REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 2022-058326

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED [redacted]

DATE 17/06/2025 SIGNATURE

In the matter between:

AVIATION CO-ORDINATION SERVICES (PTY) LTD	**Applicant**
and	
MANGO AIRLINES SOC LIMITED (in business rescue)	**1st Respondent**
SIPHO SONO	**2nd Respondent**
THE AFFECTED PERSONS LISTED IN ANNEXURE A TO THE NOTICE OF MOTION	**3rd to 90th Respondent**

JUDGMENT

Summary

Business Rescue Plan that sought to create an automatic and compulsory cession of claims.
Held -Proposed compulsory cession in Business Rescue Plan invalid on the basis that a cession requires intention to cede.
Held -Section 154 of the Companies Act 71 of 2008 – cession of book debts does not constitute a discharge under the section.
Held – Section 154 relates to compromise and does not extend to cession of book debts

FISHER J

Introduction

[1] The applicant is a creditor of Mango in business rescue. The respondents are Mango in business rescue and the business rescue practitioner, Mr Sipho Sono.

[2] The case involves questions around the validity of a cession of book debts to an Investor under a Business Rescue Plan pertaining to the rescue of Mango. The Plan has allegedly been approved by 98% of the voting creditors.

[3] The applicant was one of the creditors that voted against the Plan.

[4] The applicant seeks that it be declared that the Plan is not capable of lawful implementation.

[5] The Plan prescribes, as a central feature thereof, an automatic and compulsory cession of the book debts of Mango to an unnamed third-party Investor.

[6] The cession is stated to come into effect automatically on a negligible part payment of the debts of the creditors and the *spes* of receiving payment of a "top-up" in an amount which will be determined at the end of what is called "the Investor Process" in the Plan.

[7] The validity of this cession is central to the case.

The competing arguments

The application

[8] The applicant argues that the compulsory cession, which lies at the heart of the Plan, is invalid for being the dispossession of property at common law and under the Constitution.

[9] The applicant submits that this central invalidity vitiates the entire Plan and renders it incapable of lawful implementation.

The counter -application

[10] The respondents argue in their conditional counter-claim that all creditors, including the applicant and other dissenting and non-voting creditors are bound by the Plan. This argument is made on the basis of section 154 of the Companies Act[1] (the Act).

[11] The respondents argue that section 154 operates to render the imposed cessions valid and capable of implementation, either *per se* or alternatively, in the context of declarations of rights sought in the counter-application.

[12] The relief in the counter-application is framed, in the first instance, on the basis that it be declared that the rights of creditors against sureties for the ceded debts will not be affected by the cessions in the Plan.

[1] Companies Act 71 of 2008

[13] This claim emerges from an argument to the effect that the only invalidity which could possibly arise from the cession scheme in the Plan is the extinguishing of the creditors' rights to claim against sureties for the debts. This is because, argue the respondents, under section 154(2) of the Act the applicant is deprived of the ability to enforce its claim so the only possible prejudice would arise out of the loss of a claim against the surety. If this is taken account of by declarator that the suretyship rights are not affected by the cession, say the applicants, then any possible invalidity is eradicated.

[14] The point is made that the applicant, in any event, has no basis for complaint in that there is no accessory obligation to the principal debt owed by Mango to it. The applicant is accused of acting in bad faith to scupper the plan in a bid to obtain a better deal for itself.

[15] In the alternative to the relief which seeks to solve what is framed as this "suretyship difficulty", a declarator is sought to the effect that clause 6.2.6 of the Plan, which contains the impugned compulsory cession, does not apply to the applicant or any other creditor that has dissented from the Plan. This argument goes that this declaration will have the effect that any invalidity which arises because of the lack of agreement to the cession is taken account of by excluding the dissenting creditors from the Plan.

[16] These alternative claims notwithstanding, the counter-application seeks to go further still and obtain declaratory relief to the effect that the applicant is, nonetheless, bound by the Plan. This it seeks on the basis of a construction of section 154(2) of the Act.

[17] The respondents also seek yet a further declarator to the effect that the applicant is not entitled, upon the implementation of the Plan, to enforce its claims against the company.

[18] This latter declarator will be put into context later. It suffices here to state that the relief stems also from the respondents' construction of section 154 of the Act with which interpretation the applicant joins issue.

Issues for determination

[19] The central question is whether the Plan is incapable of lawful implementation for its purpose under the Act because of the central invalidity of the compulsory cession.

[20] A second question is whether the Plan can be rendered unobjectionable by a reading thereof in the context of the declaratory relief.

[21] I will deal with these questions in turn.

Is the Plan capable of implementation?

[22] Business rescue entails putting a distressed company under temporary supervision and management by a properly qualified Business Rescue Practitioner.

[23] The soul of the business rescue process is compromise in respect of the company's debts.[2] The Act accepts that, without such compromise, business rescue is not possible. The Act thus allows for the putting in place of temporary moratoria to give the company "breathing space" to develop a plan which has, as its purpose, the rescue of the company through the restructuring of the company's business, property and debt and other liabilities.[3]

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[2] The heading of Chapter 6 makes direct reference to the fact that compromise is entailed. It reads: "CHAPTER 6 - BUSINESS RESCUE AND COMPROMISE WITH CREDITORS (ss 128-155)"

[3] S 128(1)(b) of the Act

[24] Thus, what is envisaged is the development, to the greater good, of a solution to the financial distress in which the company finds itself.

[25] Any such solution would, in the normal course, amount to the implementation of an agreed Plan which is directed at managing the company's indebtedness such that the company is given a chance at solvency or the prospects of recovery of creditors and members on insolvency are improved.[4]

[26] The validity and appropriateness of the Plan must be considered as against its salient features as seen in this context.

The salient features of the Plan

[27] All emphasis in quotations from the Plan are mine.

[28] South African Airways (SOC) (SAA), the sole shareholder of Mango has declined to provide further funding in the business rescue and has distanced itself from the Business Rescue process. Thus, the rescue process can only succeed with investor funding. The terms under which this investor funding is obtained are thus central to the Plan that creditors have been asked to accede to.

[4] Section 128(b): 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

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

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

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

[29] The Plan proposes that Mango pay the residue of the funds that were previously injected by SAA (net of employee claims and restructuring costs) to concurrent creditors in part payment of their claims.

[30] The estimated settlement that would be forthcoming from these funds is 4.43 cents in the Rand – which would translate roughly to R44 300 per R1 million. Thus, the return from this fund is negligible, if not nominal.

[31] The Plan envisages that the shares are then sold and transferred by SAA to the Investor at a nominal price after payment of this negligible dividend to creditors.

[32] Immediately after the sale date in respect of the shares, the Investor will subscribe for additional shares so as to provide funds. There is no detail provided as to the nature of the subscription, the amount that will flow from this process and who will be obliged to provide the funds.

[33] These funds in an unspecified amount will then, it is hoped, be paid as a “top up” settlement to concurrent creditors in addition to the 4.43 cents.

[34] The concurrent creditors (save for SARS and a category of creditor having what is called “un-flown ticket liability” who would be given vouchers) would be in line for the hoped for top up payment.

[35] The relevant term of the Plan stating this position is clause 6.2.5.3.1 which reads as follows:

> “The Concurrent Creditors (save for SARS and the creditors in respect of the Un-flown Ticket Liability) will be paid a "top up" settlement payment for their Claims in addition to the payment referred to paragraph[sic] 6.2.5.1 [i.e. the 4.43 cents in the Rand]”

[36] Clause 6.2.6 is a central provision of the Plan. It reads as follows:

> "On payment to the Creditors as contemplated in paragraph[sic] 6.2.5.3.1, all of the remaining balance of the Claims of the remaining Concurrent Creditors are ceded to the Investor at face value thereof but for nominal consideration. Under the heading "Discharge of Debts and Claims" it was stated that if the Plan was adopted and implemented in accordance with its terms as set out in the Investor Process all claims (save for those of SARS) "will not be compromised."

[37] Clause 6.10.3 purports to provide legal advice to the creditors. It seeks to explain the effect of the cession with reference to the operation of section 154 (2) of the Act as follows:

> "Accordingly, in terms of Section 154(2) of the Companies Act, if a BR Plan has been approved and implemented, a Creditor will not be entitled to enforce any debt owed by the Company immediately before the beginning of the Proceedings, except to the extent provided for in this BR Plan.
> Thereafter the debt acquired by the Investor through the cession of Claims of Concurrent Creditors may be converted to equity (or quasi equity instrument), subordinated or otherwise be dealt with in such manner that the Company will be restored to solvency."

[38] The deal proposed to the creditors is essentially this. The creditors are asked to assent to a cession of their claims to an Investor (whose identity is not disclosed) on the understanding that, if the required 75% majority vote for the deal is achieved, the dissenting and non-voting creditors' claims will, in any event, become unenforceable under section 154(2).

[39] Thus, the thrust of clause 6.10.3 is to inform the creditors that they may as well agree to the proposed cession because their claims are in danger of being rendered unenforceable in any event.

[40] Regrettably, this advice to the creditors is wholly misleading in that it misstates the effect of section 154 (2).

[41] In fact, section 154 does not operate in the event of cession. Thus, the central premise of the deal offered to the creditors under the Plan is false.

[42] Once this misstatement of the legal position on cession is made clear, it is unlikely that any sensible creditor would accede to the Plan. In my view, it is commercially unviable.

[43] Simply put, the Plan is based on the incorrect assertion that the proposed compulsory cession is lawful.

[44] The respondents concede that compulsory cession is not competent on general principles. They, seek, however to posit that section 154(2) provides a statutory mechanism to render the cession valid.

[45] The argument, simply put, is that the hapless creditor who is bound by this Plan can refuse to cede, but is still bound by the Plan to the extent that it cannot pursue the ceded claim. Thus, goes the argument, the claim is of no real value to the creditor so he may as well cede it.

[46] The respondents in their heads of argument posit the following construct which they argue leads to a conclusion of validity of the cession under the Plan:

> "As for the validity of the cession, it is common cause that section 154(1) renders it incompetent to extinguish a creditor's claim against its consent. But the law is settled that a creditor's claim may be rendered unenforceable against the company without the consent of the creditor. The only practical difference for the creditor between extinguishing the claim and rendering it unenforceable against the company is that extinguishing the claim means it is lost against a surety as well. Purporting to deprive a creditor of a right against a surety against the creditor's consent is not competent."

[47] This statement of the respondents' argument represents a curious blend of non-sequiturs and anomalies.

[48] The point of departure of the argument is the positioning of the reason for invalidity as flowing from section 154(1). From this point of departure and on a treatment of section 154(2) a statutory basis for the submission of validity of the compulsory cession in clause 6.2.6 is conjured up.

[49] The argument goes that invalidity, in effect, arises solely from the fact that a claim against a surety is lost upon cession. There is, it is argued, no practical benefit other than the retention of the accessory claim against the surety on a reading of section 154(2). The reason for this, it is submitted, is that the claims under the Plan are not enforceable in any event. But the respondents go so far as to seek a declarator to this effect for good measure.

[50] The argument is then made that the surety problem does not exist on a proper reading of the Plan, which is one which is in favour of validity. It is argued, on this basis, that this implies that the claim against the surety remains extant on transfer of the principal debt. Alternatively, say the respondents any insecurity around this issue can be cured by the declarator sought to the effect that rights against sureties are not affected.

[51] Simply put, the argument goes that, once the possible suretyship problem is solved by the reading in of an implied preservation of the claim against sureties or the declarator, then the cession is not invalid.

[52] The applicant argues that this is a non-sequitur. The invalidity, it says, in not cured by the alleged accommodation of the suretyship problem in that this is not the reason for the invalidity. It argues, in any event, that section 154 has no application to the cession.

[53] Thus, if the applicant is correct and section 154(2) does not apply to the cession, the whole argument unravels because there is no basis for the statutory validity contended for and neither is there a basis for the contention creditors who do not accede are deprived of the right of enforcement of their claims.

[54] I turn to deal with the respondents' argument in more detail.

[55] The first and, with respect, most obvious fallacy in the reasoning is that the invalidity of the cession does not lie in the deprivation of the creditors' claims against a surety where there is such a suretyship liability. The invalidity arises simply because, according to the law of cession and at common law generally, one cannot deprive the creditor of the debt or claim without his agreement.[5] Section 154 does not operate to change this principle.

[56] And neither can section 154(2) be construed as a statutory mechanism that allows for a treatment of the purported cession in a manner that lawfully deprives the applicant and other dissenting creditors of their right to pursue their claims.

[57] On the back of the submission that the only impediment to validity was the suretyship problem, the respondents have sought to segway into an elaborate examination of whether it is possible, on legal principles, to preserve the claim against a surety in the face of cession without the surety's agreement. This convoluted analysis is nothing more than an irrelevant distraction and it is not entertained.

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[5] *Johnson v Inc General Insurances Ltd 1983(1) SA 318 (A); Skjelbreds Rederi AS v Hartless (Pty) Ltd 1982(2) SA 710 A*

[58] Thus, to my mind, the matter begins and ends with the trite principle that a cession cannot be forced on a person without their consent. Once this is accepted the entire argument of the respondents fail.

[59] Regrettably, because of the suggestion, on behalf of the respondents, that section 154 of the Act can be employed or interpreted to, in some way, make inroads into this trite principle, I am compelled to deal with how section 154 actually operates under Chapter 6 of the Act.

Section 154

[60] It is helpful to set out the section in full.

> "154 *Discharge* of debts and claims
>
> (1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to *the discharge* of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.
>
> (2) If a business rescue plan has been approved and *implemented in accordance with this Chapter*, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan." (Italics added).

[61] Wallis JA in *Van Zyl v Auto Commodities (Pty) Ltd*[6] in the course of a comprehensive interpretation of section 154, made it plain that the section applied only to discharge of indebtedness.[7] Section 154(1) allows a business rescue plan to contain a provision that operates to discharge the company's

[6] *Van Zyl v Auto Commodities (Pty) Ltd* 2021 (5) SA 171 (SCA).
[7] Id at para 20.

indebtedness to particular creditors (i.e. acceding creditors) and limit the claims of others (dissenting creditors). Where such a provision is contained in the business rescue plan and a creditor 'accedes' to it, the debt is discharged in the sense that it ceases to exist.[8]

[62] Section 154 has nothing to do with cession and, once this is accepted, the respondents must fail.

[63] A classic Catch 22[9] arises from the model proposed in the Plan: dissenting (and probably non-voting)[10] creditors who, as such, do not agree to cede their claims can only enforce their claims through the Plan which entails cession.

[64] Section 154 entails majority compromise of indebtedness. The minority dissenters do not lose their claims, but they can only enforce them to the extent of the compromise. Thus, the discharge of the debt under section 154(1) and its unenforceability by the creditor go hand in hand. The compromised debt under section 154(1) ceases to exist whereas, under section 154(2), the debt continues to exist but its enforcement is curtailed under the Plan in that it is only realizable to the extent of the compromise

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[8] *Van Zyl* at para 23.

[9] A *Catch 22* is a paradoxical situation from which a person cannot escape because of contradictory rules or limitations. The term was coined by Joseph Heller in his 1961 novel of that name. The plot involves a fighter pilot who must fly on dangerous missions unless he achieves exemption on the grounds of insanity. If he expresses that he will not fly because he is afraid, then this indicates that he is sane and he is thus not eligible for exemption; if he is not afraid, he will fly even though the lack of fear indicates insanity.

[10] In *van Zyl* at para 23 the Court raised without deciding the question of what is required for a creditor to 'accede' to the discharge of the debt. The following questions are posed: “Does it mean that they must have agreed to it? If so, is the agreement constituted by voting in support of the plan, or merely by accepting the benefits under the plan, or in some other way? “The Court concluded that the answers to these questions are by no means clear-cut. The indication given is that the Court is inclined to the view that the section contemplates a discharge brought about by the voluntary action of the creditor, or consented to by way of an overt act, rather than a compulsory deprivation of rights.

accepted by the majority; in effect section 154(2) provides a personal defence to the company, without discharging the debt itself.[11]

[65] Cession is incompatible with section 154(1). The subsection deals with complete discharge. It does not accommodate a situation where the debt remains extant but is transferred to another person with the right to enforce.

[66] The two subsections deal with different situations entirely: the application of section 154(1) results in the discharge of debt on compromise, whereas section 154(2) accepts that the debt is extant but places a statutory limitation on the right of the dissenting creditor to claim from the company.

[67] In terms of the section, acceding creditors' claims are dealt with under subsection 154(1) and dissenting creditors are dealt with under subsection (2).

[68] In contrast, the melange of rights proposed by the respondents entails that there is no compromise. Instead, the balance of the claims after payment of the paltry 4.43 cents in the Rand remain extant but are not enforceable to any extent by creditors. But they are enforceable by the Investor. Thus, the creditors get the worst of both worlds: the company is no better off from an indebtedness perspective and the unpaid debts pass to the Investor for no consideration. How this could possibly achieve the rescue of the company is difficult to understand.

[69] Furthermore, a creditor cannot, under the section, be deprived of the right to enforce a claim that remains enforceable in the hands of a cessionary of the claim.

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[11] *van Zyl* at para 28

[70] And this brings me to a further fundamental problem with the proposed cession. If the creditor is deprived of the right of recovery, as the Plan seeks to do, the debt cannot be transferred to the Investor with the right of recovery. To the extent that the Plan seeks to override the general principle that a person cannot cede more rights than he has, and it seems, on its terms, that it purports to do so, the inability to implement the Plan arises also at this fundamental level.[12]

[71] In short, the cession is unsustainable and unable to be implemented on legal principles and this renders the entire Plan incapable of implementation.

[72] These fundamental problems operate at the level of principle and are not capable of severance as contended for on behalf of the respondents.

[73] Regrettably, the Plan seeks to posit a central but false incentive to creditors – they are advised that their claims would not be enforceable in any event because of section 154(2). This advice has no basis in law and is nothing but a chimera.

[74] Section 150(2)(b)(ii) of the Act provides that it is mandatory for a business rescue plan to include a statement of the extent to which the company is to be released from payment of “any of its debts”.

[75] It comes as no surprise, in the circumstances, that the Plan does not provide the required statement of the extent to which the company is released from payment of its debts. This is because it is not released at all.

[76] To the extent that the Plan seeks to create the impression that the cession of debts under clause 6.2.6 amounts to a discharge as contemplated by section 154(2), it is specious.

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[12] *Brayton Carlswald (Pty) Ltd and another v Brews* 2017 (5) SA 498 (SCA) at para12.

[77] Mr Subel SC, for the applicant, correctly points out that the Plan makes provision for the complete loss of the creditors' claims to the Investor on payment by the company of the negligible amount of 4.43 cents in the Rand and the hope of some undetermined "top up". He argues that this is a very bad solution for creditors and a most attractive one for the Investor in that the Investor gets the claims and shares of the company for no consideration whilst his required investment is neither quantified nor mandated under the Plan. I agree; it is a very bad deal for all creditors.

[78] It is argued on behalf of the respondents that the only value that the cession to the Investor has in the Plan is a "tax benefit". The vague implication in this argument is that the debts will not be enforced by the Investor on a subsequent liquidation or otherwise.

[79] There is, however, nothing in the Plan that precludes the debts being enforced. On the contrary, the Plan expressly provides that "…the Claims of Concurrent Creditors that are ceded to the Investor, in terms of the Investor Process, may be converted to equity (or quasi equity instrument), subordinated or otherwise be dealt with in such manner that the Company will be restored to solvency".

[80] The debts can also be set off, in due course, against debts owed to the company by the Investor. They have value to the Investor far above an alleged tax benefit.

[81] Once it is accepted, as it must be, that the cession proposed is invalid and not capable of being dealt with under section 154, it follows that the argument that, if the debt is not ceded it cannot in any event be enforced is incorrect.

Conclusion

[82] The Plan, shorn of its complexity, amounts to nothing more than the confiscation of the creditors' claims in order that they be transferred by Sono to an Investor who pays no value for them or the shares.

[83] The creditors' position in the advent of liquidation, which is a distinct possibility, is also worsened rather than improved by the Plan in that they have been divested of their claims.

[84] All these consequences would be in conflict with the purpose of Business Rescue if the Plan were capable of lawful implementation – which, clearly, it is not.

[85] In sum, the cession provided for is unenforceable which, in turn, results in the Plan being incapable of implementation.

[86] In the circumstances, the applicant must succeed.

Costs

[87] There was a dispute regarding whether it was necessary for the applicant to obtain leave in terms of section 133(1) of the Act to institute the application. There was also a dispute as to whether the applicant had properly served the application on affected persons.

[88] These disputes resulted in opposed interlocutory proceedings.

[89] Mr Sono later consented to the bringing of the proceedings, to the extent necessary, which takes account of the section 133(1) point and the further

interlocutory issue relating to service on affected parties was resolved by way of a consent order.

[90] The parties seek costs in the interlocutory application which were reserved for determination by this court.

[91] To my mind, the opposition by the respondents in the main application was so unmeritorious that the costs should follow the result in relation to interlocutory issues as well as the main claim and the counter -claim.

Order

[92] I make the following order:

1. The compulsory cession contained in clause 6.2.6 of the Business Rescue Plan is declared to be invalid and of no force and effect.

2. It is declared that the Business Rescue Plan cannot be implemented.

3. The respondents are to pay the costs which are to include the costs of two counsel where employed, to be calculated on scale C in respect of senior counsel and scale B in respect of junior counsel, and which costs are to include the reserved costs in respect of the interlocutory application dated 3 March 2023.

FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Caselines. The date for hand-down is deemed to be 17 June 2025.

Heard:	27 May 2025
Delivered:	17 June 2025

APPEARANCES:

Applicant’s counsel:	Adv. A Subel SC Adv A Vorster
Applicant’s Attorneys:	Cox Yeats Attorneys
1st Respondent's Counsel:	Adv F Snyckers SC Adv B M Gilbert
Respondent Attorneys:	Bowman Gilfillan Inc