). They would not have been entitled to bring an application under section 130, and it is an open question whether section 130(2) would permit them to do so by making the Trust the applicant rather than themselves (par 15). However, if they were permitted to do so, that would clearly be contrary to the underlying purpose of section 130(2), which is that those responsible for placing the company in business rescue should not be entitled to challenge that decision merely because they have changed their minds, much less because it suits their private interests to do so. If it were permissible for the Nels to nonetheless bring such an application, it would undoubtedly be a factor that a court would seriously take into account in considering what was just and equitable under section 130(5)(a)(ii) (par 15).

It was contended by the Trust that it was not obliged to follow the route of an application to court under section 130(1)(a)(iii), because such a challenge was unnecessary in the light of section 129(5)(a) (par 16). The Trust contended further that the effect of its non-compliance with the provisions of sub-sections (3) and (4) of section 129 was that the resolution commencing business rescue in relation to Panamo lapsed and became a nullity, thereby

bringing the business-rescue proceedings to an end. This was so, irrespective of the fact that the non-compliance flowed from the Trust's own failures to comply with these requirements, and without any need to invoke the provisions of section 130 (par 16).

As will be seen below, there have been a number of decisions in various divisions of the High Court that have dealt with the issues and arguments raised in the present case. In *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS* (GNP case no 72522/11), Fabricius J implied that an inevitable consequence of the resolution having lapsed would be that the business-rescue process would terminate. The Judge concluded (par 27) that:

"It is clear from the relevant sections contained in chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the resolution beginning rescue proceedings. The purpose of s 129(5) is very plain and blunt. There can be no argument that substantial compliance can ever be sufficient in the given context. If there is non-compliance with s 129(3) or (4) the relevant resolution lapses and is a nullity. There is no other way out, and no question of any condonation or argument pertaining to 'substantial compliance'" (see also *Madodza (Pty) Ltd (in business rescue) v ABSA Bank Ltd* (GNP Case 38906/12); *Homez Trailers and Bodies (Pty) Ltd (under supervision) v Standard Bank of South Africa Ltd* (GNP case no 35201/2013); *ABSA Bank Ltd v Ikageng Construction (Pty) Ltd* (GNP Case no 61235/2014; and in *Newton Global Trading (Pty) Ltd v Corte* [2014] ZAGPPHC 628 Fourie J, held that the nullity dates back to the date of the original resolution and could not be remedied by a further resolution (par 12).

This approach, however, has not been universally accepted. In *Ex Parte Van den Steen NO (Credit Suisse Group AG Intervening)* (2014 (6) SA 29 (GJ)), Rautenbach AJ, held that Fabricius J, was dealing only with non-compliance with time limits in regard to the appointment of a business-rescue practitioner, and not to other aspects of sub-sections (3) and (4). He accordingly held that, where there had been substantial compliance with those provisions, section 129(5) did not operate to nullify the resolution (par 11; see also *MAN Financial Services SA (Pty) Ltd v Blouwater Boerdery CC* (GNP case no 72522/2012); in *ABSA Bank Ltd v Caine NO* [2014] ZAFSHC 46 Daffue J, pointed out that Fabricius J, had not given consideration to the provisions of s 130(1)(a)(iii), and that his construction led to anomalies as between s 129 and 130, par 24–26; see also *Vincemus Investments (Pty) Ltd v Louhen Carriers CC* 2013 JDR 0881 (GNP), when the proceedings were adjourned, but on the adjourned date the approach in *Advanced Technologies* was followed; and see *Vincemus Investments (Pty) Ltd v Louhen Carriers CC* GNP case no 16550/2013 dated 5 November 2013).

Wallis JA stated that the approach followed by Daffue J, in *ABSA Bank Ltd v Caine NO* (*supra*) was correct, and that it is supported by a passage from Henochsberg, where the author had identified an identical problem that arose in the present case. According to Henochsberg:

"The practical consequences of the resolution that 'lapses and is a nullity' are uncertain ... From the wording of the section it would appear that the resolution lapses and becomes a nullity automatically, without any intervention from outside parties. From a practical perspective this could create a number of problems, especially if this has been done intentionally by the company in

order to gain the protection of Chapter 6 for a brief period of time, only to exit the procedure due to the resolution lapsing and becoming a nullity at a later date. This could also have unintended consequences where non-compliance with the notice and publication requirements has been minor and unintentional ... It is not clear whether non-compliance in such circumstances means that the business-rescue process lapses and becomes a nullity, even if the business-rescue plan has already been adopted, and is in the process of being implemented" (Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008 Issue 11 463*).

As far as the relationship between section 129(5)(a) and section 130(1)(a)(iii) was concerned the author in *Henochsberg* stated that it is difficult to align the apparent automatic lapsing of a business-rescue resolution under the provisions of section 129(5) with the provisions in section 130(1)(a)(iii) (Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008 Issue 11 464*).

According to Wallis JA, the approach of Fabricius J, in *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Technologies Embarquées SAS (supra)* appears to inhibit the operation of section 130(1)(a)(iii). There is no point in bringing an application to set aside a resolution on the grounds of non-compliance with the procedural requirements of section 129 if that resolution has already lapsed and been rendered a nullity, and the process of business rescue has, as a result, come to an end. It was submitted by counsel that this obstacle could be dealt with if it were to be accepted that section 129(5)(a) deals with non-compliance with the requirements of section 129(3) and (4), while section 130(1)(a)(iii) operates in respect of non-compliance with other procedural requirements in section 129 (par 20).

Wallis JA was not willing to accept this submission because he was not of the view that the expression "procedural requirements" in section 130(1)(a)(iii) extends to any matter beyond the steps set out in section 129(3) and (4). The phrase "procedural requirements" must refer to obligations of an administrative or procedural nature imposed upon the company. The steps that have to be taken under section 129(3) and (4) fall naturally in this category. It was submitted by counsel that it would amount to a failure to comply with the procedural requirements of section 129(1) of the Act in instances, where a resolution to commence business rescue was passed without the board of directors having been properly constituted (see *DH Brothers Industries (Pty) Ltd v Gribnitz NO 2014 (1) SA 103 (KZP) par 16*). Wallis JA stated that this was in his view an incorrect conclusion. According to Wallis JA, the consequence of the board's not having been properly constituted, (which was not what occurred in the present case), would be that the resolution was not a resolution of the board of directors. As such it was a nullity and ineffective for the purpose of commencing business-rescue proceedings (par 22). Equally, in the absence of such a resolution, there was nothing to set aside in terms of section 130(1)(a)(iii). Wallis JA, stated that the court in *DH Brothers Industries (Pty) Ltd v Gribnitz NO (supra)* could and should have made a declaration to that effect, but in doing so it would not have been acting in terms of section 130(1)(a)(iii) (par 22).

A resolution adopted by the majority would be enough to commence business-rescue proceedings (Delpont and Vorster *Henochsberg on the*

Companies Act 71 of 2008 Issue 11 464). But if the board was not properly constituted, or if so constituted, does not take the resolution as required by the Act or Memorandum of Incorporation as set out in section 73(2) of the Act, then the consequence would be that the resolution taken would be a nullity and ineffective for the purpose of commencing business-rescue proceedings (Delport and Vorster *Henochsberg on the Companies Act 71 of 2008 Issue 11 455*).

Wallis JA stated that the passing of a resolution to commence business rescue cannot readily be described as a procedural requirement. It is merely the substantive means by which the company may take that step (par 23). The board is under no obligation at all to take such a resolution, although, if it is financially distressed, it may be obliged to inform shareholders and creditors of the reasons for not doing so (s 129(7) of the Act). It cannot then be described as a “requirement”, much less a procedural requirement (par 23). The obvious and sensible meaning of the expression “procedural requirement” in section 130(1)(a)(iii) is that it refers to the procedural requirements in sections 129(3) and (4). But, if the resolution lapses and becomes a nullity in consequence of such non-compliance, and this brings an end to the business-rescue process, as has been held in the High Court judgments mentioned above, no purpose would be served by a provision that empowered a court to set it aside (par 24).

The language of section 129(5)(a) at first reading may suggest that there is an absolute and immediate nullity of the resolution if there is non-compliance with the requirements of section 129(3) and (4). According to Wallis JA, in order for a court to deal with the anomaly that such a reading of the statute appears to create, would be to have regard to certain basic principles of statutory interpretation (par 25).

The courts have stated that the inevitable point of departure in interpreting a statute is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par 1, and see also par 8). This is supported by Delport and Vorster (*Henochsberg on the Companies Act 71 of 2008 Issue 11 455*) who state that a court will, in the first instance, endeavour to give a meaning to every word and every section in the statute, and not lightly construe any provision as having no practical effect, as well as in the second instance, and most relevant for present purposes, that, if the provisions of the statute that appear to conflict with one another are capable of being reconciled, then they should be reconciled. It must be noted that, if the words of the relevant provision are unable to bear the contended meaning, then that meaning is impermissible (see *Firstrand Bank Ltd v Land and Agricultural Development Bank of South Africa* (436/2013) [2014] ZASCA 115; 2015 (1) SA 38 (SCA); [2014] 4 All SA 425 (SCA) (18 September 2014) par 27). It is also important to note that section 39(2) of the Constitution of the Republic of South Africa, 1996, which compels an interpretation of legislative provisions in the light of the values enshrined in the Bill of Rights, applies only where the language of the statute is not unduly strained (*South African Airways (Pty) Ltd v Aviation Union of South*

Africa 2011 (3) SA 148 (SCA) par 25–26).

In order to prevent anomalies that may arise in the interpretation of the relevant provisions of statutes a court will endeavour to give a meaning to every word and every section in the statute, and not lightly construe any provision as having no effect (*Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 436; and *Commissioner for Inland Revenue v Shell Southern Africa Pension Fund* 1984 (1) SA 672 (A) 678C–F). In instances where the provisions of the statute appear to conflict with one another but they are capable of being reconciled, then they should be reconciled (*Minister of Interior v Estate Roos* 1956 (2) SA 266 (A) 271B–C; and *Amalgamated Packaging Industries Ltd v Hutt* 1975 (4) SA 943 (A) 949H). Wallis JA, stated that in this case it was possible to reconcile section 129(5)(a) and section 130(1)(a)(iii) without doing damage to the language used by the legislature (par 27).

The SCA in *Panamo Properties (Pty) Ltd v Nel NNO* (*supra*) determined the effect on business-rescue proceedings if there was non-compliance with the procedural requirements. According to Delpont and Vorster (*Henochsberg on the Companies Act 71 of 2008 Issue 11* 463) the basis of the reasoning in *Panamo Properties (Pty) Ltd v Nel NNO* (*supra*) were the requirements in section 132(2)(a)(i) of the Act in respect of the termination of business-rescue proceedings. In terms of section 132(2)(a)(i) business rescue-proceedings terminates when the court sets aside the resolution that commenced those proceedings; in other words, when a court grants an order in terms of section 130(5)(a) of the Act (par 28). The effect of such an order is not merely to set the resolution aside, but to terminate the business-rescue proceedings. *A fortiori* it follows that until that has occurred, even if the business-rescue resolution has lapsed and become a nullity in terms of section 129(5)(a), the business rescue commenced by that resolution has not terminated. Business rescue will only be terminated when the court sets the resolution aside. According to Wallis JA, the assumption underpinning the various High Court judgments to the effect that the lapsing of the resolution terminates the business-rescue process is inconsistent with the specific provisions of the Act (par 28). None of the High Court judgments referred to section 132(2)(a)(i); see also Delpont and Vorster (*Henochsberg on the Companies Act 71 of 2008 Issue 11* 464).

Once it is appreciated that the fact that non-compliance with the procedural requirements of section 129(3) and (4) might cause the resolution to lapse and become a nullity, but does not terminate the business rescue, the legislative scheme of these sections becomes clear. The company may initiate business rescue by way of a resolution of its board of directors that has been filed with CIPCSA. The resolution, and the process of business rescue that it commenced, may be challenged at any time after the resolution was passed and before a business rescue plan is adopted on the grounds that the preconditions for the passing of such resolution are not present (par 29; Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008 Issue 11* 464). In instances where there is non-compliance with the procedures to be followed once business rescue commences, the resolution lapses and becomes a nullity, and is liable to be set aside under section 130(1)(a)(iii) (par 29). In all cases the court must be approached for the

resolution to be set aside and business rescue to terminate. That avoids the absurdity that would otherwise arise of trivial non-compliance with a time period bringing about the termination of the business rescue, but genuine issues of whether the company is in financial distress, or capable of being rescued having to be determined by the court (par 29; and Delpont and Vorster *Henochsberg on the Companies Act 71 of 2008 Issue 11* 464).

Wallis JA stated that section 130(5)(a)(ii) of the Act does not create a separate substantive ground for setting aside the business resolution. According to Wallis JA, the word “otherwise” is used in this context to convey that, over and above establishing one or more of the grounds set out in section 130(1)(a), the court needs to be satisfied that, in the light of all the facts, it is just and equitable to set the resolution aside and terminate the business-rescue proceedings (par 31).

Under section 129 of the Act the company initiates the business-rescue process and takes the procedural steps that must be followed. Under section 130 an affected person, excluding, save in special circumstances, a director who voted in favour of the resolution, may, during the period from the date of the resolution until the date of acceptance of a business-rescue plan, apply to set the resolution aside either on substantive or procedural grounds. Such an application is made to court, and the applicant must not only establish the statutory grounds, but also satisfy the court that it is just and equitable that the resolution be set aside. If the court grants such an order it will terminate the business-rescue proceedings (par 33). Once it is recognized that the resolution may be set aside and the business rescue terminated, if it is just and equitable to do so, the scope for raising technical grounds to avoid business rescue will be greatly restricted, although it may not disappear altogether (par 34). The advantage of this approach is that it largely precludes litigants, whether shareholders and directors of the company or creditors, from exploiting technical issues in order to subvert the business-rescue process, or turn it to their own advantage (par 34).

6 Conclusion

Business-rescue proceedings under the Act are intended to provide for the efficient rescue and recovery of financially distressed companies, the temporary supervision of the company and its business by a business-rescue practitioner, a moratorium on the rights of claimants against the company and, importantly, the development of a business-rescue plan aimed at restructuring a company in order that it can operate on a solvent basis (Van Huyssteen *An Overview of the Business Rescue Moratorium Contained in Section 133 of the Companies Act 71 of 2008* (unpublished LLM (Commercial Law) dissertation, University of Johannesburg 2012) 6–7; and Kloppers “Judicial Management – A Corporate Rescue Mechanism In Need of Reform?” 1999 10 *Stellenbosch LR* 429). Unfortunately, the objectives of the statutory provisions dealing with business rescue have not been clearly drafted. This has resulted in confusion and has provided scope for litigious parties to exploit inconsistencies in the legislation. The SCA in *Panamo Properties (Pty) Ltd v Nel NNO* (*supra*) is likely to have profound

positive implications for the business-rescue industry. This is because the court adopted a purposive approach and clarified and guided the way in which chapter 6 of the Act must be interpreted in the future (see generally Pretorius and Rosslyn-Smith “Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation 2014 18 *Southern African Business Review* 108–139; and see also Elliot and Weyers “Hot off the Business Rescue Press” 2015 *Without Prejudice* 10). The court in essence reconciled section 129(5)(a) of the Act with sections 130(1)(a)(iii) and 132(2)(a)(i), and adopted an interpretation of these provisions that is both sensible and practical in their application. This will prevent business-rescue proceedings from being stultified by creditors, or those who stand behind the company, in the form of its shareholders and directors, on the basis of technical arguments that hinder and subvert the purpose of business rescue (see section 7(2)(k) of the Act).

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