The Neglect of Minority Creditors

Kransfontein Beleggings (Pty) Ltd V Corlink Twenty-Five (Pty) Ltd 2017 Jdr 1577 (SCA)

Mbuh Ndoh*
LLB LLM
University of Johannesburg
Johannesburg, South Africa

Received: 26 May 2025
Revised: 3 June 2025, 26 June 2025 & 4 July 2025
Approved: 19 September 2025

Summary

This case note critically analyses the Supreme Court of Appeal's decision in the matter of *Kransfontein Beleggings v Corlink Twenty-Five (Pty) Ltd* (2017 JDR 1577 (SCA)) and its implications for the status of minority creditors in business rescue proceedings in South Africa. The central issue in this case is whether a business rescue plan which had already been adopted and partially implemented may be lawfully and unilaterally amended to accommodate a minority creditor who had not been notified of business rescue proceedings, as required in section 129(3) of the Companies Act 71 of 2008. The court dismissed the applicant's claim based on procedural irregularities such as a non-joinder, further declining to partially set aside or amend the plan post-implementation. The note asserts that the court's judgment failed to uphold the principles of procedural fairness, creditor equality and *concursus creditorum* which require the collective consideration of all the creditors' interests in the drafting of the business rescue plan. It critiques the pragmatic judicial restraint applied and highlights the absence of meaningful remedies that offer protection to minority creditors under current legislation. Moreso, it analyses the decision of the court within the broader context of South

* Mbuh Ndoh, final year LLB student, University of Johannesburg.

African constitutional values and the United Nations Sustainable Development Goal 16 which promotes peace, justice, and strong institutions. Ultimately, the note contends that the court missed an opportunity to strengthen the legitimacy and fairness of the business rescue regime by refusing to rectify a procedural irregularity that led to the exclusion of a legitimate creditor from substantive participation in business rescue proceedings.

Keywords:

1. Introduction

No business entity is an island; it is factually impossible for a company to exist in isolation. This phenomenon is advantageous because the involvement of other parties in a business translates to a broader pool of resources and expertise, enabling the company to thrive – however, it is disadvantageous because the financial position of the business is of interest to all its stakeholders. This includes employees, creditors, and shareholders. Business rescue is a fundamental arm of corporate law as it gives room for the rehabilitation of financially distressed companies. It was established in *Swart v Beagles Investments 25 (Pty) Ltd* (2011 5 SA 422), that the business rescue plan lies at the core of business rescue procedures, as it is aimed at producing the best returns for the company's creditors. In *Kransfontein Bellegings v Corlink Twenty-Five* (2017 JDR 1577 (SCA)) (hereinafter "*Kransfontein*"), the court made a pronouncement on the nature of the business rescue plan and when it may be amended. This paper illustrates the court's failure to protect the interests of a company's creditors, resulting in the prejudicial treatment of minority shareholders in business rescue proceedings. It will first outline the facts of the *Kransfontein* matter, the court's reasoning, and the court's judgment. Secondly, it will highlight the significant role of business rescue in the commercial landscape. Thirdly, it will discuss the principle of *concursus creditorum* as a backdrop for the equal protection of creditors. Fourthly, it will discuss the existing gap in the law governing business rescue proceedings. Finally, the contribution will scrutinise the court's approach to judicial restraint

and the court's failure to uphold the United Nations' sustainable development goals.

2. Overview of the *Kransfontein Bellegings* case

The central question in this matter was whether a business rescue practitioner can lawfully and unilaterally amend a business rescue plan that has been duly adopted. The court was tasked with deciding whether it may "partially set aside and then amend an adopted business rescue plan to alter its operation in relation to one or more of the creditors" (par 17). The applicant was a secured creditor of the first respondent (Corlink). The applicant held the registered bond of a general and special notarial bond in terms of the Security by Means of Movable Property Act 57 of 1993 over movable property owned by Corlink (par 2).

Corlink eventually became financially distressed and passed a resolution placing it in business rescue in terms of section 129(1)(*b*) of the Companies Act 71 of 2008 (hereafter "the Act"). Two business rescue practitioners were appointed to this effect (par 4). A business rescue plan was then prepared at a creditors' meeting; however, the applicant was not invited to this creditors' meeting. The attorney of the applicant then informed the practitioners of the applicant's status as a creditor of Corlink by virtue of the notarial bond, with a request to be added to the drafting and adoption of the business plan (par 4). Despite this fact, the first business rescue plan published by the practitioners did not include the applicant's claim. The creditors resolved to adjourn the meeting to allow the practitioners to rectify the omission. A second meeting was held, and the revised plan was presented to the creditors. However, the revised plan did not include the applicant as a creditor. To this effect, the representative of the applicant voted against the adoption of this plan (par 5). The plan dictated that the majority of Corlink's assets be given to the fifth respondent (ABSA) and sixth respondent (GWK) together with a concurrent shortfall. The plan also dictated that the concurrent creditors would forfeit their settlement if Corlink was liquidated.

The applicant then launched an urgent application before the Free State Division of the High Court, Bloemfontein, to interdict

the implementation of the plan and to request a declaration of invalidity in respect of the plan (par 7). ABSA and GWK were joined as respondents in these proceedings. In their defence, they raised, amongst other things, the non-joinder of the other creditors of Corlink. The High Court consequently dismissed the application with costs (par 11).

The applicant appealed this decision in the Supreme Court of Appeal. This court agreed with the court *a quo* regarding the issue of the non-joinder of the other creditors. The court relied on *Absa Bank Limited v Naude NO* (2016 6 SA 540 (SCA)), where the court held that if the creditors who voted in support of the plan were not joined in the proceedings, their position would be prejudicially affected. Their position with respect to the plan would change; the amount that they believed they would receive would be changed, and any amount they would have already received would have to be repaid. The court added that they were under no obligation to allow the applicant an opportunity to join the creditors that were left out, as the applicant had the opportunity to do so but did not (par 16).

The court also dissected the other reasons for the dismissal of this matter in the court *a quo*. These include the fact that the applicant did not rely on their initial claim to request the court to set aside and amend an already adopted business rescue plan, even though it had already been implemented. The court reasoned that, should the relief sought by the applicant be granted, the implementation of the business rescue plan would then result in the applicant receiving the entire ringfenced amount and GWK receiving a significantly smaller amount than dictated by the plan; however, this result is not what had been agreed upon by the plan. The court therefore dismissed the leave to appeal with costs (par 22).

3. Significance of business rescue

Business rescue is integral to the success of the South African commercial landscape. Section 128(1)(*b*) of the Act defines "business rescue" as "proceedings to facilitate the rehabilitation of a company that is financially distressed…". The solvent continuity of the company is of paramount importance and is an indicator of the success

of business rescue. This provision of the Act provides that business rescue is administered through three pillars; temporary supervision, temporary moratorium, and the development and implementation of a plan to rescue the company. Temporary supervision involves the management of the company's affairs and assets for the duration of business rescue. Temporary moratorium, on the other hand, involves putting a pause on the rights of the company's creditors. Section 128(1)(*b*) of the Companies Act defines the purpose of business rescue. These include: ensuring the continued existence of the company on a solvent basis and ensuring better returns for the company's creditors.

Section 7(k) of the Act provides that should a company find itself in a position of financial distress, the courts are mandated to give preference to business rescue over liquidation. Business rescue involves proceedings aimed at facilitating the rehabilitation of financially distressed companies (see Rosslyn-Smith *Critical Elements for Decision Making in Business Rescue Plans* (2014 thesis UP)). Lastly, the business rescue plan is aimed at restructuring the business affairs, debt, and property in a manner that will ensure the business continues existing on a solvent basis. Throughout this process, the management of the company is held with business rescue practitioners who are skilled in the reorganisation and rehabilitation of these companies.

As established above, the solvent continuity of the business is a key aim of business rescue proceedings. This is illustrated in the fact that it is possible to apply for the commencement of business rescue proceedings even after a final liquidation order has been granted against the company. This is illustrated in the case of *Richter v Absa Bank Limited* (2015 5 SA 57 (SCA)), wherein the manager of a company that had been placed under final liquidation, applied to the High Court seeking an order to have the business placed under business rescue (par 2). The manager brought this order in terms of section 131 of the Act, which provides that the application for business rescue proceedings will suspend liquidation proceedings. This was opposed by Absa Bank who was a creditor of the business. Absa Bank argued that the business could not be placed under business rescue because

liquidation proceedings had begun (par 3). The Supreme Court of Appeal held that the words "liquidation proceedings" in section 131(6) of the Act refers to the entire process of winding up and not just the period before the final liquidation order (par 12), declaring that a business rescue application may be brought in even after the final liquidation order (par 19).

This is confirmed in *GCC Engineering v Lawrence Maroos* (2019 2 SA 379 (SCA)) where the court held that: "An application for business rescue does not terminate the office of provisional liquidators nor does it result in the assets and management of the company in liquidation re-vesting in the directors."

In this analysis of the *Kransfontein* case, it is essential to determine whether a business is financially distressed, as this is the precursor to a company that qualifies for business rescue. A company is financially distressed should it appear to be reasonably unlikely to pay its debts as they fall due and payable or be reasonably likely to become insolvent, within the next six months (Smith, Van der Linde and Calitz *Hockly's Law of Insolvency Winding-Up and Business Rescue* (2022)). A company may enter into business rescue proceedings in two ways: by means of an application brought in by an affected person or by means of a resolution by the company. The directors of *Kransfontein* entered into business rescue proceedings by means of a resolution (par 4).

The prescribed procedure governing the administration of business rescue proceedings by means of a resolution contained in section 129(3) of the Act holds that within five days of filing the resolution, the company must publish a notice of the resolution and the effective date of the resolution to every affected person. Affected persons included, amongst others, shareholders, employees and creditors.

4. Non-recognition of concursus creditorum

The South African constitution places emphasis on the values of *Ubuntu*, togetherness and equality for all (*S v Makwanyane* 1995 3 SA 391 (CC)). It is with this in mind that one must introduce the principles of *concursus creditorum* in analysing the court's reasoning in

the *Kransfontein* case. This principle was established in *Walker v Syfret NO* (1911 AD 141), where the court determined that the rights of all the creditors are frozen and must be considered collectively. *Concursus creditorum* is a term which refers to a collective body of creditors. Companies are meant to act collectively rather than individually in pursuing their claims against the insolvent estate (see Prinsloo "Understanding concursus creditorium in liquidation in South Africa" 2023 *Empower Law*, available at https://www.empowerlaw.co.za/understanding-concursus-creditorum/). It further suggests that the affairs of the company be administered for the benefit of all the creditors, ensuring that the creditors are treated as one body. A key feature of *concursus creditorum* is to prevent the preferential treatment of any of the creditors. In this way, no creditor is allowed an unfair advantage over a fellow creditor (Chitimira "Some thoughts on the meaning and application of commercial insolvency in winding-up proceedings involving contingent creditors – *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA)" 2017 *Obiter* 454). Although one may argue that this phenomenon is primarily grounded in liquidation proceedings and is established once a company is liquidated, it is relevant to this discussion because the aim of business rescue is also to protect the joint interests of the creditors.

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (2013 4 SA 539), the court was tasked with making a pronouncement on a scenario where the implementation of the business rescue plan may not be completely fair to dissenting minority holders. It was confirmed that business rescue is meant to be interpreted with recognition for the protection of creditors (Richard "Lending a helping hand – the role of creditors in business rescues?" 2013 *De Rebus* 22). Furthermore, legislation does not make provision for a remedy for creditors who have been unfairly prejudiced by the implementation of the business plan (Kekana, Pretorius and Abreu "Enhancing creditor decision-making in South African business rescue proceedings: a comprehensive analysis of information requirements in business rescue plans" 2024 *International Journal of Law and Management*). It is important to note that the law offers neither protection nor a remedy to creditors whose interests have been prejudiced. It is even more concerning that there is no avenue

for an enquiry to determine whether the creditor has suffered the harm that they claim to have suffered.

The question then arises as to whether this phenomenon was evident in the *Kransfontein* judgment. The new business rescue regime provides that, although not of paramount importance, the interests of creditors are afforded suitable protection during insolvency proceedings. One then questions why the court made little to no effort to recognise and protect the rights of the applicant in this matter. Two competing interests are made manifest; the interests of the applicant who has not made any contribution to the drafting of the already adopted business rescue plan, and the interests of the other creditors whose interests will be affected by the halting and amendment of the adopted business rescue plan. The court's reluctance to allow the amendment of the business rescue plan in order to accommodate the interests of the applicant is in direct contrast to this principle and further enables the exclusion of the applicant in business rescue proceedings.

5. The shortcomings of the law governing business rescue proceedings

The business rescue plan is intended to represent the interests of all of the company's creditors. It is for this reason that the creditors vote in support of a proposed plan before it is adopted and subsequently implemented (Anderson "Viewing the proposed South Africa business rescue provisions from an Australian perspective" 2008 *PELJ* 1). The creditor's votes will be proportional to their voting rights; the creditor with the majority voting rights having the majority vote. Some may argue that this brings about inequality with how the creditors rights are protected and this may have a prejudicial result on creditors, such as the applicant in the *Kransfontein* matter. Should the business plan not be suitable for all the creditors, section 152(1)(*d*) makes provision for it to be referred to the business rescue practitioners for amendment. The business plan, once adopted, becomes binding on the creditors of the company. Tension now arises when a particular creditor raises dissatisfaction with the business rescue plan and

seeks for it to be amended after it has already been adopted and is in the process of implementation.

Although being an important element in business rescue proceedings, business rescue practitioners are not the be-all, end-all as far as business rescue is concerned. In *Booysen v JonkheerBoerewynmaker (Pty) Ltd* ([2017] 1 All SA 862 (WCC)), the court illustrated the role of the business rescue practitioner, highlighting that the business rescue practitioner may not amend the business rescue plan after it has been adopted by the creditors. The participation of the creditors in the adoption of the business rescue plan is central. It is problematic that the participation of all the creditors is not central to the adoption of the business rescue plan. Section 152(4) holds that, once adopted, the business rescue plan is binding on the company, each of its creditors, and every holder of the company's securities, regardless of whether the creditor participated in the drafting and adoption of said business plan. This provision specifically provides that:

> "(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person— (a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company."

This raises a red flag for every reasonable legal practitioner who comes across this provision and reads it with the constitutionally provided values of equality and fairness in mind. Locke and Van der Linde agree, holding that (Locke and Van der Linde "Business rescue and the fate of accessory security rights recommendations for the improvement of the business rescue procedure in the Companies Act of 2008" 2018 *TSAR* 839):

> "Dissenting minority creditors or security holders are left without meaningful protection. Having said that, it is accepted that the practitioner must not arbitrarily deviate from the approved business rescue plan. However, it should be sufficient to afford dissenters an opportunity to challenge the plan before the court on special grounds."

One may however question the fairness of business rescue proceedings that were initiated without having notified all the company's creditors and ensuring their participation in the drafting of the business rescue plan.

Corlink entered business rescue proceedings by way of a section 129 resolution. To this end, they were expected to notify every affected person of this decision. Affected persons include shareholders, stakeholders, employees, creditors and holders of securities. The question then arises as to how it was possible for Corlink to enter into business rescue proceedings without the knowledge of the applicant (par 4). The court failed to address this omission and, consequently, the prejudice suffered by the applicant.

6. Judicial restraint as applied by the court

The court exercised a pragmatic approach in dealing with the matter. This approach is not without its shortcomings. The court's approach is overly "procedure-focused", does not take cognisance of the intricacies of the matter, the stakes involved, nor the effect on the parties. Granted, the applicant erred in failing to join the other creditors in proceedings seeking to set aside and amend the already adopted business rescue plan because the plan unanimously affected their interests in a manner that was not projected by the adopted plan. Nevertheless, the issue of the non-joinder was procedural (par 17-18):

> "[17] However, and even if non-joinder was not a sufficient basis for dismissing the application, the application was in any event doomed to fail for the reasons elaborated below. Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. In my view the answer is no.
>
> [18] A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act.

> The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do."

The court was able to condone this non-joinder and allow the applicant to remedy this procedural oversight. One could argue that the court should have considered the bigger picture, namely, the effect of implementing a business rescue plan that did not afford every creditor the opportunity to contribute to the interests of their own financial status.

Similarly to *Kransfontein*, the courts applied judicial restraint in the case of *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* ([2021] 3 All SA 843 (SCA)), wherein the Supreme Court of Appeal intervened in a dispute between *Afrimat* and *Timasani* about the recovery of a deposit paid by *Afrimat* to *Timasani* for the purchase of assets (par 7). The courts applied judicial restraint by declining to interfere in with the business rescue practitioner's commercial decisions, emphasising that the courts may not override the autonomy of practitioners. This judgment is similar to *Kransfontein* in that it reinforced that courts are not willing to intervene in business rescue proceedings as it is a commercial process.

7. The perspective of the United Nations Sustainable Development Goals

The court's refusal to amend the business rescue plan to include the interests of the minority creditor who was not informed of the commencement of business rescue proceedings as is required in section 129(3)(*a*) of the Act which states that: "Within 5 days after filing a resolution to begin business rescue, the company must – (a) publish a notice of the resolution and its effective date to every affected person." According to section 128(1)(*a*)(i), "affected persons" include shareholders or creditors of the company. This requires that the applicant be notified of the commencement of business rescue proceedings. Serious concerns are raised about procedural fairness and accountability. The outcome of this case may be assessed through the lens of the United Nations Sustainable Development Goals.

The United Nations' sustainable development goals are quickly gaining recognition in contemporary society (see Sianes, Vega-Munoz, Tirado-Valencia "Impact of the Sustainable Development Goals on the academic research agenda. A scientometric analysis" 2022 PLOS ONE, available at https://journals.plos.org/plosone/article/citation?id=10.1371/journal.pone.0265409) (14-11-2025). They are a call to action for all the participating nations to do their part to combat global challenges such as hunger, poverty, and pollution, with an aim to make significant progress by the year 2030. South Africa, being a participating nation, has a responsibility to uphold and promote these 17 sustainable development goals (see United Nations in South Africa "UN Results Report 2022" (02 November 2023), available at https://southafrica.un.org/en/251532-un-results-report-2022 (30-07-2025)).

Particularly relevant to this matter is SDG 16: Peace, justice, and strong institutions. This goal aims to promote peaceful and inclusive societies with a focus on creating justice for all. Access to justice is a major issue locally and internationally (Ameermia and Mhodi "The role of SAHRC in facilitating justice through litigation" 2020 *ESR Review* 11). On an international scale, the Universal Declaration on Human Rights, 1948 *provides* that the right to justice is integral to the protection of other human rights. Domestically, section 34 of the South African Constitution provides for the right of access to its courts, as well as the right to justice.

The exclusion of a legitimate creditor from substantive participation in the business rescue proceedings such as the drafting of the business rescue plan undermines the principles of transparency, inclusivity, and fairness that SDG 16 seeks to promote. As a statutory mechanism for the rehabilitation of companies, business rescue should not only aim to rehabilitate companies but also to ensure that all affected persons, especially the vulnerable, such as the applicant, are afforded procedural justice.

This paper has established that the court did not adequately play its role as an instrument of justice by using its authority to protect the interests of the applicant in this matter. It is rather unfortunate that the court maintained a position of judicial restraint and exercised a

pragmatic approach in this matter. The rule of law is not static but is an ever-evolving instrument. The rule of law has been described as "a living system capable of growth" (Mtshaulana "Judicial restraint is judicial wisdom" 2008 *AJA* 45). Using a pragmatic approach, along with judicial conservatism, is neither reflective of the purposes of business rescue, nor conducive to upholding the principles underlying the rule of law. By aligning domestic legal interpretation with SDG 16, South African courts can reinforce the legitimacy of business rescue as a tool for strengthening equitable governance.

8. Conclusion

The court in the *Kransfontein* judgment, was presented with a critical opportunity to uphold the principles of procedural fairness and justice, by condoning procedural irregularities in the interests of justice. While the primary objective of business rescue is to facilitate the solvency of the financially distressed company, this goal must be pursued within a framework that is respectful of *concursus creditorum* and the equality of creditors. The failure to notify the applicant of the commencement of business rescue proceedings, and the court's subsequent refusal to amend the business rescue plan to include their interests undermines the integrity of the minority creditors. Allowing business rescue to proceed without rectifying this irregularity indicates that the court deviated from the collective approach and weakened the legal safeguards intended to protect minority creditors. Moreso, the outcome in this matter is inconsistent with the values of the Sustainable Development Goals of the United Nations, particularly SDG 16 which calls for peace, justice and strong institutions. The exclusion of the applicant as a creditor compromises trust in the business rescue regime.

By failing to intervene, the courts missed a vital opportunity to reinforce the legitimacy of business rescue proceedings as a fair mechanism. This judgment risks entrenching a precedent wherein the rights of minority creditors are subordinate to the interests of majority creditors. Such an approach is contrary to the broader constitutional values of fairness, transparency and justice.