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**INYUVESI  
YAKWAZULU-NATALI**

**A critical analysis of the effect of the Moratorium on property owners**

**BY**

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## **DECLARATION**

I, **Yasthil Beekarun**, student number 217080443, do hereby declare that, unless specifically referenced, this dissertation is my own work and has not been submitted to any other university in full or partial fulfillment of the academic requirements of any other degree or qualification.

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## **DEDICATION**

I dedicate this dissertation to my family for all their support, love and encouragement throughout my studies and to my supervisor, Mr Simphiwe Phungula for his advice and guidance in helping me to structure my dissertation and refine my topic.

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## **1. General Introduction**

### **1.1 Introduction**

Companies that find themselves in financial difficulties can either opt for liquidation or try to save the company by following certain procedures. Prior to the enactment of Chapter six of the Companies Act 71 of 2008 (hereinafter referred to as “the Act”), the procedure of judicial management was followed as provided for in the Companies Act 61 of 1973 (hereinafter referred to as “the 1973 Act”) and the Companies Act 46 of 1926 (hereinafter referred to as “the 1926 Act”). Chapter six introduced the concept of business rescue as a mechanism to save financially struggling companies. This is necessary because liquidation may have far reaching consequences such as job losses and negative economic impacts. As noted by Loubser, a company has a ‘major impact on the economy and social well-being of the community through the company’s employees, suppliers and distributors.’<sup>1</sup>

While the Act introduced the concept of business rescue proceedings, the concept is not without its problems. Certain provisions are not clear, leading to different interpretations. This dissertation considers the *moratorium* provided for in section 133(1)<sup>2</sup>, different interpretations of its provisions and the effect of these interpretations on property owners.

### **1.2 Problem Statement and Rationale**

Although the Act was drafted in a manner that was intended to be clear, it appears that some sections are problematic when it comes to interpretation. This dissertation focuses on the interpretation of the Act in relation to the *moratorium* and property owners. The rationale is to provide guidance to property owners regarding the exercising of their rights whilst a company is under business rescue by analysing the literature and case law applicable to the moratorium. Since business rescue is a fairly new process, numerous cases have refined the interpretation of the provisions of the moratorium. As such, this research will prove valuable

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<sup>1</sup> A Loubser *Some comparative aspects of corporate rescue in South Africa* (unpublished LLD thesis, University of South Africa, 2010) 1.

<sup>2</sup> Act 71 of 2008.

to property owners looking to determine their right to protect their claims during business rescue proceedings.

### **1.3 Research Questions**

The research aimed to address the following questions:

1. What is the effect of 'Legal Proceedings' in respect of section 133 and property owners?
2. What is the effect of 'Enforcement Action' in respect of section 133 and property owners?
3. What is the effect of 'In Lawful Possession' in respect of section 133 and property owners?
4. What is the effect of suspension of agreements during business rescue?

### **1.4 Research Methodology**

A qualitative research method in the form of desktop research was employed to answer the research questions. A critical analysis was undertaken of the effect of the moratorium on the rights of property owners during business rescue proceedings. The data included the relevant literature in the form of legislation, case law, journal articles, textbooks, theses and internet resources.

## **2. Historical Background of the Corporate Rescue Procedure in South Africa**

Judicial management was first introduced in South Africa by the 1926 Act. Although it subsequently 'lagged' behind most other business rescue regimes internationally, South Africa was one of the first countries in the world to introduce a business rescue regime under company law.<sup>3</sup> However, following its introduction, judicial management did not change

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<sup>3</sup> DA Burdette 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)' *SA Mercantile Law Journal* 2004 16(2) 245.

very much over the years.<sup>4</sup> Despite the establishment of a number of commissions of enquiry, few amendments were made.<sup>5</sup> ‘Representations were made to the Van Wyk de Vries commission’ in 1970 for the abolition of judicial management on the grounds that it had a low success rate’.<sup>6</sup> However, the commission did not concur, and held that the retention of judicial management was justified by successful cases.<sup>7</sup> Thus, judicial management was ‘retained’ under the 1973 Act.<sup>8</sup>

Sections 427 to 440 of the 1973 Act provided for judicial management.<sup>9</sup> Section 427 provided that ‘when any company was unable to pay its debts or was probably unable to meet its obligations and there was a reasonable probability that, if it was placed under judicial management, it would be able to pay its debts or meet its obligations and become a successful concern, the court would if it appeared just and equitable, grant a judicial management order in respect of that company.’<sup>10</sup> Kloppers submits that, ‘under the circumstances set out in this section, a judicial manager would be provisionally appointed.’<sup>11</sup>

Such an order will be normally be accompanied by a *moratorium* on enforcement proceedings by creditors.<sup>12</sup> The provisional judicial manager takes over management of the business from the current management, investigates the company’s situation and reports to meetings of creditors and members convened by the Master.<sup>13</sup> These meetings consider the desirability of placing the company under final judicial management.<sup>14</sup> The provisional judicial manager then reports to the court on the prospects of the company being able to

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<sup>4</sup> RH Barends *A Critical Analysis of Section 129 of the Companies Act 71 of 2008* (unpublished LLM thesis, University of the Western Cape) 4.

<sup>5</sup> DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 246.

<sup>6</sup> A Loubser ‘Judicial management as a business rescue procedure in South African corporate law’ *SA Mercantile Law Journal* 2004 139.

<sup>7</sup> H Rajak and J Henning ‘Business Rescue for South Africa’ (1999) *South African Law Journal* 266.

<sup>8</sup> DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 247.

<sup>9</sup> DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 246.

<sup>10</sup> Section 427(1) of the Companies Act 61 of 1973; LJ Sher *A critical analysis of the requirements for a successful business rescue order as set out in section 131(4) of the Companies Act 71 2008* (unpublished LLM thesis, University of Johannesburg, 2013) 10.

<sup>11</sup> P Kloppers ‘Judicial Management – A corporate rescue mechanism in need of reform?’ (1999) 10 *Stellenbosch Law Review* 419; see section 427(1) of the Companies Act 61 of 1973.

<sup>12</sup> *Ibid*; see section 428(2) of the Companies Act 61 of 1973.

<sup>13</sup> *Ibid*; see section 430 of the Companies Act 61 of 1973.

<sup>14</sup> *Ibid*; see section 431(2) of the Companies Act 61 of 1973.



become a successful concern or to pay its debts within a reasonable time.<sup>15</sup> Once the provisional judicial manager has reported to the court and the court decides to make a final order, the judicial manager continues to run the business to the exclusion of the previous management and under the supervision of the Master.<sup>16</sup>

## **2.1 The Failure of Judicial Management**

Levenstein argues that, ‘Judicial management was never generally regarded as an effective corporate rescuing process.’<sup>17</sup> It was described as an ‘abject failure’ by the court in *Le Roux Hotel Management (Pty) Ltd*<sup>18</sup> as well as a system which ‘barely worked since its inception in 1926.’<sup>19</sup> According to Kloppers, the shortcomings of judicial management which hampered it from serving as a viable rescue mechanism were<sup>20</sup>:

1. ‘Heavy reliance on court proceedings’ to initiate judicial management.<sup>21</sup> A court order was required to initiate judicial management with applications for both a provisional and final order, thus requiring companies to engage the services of legal practitioners.<sup>22</sup> Kloppers submits that this ‘increased the costs of the procedure, thereby making judicial management generally unsuitable for small and medium-sized businesses’.<sup>23</sup> Rajak and Henning submit that ‘the costs made the process unappealing to creditors as this drained available funds’.<sup>24</sup>
2. Burdette submits that ‘there had to be a “reasonable probability” that the company would become a successful concern’.<sup>25</sup> This requirement was onerous and often impossible to discharge.<sup>26</sup>

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<sup>15</sup> Ibid; see section 432(2) of the Companies Act 61 of 1973.

<sup>16</sup> Ibid; see section 433 of the Companies Act 61 of 1973.

<sup>17</sup> E Levenstein South African Business Rescue Procedure Issue 3 (2019) 3-5.

<sup>18</sup> *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd (FBC Fidelity Bank Ltd (under curatorship) intervening)* 2001 (2) SA 727 (C).

<sup>19</sup> *Le Roux Hotel Management (Pty) Ltd* at para 60.

<sup>20</sup> P Kloppers ‘Judicial Management Reform – Steps to initiate a business rescue procedure’ (2001) 13 *South African Mercantile Law Journal* 370

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> H Rajak and J Henning ‘Business Rescue for South Africa’ (1999) *South African Law Journal* 268.

<sup>25</sup> DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 249.

<sup>26</sup> A Loubser *Some comparative aspects of corporate rescue in South Africa* (unpublished LLD thesis, University of South Africa, 2010) 43.

3. Klopers further submits that ‘it was “traditional practice” to appoint professional liquidators as judicial managers of companies.’<sup>27</sup> According to Olver<sup>28</sup>, the ‘objectives and duties of these two categories of people are “diametrically opposed” as liquidators are trained to liquidate companies and not to save them.’<sup>29</sup>

Despite the importance of their role, there were no statutory regulations prescribing the minimum qualifications and necessary experience of judicial managers.<sup>30</sup> Rajak and Henning argued that ‘although the voluntary body, the Association of Insolvency Practitioners of Southern Africa (Aipsa) brought some “order” in respect of monitoring this field of practice, membership of Aipsa was voluntary and a judicial manager was not required to be a member of a body with licensing and monitoring functions.’<sup>31</sup> Thus, ‘what could have been a “statutorily regulated practice” reserved for persons with the necessary business acumen and skills was left open to ‘abuse and incompetence.’<sup>32</sup>

While the above exposition does not cover all the aspects relating to judicial management, it sheds some light on the problems that rendered ‘judicial management’ an ‘unattractive option’ as an effective corporate rescue procedure.<sup>33</sup>

## **2.2     The Current Rescue Procedure in South Africa**

In 2011, the Act introduced a new business rescue regime to South African law.<sup>34</sup> Business rescue, which effectively replaced judicial management aims to provide a company with a better chance of being rescued by allowing it to restructure itself with the assistance of a business rescue practitioner.<sup>35</sup> The drafters drew on the legal systems of countries such as Australia and England, where corporate rescue mechanisms have been adopted in order to

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<sup>27</sup> P Klopers ‘Judicial Management – A corporate rescue mechanism in need of reform?’ (1999) 10 *Stellenbosch Law Review* 424.

<sup>28</sup> AH Olver ‘Judicial management – A case for law reform’ (1986) 49 *THRHR* 86.

<sup>29</sup> Ibid. See DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 250.

<sup>30</sup> H Rajak and J Henning ‘Business Rescue for South Africa’ (1999) *South African Law Journal* 268.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> DA Burdette ‘Some Initial Thoughts on the Development of a Modern and Effective Business Rescue model for South Africa (Part 1)’ *SA Mercantile Law Journal* 2004 16(2) 250.

<sup>34</sup> J Rushworth ‘A critical analysis of the business rescue regime in the Companies Act 71 of 2008’ (2010)(1) *Acta Juridica* 377.

<sup>35</sup> R Bradstreet ‘The new business rescue: will creditors sink or swim’ *South African Law Journal* (2011) 128(2) 355.

help companies remain in existence and contribute to the economy.<sup>36</sup> According to Bradstreet, the introduction of business rescue proceedings has resulted in a ‘noticeable shift’ from a creditor orientated system, which was the approach under judicial management, to a debtor friendly system.<sup>37</sup> Thus, it is evident that business rescue attempts adopt a more genuine approach to assisting companies that are financially distressed, as opposed to liquidation of the company.<sup>38</sup> This shift was encapsulated by the court in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) v Kyalami Events and Exhibitions (Pty) Ltd and others* where it was held that:<sup>39</sup>

‘the general philosophy permeating through the business rescue provisions is the recognition of the business as a going concern rather than the juristic person itself. Hence the name “business rescue” and not “company rescue”. This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors’ interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees may, in the end prove to be a better option for creditors in securing full recovery from the debtor.’<sup>40</sup>

The term business rescue is defined in section 128(1)(b) of the 2008 Act as proceedings to facilitate the rehabilitation of a company that is financially distressed by means of three measures:

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<sup>36</sup> R Bradstreet ‘The leak in the chapter 6 lifeboat: inadequate regulation of business rescue practitioners may adversely affect lenders’ willingness and the growth of the economy’ *SA Mercantile Law Journal* (2010) 22(2) 196.

<sup>37</sup> TE Patel *Business Rescue in South Africa: An Exploration of Business Rescue and the role of the Business Rescue Practitioner* (unpublished LLM thesis, University of KwaZulu-Natal, 2018) 33.; R Bradstreet ‘The leak in the chapter 6 lifeboat: inadequate regulation of business rescue practitioners may adversely affect lenders’ willingness and the growth of the economy’ *SA Mercantile Law Journal* (2010) 22(2) 197-198.

<sup>38</sup> R Bradstreet ‘The new business rescue: will creditors sink or swim’ *South African Law Journal* (2011) 128(2) 353.

<sup>39</sup> 2012 (3) SA 373 (GSJ) at para 12.

<sup>40</sup> *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) v Kyalami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) at para 12; R Bradstreet ‘Business rescue proves to be creditor friendly: CJ Claassen J’s analysis of the new business rescue procedure in Oakdene Square Properties’ *South African Law Journal* (2013) 130(1) 48.

‘the temporary supervision of the company, and of the management of its affairs, business and property<sup>41</sup>; a temporary *moratorium* on the rights of claimants against the company or in respect of property in its possession<sup>42</sup>; and the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equities 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 immediate liquidation of the company.’

In terms of the above definition, if a company is placed under business rescue, an independent third party in the form of a business rescue practitioner will supervise the company by taking over its management.<sup>43</sup> An important effect of business rescue is a *moratorium*, which protects the company from all claims against it whilst it is under business rescue.<sup>44</sup> A business rescue plan, which must be prepared and implemented by a business rescue practitioner, is essential to a successful rescue.<sup>45</sup> The business rescue plan will either rescue the company which will continue in ‘existence on a solvent basis’<sup>46</sup> or will provide ‘a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company’.<sup>47</sup>

Section 128(1)(b) describes rescuing a company as ‘achieving the goals set out in the definition of business rescue.’<sup>48</sup> Joubert submits that it is “evident” from section 128(1)(b)(iii), that business rescue envisages either one of the two outcomes.<sup>49</sup> There have been numerous cases regarding the correct interpretation of the secondary goal of business

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<sup>41</sup> Section 128(1)(b) of the 2008 Companies Act.

<sup>42</sup> Section 128(1)(b)(ii) of the 2008 Companies Act.

<sup>43</sup> Section 128(1)(b)(i) of the 2008 Companies Act.

<sup>44</sup> Section 128(1)(b)(ii) of the 2008 Companies Act.

<sup>45</sup> Section 128(1)(B)(iii) of the 2008 Companies Act.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Section 128(1)(h) of the 2008 Companies Act.

<sup>49</sup> EP Joubert ““Reasonable possibility” versus “reasonable prospect”: Did business rescue succeed in creating a better test than judicial management?” (2013) 76 *THRHR* 554; KK Bagwandeem *A Critical Analysis of the Effectiveness of the Business Rescue Regime as a Mechanism for Corporate Rescue* (unpublished LLM thesis, University of KwaZulu-Natal, 2018) 35.

rescue.<sup>50</sup> This issue was finally settled by the Supreme Court of Appeal (hereinafter referred to as “the SCA”) in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*.<sup>51</sup> The SCA made it clear that either of the two objectives referred to in section 128(1)(b)(iii) of the Act<sup>52</sup> would constitute valid grounds for the commencement of business rescue proceedings.<sup>53</sup> Either of the two objectives may be pursued from the start of business rescue proceedings and it will not be necessary in every instance to first attempt to restore the company to solvency despite the wording of the Act which seems to imply such an interpretation.<sup>54</sup>

This is one of the major differences between business rescue and judicial management, which only set one goal, namely, to rescue the company and enable it to pay all its debts. The courts have emphasised that there is a ‘considerable difference between business rescue and judicial management including the fact that business rescue is not an exceptional remedy as judicial management was and that the test for granting a business rescue order is not as arduous as it was for judicial management.’<sup>55</sup>

### **3. Consequences of Business Rescue**

There are numerous consequences once a financially distressed company has commenced business rescue. This dissertation focuses on the effect of the moratorium on property owners. The Act is general on the type of property that is protected by the moratorium.

The moratorium in respect of this dissertation is dealt with in section 133(1) as follows:

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<sup>50</sup> *Gormley v West City Precinct Properties (Pty) Ltd* 2013 JDR 1895 (WCC); *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and another; Investec Bank Ltd v Aslo Holdings (Pty) Ltd* (25051/11, 18112/2011) [2012] ZAWCHC 110; *AG Petzetakis International Holdings v Petzetakis Africa (Pty) Ltd and Others* 2012 (5) SA 515 (GSJ); *Southern Palace Investments 266 (Pty) Ltd v Midnight Storm Investments* 386 2012 (2) SA 423 (WCC); *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC); *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) v Kyalami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ).

<sup>51</sup> [2013] 3 All SA 303 (SCA).

<sup>52</sup> Act 71 of 2008.

<sup>53</sup> D Davis ...et al. *Companies and other Business Structures in South Africa* 4 ed. Cape Town: Oxford University Press (2019) 265.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

‘During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum.’

It is clear that the Act makes provision for both movable and immovable property. This dissertation thus covers both. Before investigating how case law has affected the rights of property owners, it is necessary to analyse section 133(1).

### **3.1 Legal Proceedings in respect of Business Rescue**

The courts have attempted to give meaning to the term ‘legal proceedings’.<sup>56</sup> In *Van Zyl v Eudodia Trust (Edms) Bpk*<sup>57</sup>, ‘the court stated that the ordinary meaning of a legal proceeding is a “law suit”’.<sup>58</sup> This definition found support in *Lister Garment v Wallace*.<sup>59</sup> Both these cases dealt with the interpretation of legal proceedings in terms of the 1973 Act.

Certain terms in section 133 have not been explicitly defined, including ‘legal proceedings’. In *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*<sup>60</sup>, the court considered what is meant by legal proceedings:

‘The words “legal proceedings” are not in my view susceptible to any other meaning other than their ordinary every-day literal one.’<sup>61</sup>

This interpretation was extended by the SCA in the case of *Chetty t/a Nationwide Electrical v Hart NO and another*.<sup>62</sup> The issue to be decided was whether arbitration can constitute legal proceedings.<sup>63</sup> In the court *a quo*, it was held that “arbitration proceedings are not legal proceedings” for which the written consent of the business rescue practitioner is required in

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<sup>56</sup> K Weyers ‘Do arbitration proceedings constitute legal proceedings’ *Without Prejudice* (2015) 15(5) 75.

<sup>57</sup> 1983 (3) SA 394 (T).

<sup>58</sup> Ibid.

<sup>59</sup> 1992 (2) SA 772 (D)

<sup>60</sup> (13/12406) [2013] ZAGJHC 109 (10 May 2013).

<sup>61</sup> (13/12406) [2013] ZAGJHC 109 (10 May 2013) at para 63.

<sup>62</sup> 2015 (6) SA 424 (SCA).

<sup>63</sup> K Weyers ‘Do arbitration proceedings constitute legal proceedings’ *Without Prejudice* (2015) 15(5) 75.

terms of section 133(1), thus affirming the decision in *Van Zyl*.<sup>64</sup> On appeal, the SCA found that ‘arbitration proceedings were indeed legal proceedings for the purposes of section 133(1)’.

The approach followed by the SCA appears to be the correct interpretation<sup>65</sup>, as it is far broader than that of the court *a quo*.

### **3.1.1 Analysis of the relevant case law as to what constitutes legal proceedings**

In *Chetty t/a Nationwide Electrical v Hart NO and another*<sup>66</sup>, the Applicant sought to nullify the arbitration proceedings since she was unaware that the company was under business rescue proceedings when the award was made. She thus failed to seek the written consent of the business rescue practitioner to continue with the arbitration in terms of section 133(1)(a).<sup>67</sup> The Applicant submitted that the award was improperly obtained in that it was issued at a time when the Defendant in the arbitration was already in business rescue.<sup>68</sup> It was further submitted that the arbitrator committed a gross irregularity by allowing arbitration proceedings to be heard as well as publishing the award during business rescue.<sup>69</sup> Notwithstanding these submissions, the learned presiding officer held that “arbitration proceedings are not legal proceedings”.<sup>70</sup> It was further held that there is no definition of the term ‘legal proceeding’ in the Act<sup>71</sup> and the learned Judge based his decision on previous case law, namely the case of *Van Zyl v Eudodia Trust* where it was held that the ‘ordinary meaning of legal proceedings is a “lawsuit” or “hofsak”’.<sup>72</sup> This was taken on appeal to the SCA.

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<sup>64</sup> [2015] JOL 32738 (KZD) at para 13. See K Weyers ‘Do arbitration proceedings constitute legal proceedings’ (2015) 15(5) *Without Prejudice* 75.

<sup>65</sup> K Weyers ‘Revisiting Chetty’ *Without Prejudice* (2015) 15(11) 24-25. See D Lloyd and L Msomi ‘Legal proceedings under business rescue’ *Without Prejudice* (2016) 16(7) 33-34. See AO Nwafor (2017) ‘Moratorium in business rescue scheme and protection of company’s creditors’ *Corporate Board: roles, duties and composition* 13(1), 61.

<sup>66</sup> [2015] JOL 32738 (KZD).

<sup>67</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-6.

<sup>68</sup> *Chetty* at para 8.1

<sup>69</sup> *Chetty* at para 8.2 and 8.3.

<sup>70</sup> [2015] JOL 32738 (KZD) at para 13. K Weyers ‘Do arbitration proceedings constitute legal proceedings’ (2015) 15(5) *Without Prejudice* 75.

<sup>71</sup> *Chetty* at para 12.

<sup>72</sup> *Ibid*.

In *Chetty t/a Nationwide Electrical v Hart NO and another*<sup>73</sup>, the SCA was called on to further determine whether ‘arbitration proceedings were legal proceedings for the purposes of section 133(1)’<sup>74</sup> and therefore provide finality on this point.<sup>75</sup> The SCA held that the decision of the court *a quo* was too narrow, and in their view the purpose of section 133(1) is to give the business rescue practitioner “breathing space” to get the company’s financial affairs in order; thus, a wider interpretation is required.<sup>76</sup> It was therefore held that arbitration proceedings are indeed legal proceedings.<sup>77</sup>

### 3.1.2 **Analysis:**

It is submitted that the decision of the court *a quo* is incorrect, as its interpretation of the term ‘legal proceedings’ is far too restrictive. The reliance on the previous case law of *Van Zyl v Eudodia Trust (Edms) Bpk*<sup>78</sup> and *Lister Garment Corporation (Pty) Ltd v Wallace N.O.*<sup>79</sup> reinforces this narrow interpretation which is ultimately incorrect. The approach of the SCA appears to be more in line with the intentions of the drafters of the Act. Such approach indicates a wide interpretation of the term, ‘legal proceedings’ which should extend to arbitration proceedings. It is submitted that although arbitration proceedings do not take place within a formal court room, in a technical sense it is still a legal proceeding as it can also have a negative effect on the business rescue process. Thus, it fulfils the same purpose as a formal court proceeding. Both parties sought to rely on the provisions of section 142(3)(b) of the Act. Van Niekerk and Parker<sup>80</sup> submit that this section ‘obliges’ directors of a company in business rescue to assist the business rescue practitioner by providing details of:

‘any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company.’<sup>81</sup>

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<sup>73</sup> 2015 (6) SA 424 (SCA).

<sup>74</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-6.

<sup>75</sup> R Kok ‘Do arbitration proceedings fall within the general moratorium on the legal proceedings against a company in business rescue?’ (November 2015) *De Rebus* 43.

<sup>76</sup> *Chetty* at para 35.

<sup>77</sup> K Weyers ‘Revisiting *Chetty*’ (2015) 15(11) *Without Prejudice* 24-25. See D Lloyd and L Msomi ‘Legal proceedings under business rescue’ (2016) 16(7) *Without Prejudice* 33-34. See AO Nwafor (2017) ‘Moratorium in business rescue scheme and protection of company’s creditors’ *Corporate Board: roles, duties and composition* 13(1), 61.

<sup>78</sup> 1983 (3) SA 394 (T).

<sup>79</sup> 1992 (2) SA 772 (D)

<sup>80</sup> B van Niekerk and A Parker ‘Beware the double edged sword in litigating with a company in business rescue’ (January 2016) *De Rebus* 36.

<sup>81</sup> *Chetty* at para 23.



It was submitted by the Appellant that section 142(3)(b) specifies the proceedings a business rescue practitioner must be appraised of and this includes ‘arbitrations’.<sup>82</sup> As can be seen from its wording, section 133(1) refers to legal proceedings in a general sense and can therefore include arbitrations.<sup>83</sup> The First Respondent thereafter contended that the fact that arbitrations are specifically mentioned in section 142 (3)(b), but not in section 133(1) is of no consequence.<sup>84</sup> It is submitted that this contention is incorrect. It could not have been the intention of the legislature to require the directors of the company to provide the business rescue practitioner with details of all proceedings including arbitrations, yet exclude arbitrations from the general moratorium provided for in section 133(1).<sup>85</sup> As noted above arbitrations fulfil the same purpose as formal court proceedings which render more or less the same outcome.<sup>86</sup>

Thus, in respect of the SCA’s decision, once ‘arbitrations’ are included in the meaning of ‘legal proceedings’ in section 133(1), it can be read “harmoniously” with section 142(3)(b) of the Companies Act<sup>87</sup>. This harmony creates a consistent interpretation, which it is submitted was the ‘intention of the legislature’ rather than a contradictory interpretation as contended by the First Respondent.<sup>88</sup>

### **3.2 Enforcement Action in respect of Business Rescue**

The term ‘enforcement action’ is likewise not defined in Chapter six of the Act.<sup>89</sup> Levenstein submits that, “enforcement action can only be a reference to attempts made by creditors who have obtained judgement to enforce such judgment by way of ‘writs of execution, attachments and sales in execution.’<sup>90</sup> Proceeding with such an action would constitute

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<sup>82</sup> *Chetty* at para 24.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Chetty* at para 25.

<sup>85</sup> *Chetty* at para 26.

<sup>86</sup> K Weyers ‘Revisiting Chetty’ (2015) 15(11) *Without Prejudice* 24-25. See D Lloyd and L Msomi ‘Legal proceedings under business rescue’ (2016) 16(7) *Without Prejudice* 33-34. See AO Nwafor (2017) ‘Moratorium in business rescue scheme and protection of company’s creditors’ *Corporate Board: roles, duties and composition* 13(1), 61.

<sup>87</sup> B van Niekerk and A Parker ‘Beware the double edged sword in litigating with a company in business rescue’ (January 2016) *De Rebus* 36.

<sup>88</sup> *Chetty* at para 29.

<sup>89</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-5.

<sup>90</sup> *Ibid.*

‘enforcement’ and is prohibited by section 133.”<sup>91</sup> In respect of recent case law it appears that the terms, ‘legal proceedings’ and ‘enforcement action’ tend to overlap.<sup>92</sup>

In *LA Sport 4x4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd*<sup>93</sup> in the court *a quo* it was held that a cancellation of a contract was a ‘legal proceeding’; however, on appeal to the full bench the court held that “the cancellation of a contract was not a legal proceeding or enforcement action as provided for in section 133(1).”<sup>94</sup> The court held that section 133(1) “imposes a general moratorium which flows from the commencement of business rescue proceedings and prohibits the right to commence or proceed with legal process, not the performance of juristic acts.”<sup>95</sup>

This was further supported by the SCA in *Cloete Murray and Another NNO v First National Bank t/a Wesbank*.<sup>96</sup> The court held that “the cancellation of a master instalment sale agreement (hereinafter referred to as “MISA”) during business rescue proceedings was not a ‘legal proceeding’, including ‘enforcement action’, requiring the written consent of the business rescue practitioner or leave of the court.”<sup>97</sup>

### **3.2.1 Analysis of the relevant case law as to whether the cancellation of an agreement amounts to an Enforcement Action during Business Rescue**

In *LA Sport 4x4 v Broadsword Trading 20 (Pty) Ltd*<sup>98</sup>, the Appellants were the owners of a business called LA Sport.<sup>99</sup> They concluded three agreements with the First Respondent, namely, a sale of business agreement, a trademark license agreement and a dealership agreement.<sup>100</sup> Taken together, the agreements enabled the First Respondent to operate as an LA Sport outlet.<sup>101</sup> Thereafter the First Respondent was placed in business rescue. It was further determined that the First Respondent was indebted to the Appellant in the amount of R460 863,11. The Appellant sent letters of demand to obtain this amount and on receiving no

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<sup>91</sup> Ibid.

<sup>92</sup> (A513/2013) [2015] ZAGPPHC 78 (26 February 2015). See also 2015(3) SA 438 (SCA).

<sup>93</sup> (A513/2013) [2015] ZAGPPHC 78 (26 February 2015).

<sup>94</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-8.

<sup>95</sup> (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) at para 43.

<sup>96</sup> 2015(3) SA 438 (SCA).

<sup>97</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-9.

<sup>98</sup> (A513/2013) [2015] ZAGPPHC 78 (26 February 2015).

<sup>99</sup> *LA Sport* at para 4.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

response, applied to cancel the sale agreement.<sup>102</sup> On the same date the Appellant elected to cancel the dealership agreement.<sup>103</sup> Provisions in the dealership agreement provided that the license agreement would be cancelled simultaneously. Thus, essentially, all three agreements were cancelled on the same day. The court *a quo* held that the sending of ‘letters of demand and cancellation of an agreement’ during business rescue constitutes ‘legal proceedings’ and therefore found in favour of the Respondents.<sup>104</sup>

Notwithstanding an appeal to the full bench of the High Court, it was held that the cancellation of an agreement during business rescue does not constitute ‘legal proceedings’.<sup>105</sup> It is submitted that this is the correct interpretation as presumably the legislature intended a wider interpretation of the term ‘legal proceedings’ as provided for by the SCA in *Chetty t/a Nationwide Electrical v Hart NO and another* (supra).

This interpretation finds further support in the case of *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank*.<sup>106</sup>

In *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank*<sup>107</sup>, the Respondent entered into a MISA with Skyline Crane Hire (Pty) Ltd.<sup>108</sup> Skyline was subsequently placed in business rescue. At the commencement of business rescue proceedings, Skyline was already in arrears with its payments to the Respondent.<sup>109</sup> Immediately thereafter, the Respondent sent a letter to Skyline cancelling the MISA due to Skyline’s failure to make monthly instalments.<sup>110</sup> Skyline’s business rescue practitioner subsequently consented to the Respondent repossessing and selling the relevant goods and the proceeds were then to be credited to its account. Skyline was thereafter placed in liquidation.<sup>111</sup> The Applicant’s approach was that the Respondent’s cancellation of the MISA constituted an ‘enforcement action’ and that, in the absence of the business rescue practitioner’s consent or leave of the

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<sup>102</sup> *LA Sport* at para 15.

<sup>103</sup> *LA Sport* at para 16.

<sup>104</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-8.

<sup>105</sup> K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 16.

<sup>106</sup> 2015(3) SA 438 (SCA).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Cloete Murray* at para 2.

<sup>109</sup> *Cloete Murray* at para 3.

<sup>110</sup> K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 16.

<sup>111</sup> *Ibid.*

court, the cancellation was of no force and effect.<sup>112</sup> Notwithstanding this, the Respondent submitted that the cancellation of the agreement did not constitute an ‘enforcement action’ in terms of section 133(1); therefore, the business rescue practitioner’s consent or leave of the court was not required to effect a ‘lawful cancellation of the MISA’.<sup>113</sup>

The SCA found favour with the decision of the full bench on appeal in the case of *LA Sport 4x4 v Broadsword Trading 20 (Pty) Ltd* (supra) where it was held that cancellation of an agreement does not constitute a ‘legal proceeding’.<sup>114</sup> The SCA further held that since ‘enforcement action’ follows ‘legal proceedings’, this indicates that enforcement actions are a form of legal proceedings. Thus, since no legal proceedings are permitted during business rescue proceedings in terms of section 133(1), this will include ‘enforcement actions’.

### **3.2.2 Analysis:**

It is submitted that the decision of the SCA in this case is the correct approach and interpretation in determining what an enforcement action is within the ambit of section 133(1) of the Companies Act 71 of 2008. As noted above, the SCA agreed with the decision of the full bench on appeal in *LA Sport 4x4 v Broadsword Trading 20 (Pty)* (supra) where it was held that ‘the cancellation of an agreement is not a legal proceeding’.<sup>115</sup>

“In *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18*, the court reiterated 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.”<sup>116</sup>

In light of the above, section 133(1) is made up of various parts which are interpreted with the assistance of the judgment:

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<sup>112</sup> *Cloete Murray* at paragraph 28, see K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 16.

<sup>113</sup> *Ibid.*

<sup>114</sup> *LA Sport* at para 43, see K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 16.

<sup>115</sup> M Laubscher, ‘*Cloete Murray and Another v FirstRand Bank Ltd t/a Wesbank* [2015] ZASCA 39’ 2015 (18)5 *PELJ* 1891.

<sup>116</sup> *Cloete Murray* at para 30.

*(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum.*

According to Laubscher, “it has already been agreed that the cancellation of a contract is not considered a ‘legal proceeding’”.<sup>117</sup> As to the meaning of the phrase, ‘enforcement action’, the Respondent submitted that ‘enforcement’ usually refers to the ‘enforcement of obligations’.<sup>118</sup> It is submitted that the SCA’s interpretation of this term is correct.<sup>119</sup> Since ‘enforcement’ refers to the law of obligations, this will include contractual obligations. It is well known in South Africa’s legal system that if there is non-performance of an obligation, in this matter, Skyline’s failure to pay the monthly instalments due in terms of the MISA, the reciprocal action would be to cancel the MISA, which was done by the Respondent. As can be seen from the above, which is reinforced by the SCA’s decision, the concepts ‘enforcement’ and ‘cancellation’ are “traditionally regarded as mutually exclusive”.<sup>120</sup> The term cancellation connotes ‘the termination of obligations between parties to an agreement’.<sup>121</sup>

Since the cancellation of an agreement does not constitute a ‘legal proceeding’, this will logically include an enforcement action due to the fact that an ‘enforcement action’ follows ‘legal proceedings’ by virtue of the wording of section 133(1) of the Companies Act.<sup>122</sup> Thus, it is apparent that ‘enforcement action’ is a form of or as said by the court, a “species” of ‘legal proceedings’.<sup>123</sup> The addition of the phrase, ‘may be commenced or proceeded with in any forum’ further supports the contention that the cancellation of an agreement does not amount to an enforcement action.<sup>124</sup> The court emphasised that, “A forum is normally defined as a court or tribunal and its employment in section 133(1) conveys the notion that

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<sup>117</sup> M Laubscher ‘*Cloete Murray and Another v FirstRand Bank Ltd t/a Wesbank* [2015] ZASCA 39’ 2015 (18)5 PELJ 1889.

<sup>118</sup> *Cloete Murray* at para 32.

<sup>119</sup> S Watson and C Thakur ‘Interpreting “Enforcement Action”’ (2016) 16(7) *Without Prejudice* 29-30. See R Tsusi ‘Interpretation of s 133(1) of the Companies Act 71 of 2008 – the principle of the moratorium redefined under business rescue’ (July 2015) *De Rebus* 51-52. See A Potgieter ‘The business rescue moratorium’ (2016) 16(2) *Without Prejudice* 20. See AO Nwafor (2017) ‘Moratorium in business rescue scheme and protection of company’s creditors. *Corporate Board: roles, duties and composition*’ 13(1), 61.

<sup>120</sup> *Cloete Murray* at para 33.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Cloete Murray* at para 32.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

‘enforcement action’ relates to formal proceedings ancillary to legal proceedings.”<sup>125</sup> Based on this interpretation, the sending of a letter of cancellation by the Respondent is an ancillary process to the institution of a summons.

It is submitted that the approach adopted by the SCA is correct and that broadening the interpretation of the expression ‘enforcement action’ to include the ‘cancellation of an agreement’ would indeed do “violence” to the wording of section 133(1) and be contrary to the intentions of the legislature.<sup>126</sup>

### **3.3 In Lawful Possession in respect of Business Rescue**

Another important aspect which affects a company under business rescue proceedings is whether the general moratorium applies to, ‘property belonging to the company, or lawfully in its possession’.<sup>127</sup> The moratorium is intended to protect a company under business rescue proceedings from harassment by its creditors and property owners.<sup>128</sup>

*JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and others*<sup>129</sup> dealt with the question of whether the requirement of ‘in lawful possession’, as provided for in section 133 of the Companies Act was satisfied.<sup>130</sup> The Applicant had bought a motor vehicle under an instalment sale agreement. The bank cancelled the agreement when the Applicant fell into arrears with payments and obtained a court order confirming cancellation and ordering the return of the vehicle to the bank. Shortly thereafter the Applicant was placed in business rescue. The Applicant argued that the general moratorium prevented the bank from claiming the return of the vehicle. The court held that as a result of the court order, the vehicle was no longer in the lawful possession of the company and the moratorium therefore did not apply. The vehicle thus had to be returned to the bank.<sup>131</sup> The court based its decision on *Madodza (Pty) Limited v ABSA Bank Limited and others*<sup>132</sup> which was based on similar grounds.

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<sup>125</sup> Ibid.

<sup>126</sup> Cloete Murray at para 33.

<sup>127</sup> Section 133(1) of the Companies Act 71 of 2008.

<sup>128</sup> MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 422.

<sup>129</sup> (7076/2015) [2016] ZAKZDHC 24 (22 July 2016).

<sup>130</sup> [www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html](http://www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html) (accessed on 15 July 2020).

<sup>131</sup> Levenstein E *South African Business Rescue Procedure* Issue 3 (2019) 9-24.

<sup>132</sup> [2012] ZAGPPHC 165 (15 August 2012).

As can be seen from the above, the provisions of the moratorium do not apply to movable property not ‘in the lawful possession of a company’ when the company is in arrears with its instalment payments to the bank.<sup>133</sup> With the advent of further case law, it appears that the provisions of the general moratorium are also not applicable in respect of a company’s failure to pay rent towards immovable property in its possession.

In *Kythera Court v Le Rendez-Vous Café CC and another*<sup>134</sup>, the Applicant brought an application to evict a tenant from its premises. The First Respondent had voluntarily placed itself in business rescue when it was already in arrears with rental payments to the Applicant. Despite the fact that the Applicant later cancelled the lease agreement, the First Respondent continued to operate from the leased premises. The First Respondent argued that the section 133 general moratorium was applicable, which prevented the Applicant from cancelling the lease and launching eviction proceedings.<sup>135</sup> The court held that “the cancelling of the lease agreement did not constitute an enforcement action and that it was therefore ‘permissible’ for an agreement to be cancelled during business rescue proceedings.”<sup>136</sup> It was further held that the First Respondent’s failure to vacate the premises rendered it an ‘unlawful occupier’. Since the general moratorium was not applicable, it was therefore not necessary for the Applicant to seek the leave of the court to institute eviction proceedings. An eviction order was therefore issued by the court.<sup>137</sup>

*Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and another*<sup>138</sup> dealt with the right of a lessor to cancel a lease of a ‘non-paying’ lessee under business rescue.<sup>139</sup> The First Respondent failed to pay rental and the Applicant cancelled the lease and began proceedings for ejectment. Subsequently the First Respondent was placed in business rescue. The business rescue practitioners submitted that the provisions of the section 133(1) moratorium prevented that Applicant from obtaining an eviction order.<sup>140</sup>

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<sup>133</sup> <http://roodtinc.com/news/Newsletter-195.asp> (accessed on 18 July 2020).

<sup>134</sup> (2016/11853) [2016] ZAGPPHC 172 (22 June 2016).

<sup>135</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-25.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> (16139/2015) [2015] ZAWCHC 174 (23 November 2015).

<sup>139</sup> [www.walkers.co.za/goodbye-delinquent-tenant/](http://www.walkers.co.za/goodbye-delinquent-tenant/) (accessed on 22 July 2020).

<sup>140</sup> [www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html](http://www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html) (accessed on 15 July 2020).

The court held that the Applicant's 'cancellation of the lease' indicated that the property was no longer in the 'lawful possession' of the First Respondent.<sup>141</sup> Thus, the section 133 general moratorium was not applicable and the court ordered the First Respondent's eviction.

### **3.3.1 Analysis of the relevant case law as to when property in the possession of the company is considered lawful/unlawful during business rescue**

#### ***3.3.1.1 Madodza (Pty) Ltd v ABSA Bank Limited and others***<sup>142</sup>

*In Madodza (Pty) Limited v ABSA Bank Limited and others*<sup>143</sup>, the Applicant conducted business as a transport company. The Applicant had entered into agreements with the Respondent in order to finance the motor vehicles used to run the Applicant's business.<sup>144</sup> In 2010, the finance agreements were cancelled by the Respondent due to the Applicant's failure to pay the monthly rentals and/or lease payments in respect of the finance agreements.<sup>145</sup> Thereafter, court orders were issued to return the vehicles to the Respondent. The Applicant was placed under supervision in 2011 without returning the motor vehicles to the Respondent. Counsel for the Applicant argued that the Applicant had a right to remain in possession of the motor vehicles since section 133(1) prohibits enforcement action during business rescue proceedings.<sup>146</sup> It was further argued that without the motor vehicles the Applicant would not be able to operate and therefore the business rescue proceedings would be doomed to failure<sup>147</sup>; however, the court found in favour of the Respondent. The court held that the motor vehicles must be in the 'lawful possession' of the Applicant in terms of section 133(1).<sup>148</sup> Nwafor submits that 'since the finance agreements were cancelled and the necessary court orders were issued for return of the motor vehicles prior to the commencement of business rescue proceedings', the court held that the motor vehicles were

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<sup>141</sup> Ibid.

<sup>142</sup> [2012] ZAGPPC 165 (15 August 2012).

<sup>143</sup> Ibid.

<sup>144</sup> *Madodza* at para 4.

<sup>145</sup> *Madodza* at para 7.

<sup>146</sup> *Madodza* at para 10.

<sup>147</sup> *Madodza* at para 11.

<sup>148</sup> *Madodza* at para 17.



not in the lawful possession of the Applicant and thus had to be returned to the Respondent.<sup>149</sup>

### **3.3.1.2 Analysis:**

It is submitted that the court's interpretation of section 133(1) is correct with regard to 'property in the lawful possession of the company'. Although the Applicant's arguments make sense to a certain extent in that if the court orders were enforced, the Applicant would not be able to operate and business rescue would ultimately fail, a proper interpretation of section 133(1) renders the Applicant's argument flawed.<sup>150</sup> This case was decided in 2012 during the early days of business rescue litigation. Despite this, many subsequent judgments have made use of this interpretation to flesh out the phrase, 'in lawful possession', rendering this interpretation ultimately correct.

#### ***3.3.2.1 JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Limited and others<sup>151</sup>***

In *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and others*<sup>152</sup> the Applicant was a transport company with one motor vehicle to run its business.<sup>153</sup> The vehicle was acquired by means of an instalment sale agreement entered into with the First Respondent.<sup>154</sup> The terms of the agreement provided that the First Respondent would retain ownership of the motor vehicle.<sup>155</sup> The Applicant fell into arrears with its instalments resulting in the First Respondent cancelling the agreement and instituting proceedings to recover the motor vehicle.<sup>156</sup> The court granted an order confirming the cancellation and ordering the return of the motor vehicle on 27 March 2015.<sup>157</sup> A resolution was taken by the Applicant to commence business rescue proceedings on 31 March 2015.<sup>158</sup> The Applicant sought an

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<sup>149</sup> Nwafor AO (2017) 'Moratorium in business rescue scheme and protection of company's creditors' *Corporate Board: roles, duties and composition* 13(1), 61.

<sup>150</sup> *Madodza* at para 16.

<sup>151</sup> (7076/2015) [2016] ZAKZDHC 24 (22 July 2016).

<sup>152</sup> *Ibid.*

<sup>153</sup> *JVJ Logistics* at para 2.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

interdict ‘restraining’ the First Respondent from recovering the motor vehicle.<sup>159</sup> Counsel for the Applicant referred to the decision of the SCA in *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank* (supra) and argued that returning the motor vehicle to the First Respondent amounted to an ‘enforcement action’ which is prohibited in terms of section 133(1).<sup>160</sup> The First Respondent relied on the decision in *Madodza (Pty) Limited v ABSA Bank Limited and others* (supra) which dealt with the issue of whether ‘legal proceedings’ may be brought in relation to any property that is in the ‘lawful possession’ of the company. Based on this interpretation, the court held that the Applicant could not be in lawful possession of the vehicle and thus section 133(1) did not apply.<sup>161</sup> Thus, the motor vehicle had to be returned to the First Respondent.

### **3.3.2.2 Analysis:**

It is submitted that the court’s interpretation of section 133(1) regarding, ‘property belonging to the company, or lawfully in its possession’<sup>162</sup> is correct. Although the facts of this case are virtually the same as those in *Madodza (Pty) Limited v ABSA Bank Limited and others* (supra), which was relied on by Counsel for the First Respondent, it is submitted that more recent case law needs to be considered to make a correct judgment. The court correctly utilised the decision of the SCA in *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank* (supra). As noted above, this 2015 SCA case considered the issue of whether the cancellation of a MISA amounted to an ‘enforcement action’.<sup>163</sup> The court ruled that the cancellation of the agreement did not amount to an ‘enforcement action’.

As noted previously, the phrase, ‘including enforcement action against the company’ precedes ‘in relation to any property belonging to the company, or lawfully in its possession’. Thus, if the cancellation of the contract does not amount to an enforcement action in terms of section 133(1), the same logic should apply to property which is not in the lawful possession of the Applicant.

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<sup>159</sup> [www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html](http://www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html) (accessed on 15 July 2020).

<sup>160</sup> *Cloete Murray* at para 13.

<sup>161</sup> Levenstein E *South African Business Rescue Procedure* Issue 3 (2019) 9-24.

<sup>162</sup> *JVJ Logistics* at para 1.

<sup>163</sup> K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 16.

Despite identifying two potential meanings of the word ‘lawfully’<sup>164</sup>, the court chose the meaning adopted in *Madodza (Pty) Limited v ABSA Bank Limited and others* (supra). This meaning infers a wider interpretation which is submitted to be correct as it is the intention of section 133(1) to ‘cast the net as wide as possible’.<sup>165</sup>

### **3.3.3.1 *Kythera Court v Le Rendez-Vous Café CC and another***<sup>166</sup>

In *Kythera Court v Le Rendez-Vous Café CC and another*<sup>167</sup>, the Applicant was a partnership trading as a property rental firm, effectively the Lessor.<sup>168</sup> The Applicant concluded a written lease agreement with the First Respondent and leased the premises to the First Respondent from 10 May 2010 to 30 April 2016. After falling into arrears with payments of rent, the First Respondent placed itself in business rescue on 2 December 2015. The Applicant cancelled the lease agreement on 7 March 2016, some three months after the commencement of business rescue. The First Respondent contended that section 133(1) prevented the Applicant from cancelling the lease agreement and launching an eviction application.<sup>169</sup> However, the court held that the cancellation of a contract does not amount to an ‘enforcement action’ as provided for in section 133(1). The court applied the decision reached in *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank* (supra) to come to this conclusion. The court further held that since cancellation of the lease does not amount to an enforcement action it was the duty of the First Respondent to vacate the premises, and that failure to do so rendered the First Respondent an ‘unlawful occupier’.<sup>170</sup> In light of this an eviction order was granted.

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<sup>164</sup> *Kythera* at para 24.

<sup>165</sup> Levenstein E, *South African Business Rescue Procedure* Issue 3 (2019) 9-5. See Delpont et al. *Henochsberg on the Companies Act 71 of 2008* 478(6)-478(6c) in order to include any conceivable type of action against the party. See *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank* para 34.

<sup>166</sup> (2016/11853) [2016] ZAGPPHC 172 (22 June 2016).

<sup>167</sup> (2016/11853) [2016] ZAGPPHC 172 (22 June 2016). See [www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html](http://www.accaglobal.com/in/en/student/exam-support-resources/fundamentals-exams-study-resources/f4/technical-articles/bus-rescue-sa.html) (accessed on 15 July 2020).

<sup>168</sup> *Kythera* at para 2.

<sup>169</sup> Ibid.

<sup>170</sup> *Kythera* at para 14 and 15.

### 3.3.3.2 Analysis:

It is submitted that the court's interpretation in this instance is correct in saying that, 'the ambit of the moratorium is a matter of interpretation'.<sup>171</sup> Thus, a literal interpretation of the phrase, 'in relation to any property belonging to the company, or lawfully in its possession'<sup>172</sup> suggests that the purpose of the moratorium is to prevent the institution or continuation of legal proceedings or enforcement action in relation to property that belongs to the company in business rescue or is lawfully in its possession.<sup>173</sup> However, the ambit of the moratorium is a matter of interpretation (supra). The court was guided by the decision in *LA Sport 4x4 v Broadsword Trading 20 (Pty) Ltd* (supra) which was further bolstered by the SCA in *Cloete Murray and another NNO v FirstRand Bank Ltd t/a Wesbank* (supra) where it was held that the 'juristic act of cancelling an agreement does not constitute an enforcement action'; thus, it is 'permissible for an agreement to be cancelled during business rescue proceedings'.<sup>174</sup> Based on this as well as the fact that, 'in relation to any property belonging to the company, or lawfully in its possession' follows, 'including enforcement action', Lawrenson submits that the court was correct in holding that eviction or ejectment proceedings fall outside the ambit of the moratorium and thus repossession of property in the unlawful possession of the company during business rescue proceedings is permissible.<sup>175</sup>

The court also took into consideration section 134(1)(c) of the Companies Act 71 of 2008:

'despite any provision of an agreement to the contrary, no person may exercise any right irrespective of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.' [Judge's emphasis].<sup>176</sup>

The court further held that although section 134(1)(c) 'conditionally prohibits the exercise of any right in respect of property in the "lawful possession of the company"', it does not

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<sup>171</sup> *Kythera* at para 7.

<sup>172</sup> *Kythera* at para 9.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Kythera* at para 13.

<sup>175</sup> *Kythera* at para 9. See S Lawrenson 'Lease Agreements and Business Rescue: In Need of Rescue?' 2018(3) TSAR 659.

<sup>176</sup> *Kythera* at para 10.

prohibit the exercise of any right in respect of property in the “unlawful possession of the company”.<sup>177</sup> Thus, in accordance with the court’s interpretation, section 133(1) and section 134(1)(c) are fundamentally the same regarding the ‘repossession of property in the unlawful possession of the company’.<sup>178</sup>

It is submitted that the court correctly held that property in the unlawful possession of the company can be vindicated by the Applicant.<sup>179</sup> Lastly, it was held that the intention of the legislature needs to be considered. Thus, as submitted by Cassim, if the legislature intended the moratorium to be a ‘blanket provision’<sup>180</sup> it would have a major effect on a landlord’s common law rights of ownership as well as contract.<sup>181</sup> Thus, it was submitted that “it could not have been the intention of legislature to frustrate the rights of property owners and render them without a remedy during business rescue proceedings.”<sup>182</sup>

#### **4. The Effect of Suspension of Agreements during Business Rescue Proceedings**

In light of recent case law, it has been established that an agreement entered into by a company prior to the commencement of business rescue proceedings may be legally cancelled in respect of outstanding rental in respect of a lease agreement or any outstanding monthly instalments in respect of a MISA.<sup>183</sup> However, there is respite for a financially distressed company in terms of the Act, specifically section 136(2)(a).

- (i) ‘Section 136(2)(a) provides that despite any provision in any agreement to the contrary, during business rescue proceedings the practitioner may entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of business rescue

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<sup>177</sup> *Kythera* at para 11.

<sup>178</sup> *Kythera* at para 10.

<sup>179</sup> Levenstein E *South African Business Rescue Procedure* Issue 3 (2019) 9-25.

<sup>180</sup> M.F Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017(3) *SA Mercantile Law Journal* 422.

<sup>181</sup> *Kythera* at para 12 and 14.

<sup>182</sup> *Kythera* at para 12. See S Lawrenson ‘Lease Agreements and Business Rescue: In Need of Rescue?’ 2018(3) *TSAR* 659.

<sup>183</sup> MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 427. See also *Cloete Murray* at paragraph 36.

proceedings and would otherwise become due during business rescue proceedings.’

Weyers submits that in order for section 136(2)(a) to be successful, a business rescue practitioner must ‘suspend’ all obligations in terms of any agreements entered into by the financially distressed company by means of issuing a letter of suspension prior to a creditor sending out a letter of cancellation.<sup>184</sup> Cassim argues that the effect of the suspension is that the failure of the company to make the necessary monthly instalments or rental payments will not render it in breach of the agreement.<sup>185</sup> Thus, there will be no legal grounds on which a creditor may cancel the agreement.<sup>186</sup>

In respect of recent case law, section 136(2) has found application regarding the cancellation of lease agreements. Its application was dealt with in the case of *178 Stamford Hill CC v Velvet Star Entertainment CC*.<sup>187</sup> The Respondent was placed in business rescue due to its failure to pay arrear rental in respect of a contract of lease entered into with the Applicant. The court held that ‘the suspension of the lease by the business rescue practitioner had no effect on the claim for rental due prior to the commencement of business rescue proceedings<sup>188</sup> and the Applicant was consequently entitled to cancel the lease.’<sup>189</sup>

The court stated that “s136(2) as it now is means that the rentals due by the respondent for the months after the business rescue proceedings commenced cannot be claimed, but that the claim for rental due when the business rescue proceedings commenced were unaffected by the business rescue and could be claimed.”<sup>190</sup> Judgment in this case was given on 1 April 2015.

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<sup>184</sup> [www.brexexchange.co.za/suspension-of-obligations/](http://www.brexexchange.co.za/suspension-of-obligations/) (accessed on 29 July 2020). See also K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 17.

<sup>185</sup> MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 427.

<sup>186</sup> Ibid. See also K Weyers ‘Cancellation or suspension of agreements during business rescue’ (2015) 15(4) *Without Prejudice* 17.

<sup>187</sup> (1506/15) [2015] ZAKZDHC 34 (1 April 2015).

<sup>188</sup> MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 427. See also *178 Stamford Hill CC* at paras 25 and 27.

<sup>189</sup> Ibid.

<sup>190</sup> *178 Stamford Hill CC* at para 25.

However, in the case of *Kythera Court v Le Rendez-Vous Café CC and another*<sup>191</sup> which was based on virtually the same facts as those of *178 Stamford Hill CC* (supra), the court reached a different conclusion regarding the application of section 136(2). It held that despite the fact that the business rescue practitioner did not make use of the safeguard provided for in section 136(2), had he done so the Applicant may have been ‘prevented from cancelling the lease agreement’.<sup>192</sup> Further support is found in *Cloete Murray and Another NNO v First National Bank t/a Wesbank*<sup>193</sup>: “By invoking this provision the practitioner could prevent a creditor from instituting action and repossessing or attaching property in the company’s possession.”<sup>194</sup>

These two cases seem to infer that if a business rescue practitioner were to issue a notice of suspension in respect of a lease agreement, the property owner or landlord would not be able to cancel the lease and claim monies for rent incurred prior to the commencement of business rescue proceedings and during these proceedings. Despite the fact that the decision in *Kythera Court* was rendered in 2016 and the decision in *Cloete Murray* on 26 March 2015, a mere five days prior to the decision in *178 Stamford Hill CC*, it is submitted that the correct interpretation regarding the business rescue practitioner’s power of suspension is found in *178 Stamford Hill CC*. Thus, the business rescue practitioner’s power of suspension applies only to obligations post commencement of business rescue proceedings and not to any pre-commencement obligations.<sup>195</sup>

## **5. Conclusion**

This dissertation critically analysed the effect of the moratorium on property owners when a company is in business rescue. It is concluded that financially distressed companies are placed in business rescue either voluntarily or by way of an order of court on the understanding that the general moratorium will provide them with complete protection against their creditors, in this instance property owners, so that they can ‘restructure their

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<sup>191</sup> (2016/11853) [2016] ZAGPPHC 172 (22 June 2016).

<sup>192</sup> *Kythera Court* at para 31.

<sup>193</sup> 2015(3) SA 438 (SCA).

<sup>194</sup> *Cloete Murray* at para 35.

<sup>195</sup> MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 428.

affairs and return to financial viability'.<sup>196</sup> The analysis of relevant case law shows that the general moratorium does not provide complete protection against property owners.

Despite the provisions of section 7(k) of the Act, on analysis of the relevant case law, it appears that the interpretation favoured by the courts on the application of the moratorium are 'contrary to the spirit and purport of business rescue'.<sup>197</sup>

Cassim asserts that the courts' interpretations of the *moratorium* from the *Madodza* to the *Kythera Court* cases are 'whittling away' the moratorium<sup>198</sup>. This may be the case due to the reliance Judges are placing on the common law, specifically the common law of contract in respect of the cancellation of agreements. It is clear that this is the common thread running through all the above cases.

In *DH Brothers Industries (Pty) Ltd v Gribnitz NO and others*<sup>199</sup> the court pointed out that:

'business rescue proceedings place a moratorium on creditors enforcing their claims against the relevant company. This of course amounts to a legislative intrusion into a contractual relationship between parties. It is therefore an incursion into existing law territory. It is a well-worn tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights'.<sup>200</sup>

Subsequent judgments have followed the same line of reasoning:

'[I]t could not have been the legislature's intention that the company in business rescue would restructure its affairs by utilizing assets to which it has no lawful claim'<sup>201</sup> and, 'It could not have been the intention of the legislature

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<sup>196</sup> Cloete Murray at para 14.

<sup>197</sup> MF Cassim 'The effect of the moratorium on property owners during business rescue' 2017 *SA Mercantile Law Journal* 440

<sup>198</sup> MF Cassim, 'The effect of the moratorium on property owners during business rescue' 2017 *SA Mercantile Law Journal* 428.

<sup>199</sup> 2014(1) SA 103 (KZP).

<sup>200</sup> 2014(1) SA 103 (KZP) at para 26.

<sup>201</sup> (16139/2015) [2015] ZAWCHC 174 (23 November 2015) para 35; see MF Cassim 'The effect of the moratorium on property owners during business rescue' 2017 *SA Mercantile Law Journal* 431.



to frustrate the rights of property owners and render them remediless during business rescue.’<sup>202</sup>

Given that the Act came into force on 1 May 2011, the business rescue process is fairly new. In light of the decisions reached in the abovementioned cases, it is submitted that current judicial interpretation of the *moratorium* seems to favour the interests of property owners rather than the company in financial distress.

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<sup>202</sup> (2016/11853) [2016] ZAGPPHC 172 (22 June 2016) at para 12; see MF Cassim ‘The effect of the moratorium on property owners during business rescue’ 2017 *SA Mercantile Law Journal* 432.

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## **LEGISLATION**

Companies Act 46 of 1926

Companies Act 61 of 1973

Companies Act 71 2008

26 January 2021

Mr Yasthil Beekarun (217080443)  
School of Law  
Howard College Campus

Dear Mr Beekarun,

**Protocol reference number:** HSS/0502/019M

**Project title:** A critical analysis of the General Moratorium on affected persons when a company is in Business Rescue

**Amended title:** A critical analysis of the effect of the Moratorium on property owners

### **Approval Notification – Amendment Application**

This letter serves to notify you that your application and request for an amendment received on 17 November 2020 has now been approved as follows:

- Change in title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

**All research conducted during the COVID-19 period must adhere to the national and UKZN guidelines.**

Best wishes for the successful completion of your research protocol.

Yours faithfully








.....  
Professor Dipane Hlalele (Chair)

/ms

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