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**An analysis of the consequences of a business rescue moratorium on
legal proceedings on property owners**

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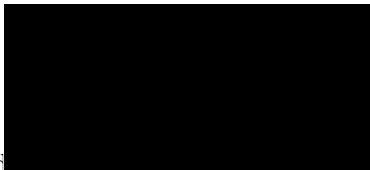
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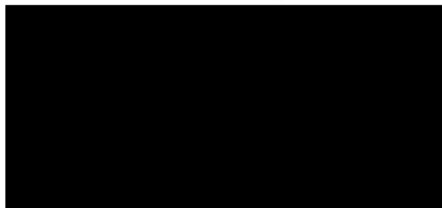
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DEDICATION

To my mother, Ms Fikile Virginia Ngubane, for her unwavering love and a great support system.

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ABSTRACT

It has been over a decade since the Companies Act 71 of 2008 introduced business rescue proceedings which provided for the rescue of financially distressed companies. This procedure replaced the then statutory procedure of judicial management under Companies Act 61 of 1973. The business rescue proceedings begin with the general moratorium or stay on legal proceedings against the company or its property. This has a consequence that any claims against the company may only be enforced with the consent of the business rescue practitioner or the leave of the court.

However, the courts continue to grapple with the interpretation, effect, and application of the key elements of business rescue provisions while always striving to accord respect to the legislative intention of business rescue as set out in section 7(k) of the Companies Act 71 of 2008. After a decade since its introduction, it is an opportune time to ascertain whether the business rescue proceedings is an effective corporate rescue procedure suitable to the modern-day demands of the South African economy.

The research analyses the effect and the consequences of the moratorium on the rights of property owners. The moratorium has the effect that companies are given temporary immunity to actions brought by creditors which would have been due and enforceable. In this regard, the property leased by the property owner remains occupied by the company during business rescue proceedings as the property owner is barred by the moratorium to institute legal proceedings against the company. Further, when the repossession of the property is not possible and the rental due or installment is not payable by the company, the business rescue proceedings encroaches on the right of the property owners. The purpose of the research is to highlight the effect of the moratorium on the lease agreement between the company and property owners and the possible protection of the property owners' rights. The study includes a critical analysis of judicial decisions on the moratorium, together with a discussion of the legal position in comparable foreign jurisdictions. In my conclusion, based on the findings, the business rescue is not free from imperfection. Therefore, I recommended that the legislature amend some parts of Chapter 6 of the Companies Act 71 of 2008.

KEYWORDS: Business rescue proceedings, Moratorium, Property owners, Legal Proceedings

CHAPTER ONE

I. INTRODUCTION

A company is an integral part of the community wherein it does business.¹ It has a direct impact on the economic and social well-being of the community in which it operates through its employees, creditors, and suppliers.² As a result, the insolvency of the company or close corporation has an adverse impact not only on the private interest of the insolvent debtor but also on other groups in society who have vested interest in the company or close corporation.³ In this regard, Binns-Ward J submitted that the legislative purpose of business rescue is to avoid the liquidation of companies as “it has serious collateral damage both economically and socially, and where reasonably possible the need to protect public interest against such adverse socio-economic consequences.”⁴ Therefore, it is beneficial to the economy of the country and its citizens to give a financially distressed company a second chance.⁵

An effective and successful business rescue procedure is of importance to the economic growth and stability of South Africa’s emerging economy. Consequently, Cilliers and Banade submitted that countries with developing economies cannot easily allow companies to be dissipated by liquidation due to temporary setbacks in cases where there is a reasonable prospect that they would if granted a *moratorium*, be salvaged (own emphasis).⁶ In this regard, a *moratorium* is a “legally authorized period of delay in the performance of a legal obligation or the payment of a debt that is triggered when the company is placed under business rescue.”⁷ Therefore, if a company is successfully rescued, it theoretically follows that creditors will be paid, jobs will

¹ RS Dzvrimbo *Should the Zimbabwean Companies Act Move Away from Judicial Management and Adopt Business Rescue?* (Unpublished LLM Thesis, University of Cape Town, 2013) 1.

² TH Mongalo *Modern Company Law for a Competitive South African Economy* 1st ed (2010) 114.

³ FHI Cassim, MF Cassim, R Cassim et al *Contemporary Company Law* (2012) 862.

⁴ *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* [2011] ZAWCHC 464, 2012 (2) SA 378 (WCC) para 14.

⁵ s7 of the Companies Act 71 of 2008. See also RS Dzvrimbo op cite note 1.

⁶ HS Cilliers, ML Banade, JJ du Plessis et al *Corporate Law* 3rd ed (2000) 478.

⁷ See s133(1) of the Companies Act 71 of 2008.

be saved and the company will be able to pay its taxes.⁸ This will positively contribute to South Africa's emerging economy, its people, and their livelihood.

Loubser submitted that an argument for a successful business rescue procedure is that “this is one of the factors that foreign investors consider when deciding whether to invest in a country.”⁹ Furthermore, the purposes of the Companies Act 71 of 2008 (hereinafter referred to as the Act) includes inter alia to “promote innovation and investment in the South African markets,”¹⁰ “reaffirm the concept of the company as a means of achieving economic and social benefits,”¹¹ and “continue to provide for the creation and use of companies in a manner that enhances the economic welfare of South Africa as a partner within the global economy.”¹² Therefore, it is submitted that a business rescue endeavor is more than a mere efficient rescue and recovery of financially distressed companies,¹³ and as Binns-Ward J cogently submitted, it is about protecting the public interest against negative socio-economic consequences resulting from liquidating the company or close corporation.¹⁴ Companies and close corporations are hereinafter collectively referred to as entities.

II. HISTORICAL BACKGROUND OF CORPORATE RESCUE IN SOUTH AFRICA

The concept of business rescue has been acknowledged as one of the innovative procedures introduced by the Act. The current procedure of business rescue¹⁵ replaced the previous concept of judicial management under the old statutory regime.¹⁶ However, judicial management was not a new concept under the Companies Act 61 of 1973 as it was introduced in South Africa in 1926.¹⁷

⁸ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 863.

⁹ A Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (Phd Thesis, University of South Africa, 2010) 12.

¹⁰ s7(c) of the Companies Act 71 of 2008.

¹¹ s7(d) of the Companies Act 71 of 2008.

¹² s7(e) of the Companies Act 71 of 2008.

¹³ s7(k) of the Companies Act 71 of 2008.

¹⁴ *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* supra note 4.

¹⁵ See Ch 6 of the Companies Act 71 of 2008 read with s7.

¹⁶ Companies Act 61 of 1973.

¹⁷ Companies Act 46 of 1926.

However, due to some practical difficulties, judicial management underwent several positive amendments from 1932 to 1973. This includes, inter alia, the Companies law Amendment Act 11 of 1932 which introduced the concept of the moratorium. In this regard, section 196(1) of the Companies law Amendment Act 11 of 1932 allowed the court to order a stay of any action against the company for the period of judicial management and such order could only be pursued on application to the court. The court had the discretion whether or not to grant the moratorium after an applicant had made their case. Therefore, the moratorium was not triggered automatically upon the placement of the company under judicial management. This meant that the creditors could have pursued their claims against the company that was in financial difficulty unless the court has granted the moratorium. This moratorium was later incorporated into the Companies Act 61 of 1973 as a mechanism to help achieve successful judicial management.

The judicial management in the Companies Act 61 of 1973, was a mechanism to attempt to save financially distressed companies.¹⁸ However, the Companies Act 61 of 1973 did not define judicial management. Therefore, to ascertain the nature and purpose of judicial management one had to rely on the requirements for and contents of both a provisional and final judicial management order.¹⁹ The requirements of judicial management indicate one recognized purpose, the rescue of the company. In this regard, section 432(2)(a) – (e) of the Companies Act 61 of 1973 provides for the final judicial management order and states that:

“On such return day, the Court may after consideration of... grant a final management order if it appears to the Court that the company will, if placed under judicial management, be enabled to become a successful concern and that it is just and equitable that it be placed under judicial management, or may discharge the provisional order or make any other order it may deem just.”

¹⁸ s427(1) of the Companies Act 61 of 1973.

¹⁹ s427(1) Companies Act 61 of 1973 provides that “[w]hen any company by reason of mismanagement or for any other cause- (a) is unable to pay its debts or is probably unable to meet its obligations; and (b) has not become or is prevented from becoming a successful concern, and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company.” See also s432 of the Companies Act 61 of 1973 for a final judicial management order.

However, judicial management in the Companies Act 61 of 1973 remained relatively unchanged from its inception in the Companies Act 46 of 1926 and did not address all the shortcomings of the 1926 Act.²⁰ The shortcomings which negated the efficiency of judicial management include, inter alia, the fact that the Companies Act 61 of 1973 did not allow voluntary judicial management. In this regard, only the court could place a company under judicial management following an application by any person entitled to apply for the winding up of the company.²¹ This prevented the board of the company to act urgently, proactively, and dynamically in dealing with the company experiencing financial difficulties as they had to go through a lengthy application process in court.

Furthermore, the court could make an order for judicial management only if “it appeared to the court that the company will become a successful concern, and granting such an order is just and equitable.”²² In other words, the procedure impoverished the companies as it was very dependent on the courts which made it unduly cumbersome and expensive. The companies had to use their limited resources to fund an application to court instead of focusing on turning around the state of the affairs of the company.²³ Consequently, judicial management was criticized. In *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd*, Josman J referred to judicial management as “a system which has barely worked since its initiation in 1926.”²⁴ Therefore, due to judicial management’s failure, a system of corporate rescue appropriate to the needs of a modern South African emerging economy needed to be introduced.

III. THE OUTLINE AND AIM OF THE STUDY

The current concept of business rescue brings into application one of the stated purposes of the Act namely, “to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the relevant rights and interests of all relevant stakeholders.”²⁵ While the

²⁰ Companies Act 46 of 1926.

²¹ s427(2) of the Companies Act 61 of 1973.

²² s427(3) and s432 of the Companies Act 61 of 1973.

²³ R Bradstreet ‘The New Business Rescue: Will Creditors Sink or Swim?’ (2011) 128(2) *SALJ* 372.

²⁴ *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) 238.

²⁵ s7(k) of the Companies Act 71 of 2008.

Close Corporations Act²⁶ does not have the business rescue clause, the provisions of the Act concerning the rescue of the company apply to close corporations as well.²⁷

Chapter 6 of the Act extensively deals with the business rescue proceedings, and it commences with the two broad types of the moratorium placed by the Act on the exercise of the creditors' rights against the company under business rescue. The two moratoriums contained in the Act are stopping legal proceedings against the company itself and the property in its possession. However, the property should be fundamental to achieving the business rescue objectives. Therefore, it follows that the property which is not essential to business rescue objectives may, subject to a business rescue practitioner's consent or leave of the court, be repossessed by the property owners.

The two moratoriums could be discerned from section 128(1)(b)(ii) of the Act which defines business rescue as “proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for, inter alia, a temporary moratorium on the rights of claimants against the company or in respect of property in the company's possession.” This has a consequence that any claims against the company may only be enforced with the written consent of the business rescue practitioner or the leave of the court.²⁸

In his judgment in *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*, Binns-Ward J reiterated that “it is unquestionable that achieving the goals of business rescue endeavor will always come at a cost to the creditors of the company.”²⁹ One of the affected third parties is the creditors who should have the strongest right to consultation regarding the development of the business rescue plan as they have one of the greatest financial interests in the outcome of the business rescue.³⁰

²⁶ Close Corporations Act 69 of 1984.

²⁷ No. 6 of Schedule 3 of the Companies Act 71 of 2008 provides for the Amendment of section 66 of Act 69 of 1984, as substituted by section 16 of Act 26 of 1997 and states that “[s]ection 66 of the Close Corporations Act is hereby amended by the insertion of the following subsection after subsection (1): (1A) The provisions of Chapter 6 of the Companies Act, read with the changes required by the context, apply to a corporation, but any reference in that Chapter to a company must be regarded as a reference to a corporation...”

²⁸ s133(1)(a)–(b) of the Companies Act 71 of 2008.

²⁹ *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* supra note 4 para 10.

³⁰ *Gormley v West City Precinct Properties (Pty) Ltd* [2012] 2 ZAWCHC 33 para 8.

The focus of this thesis is on one of the creditors of the entity, namely the property owners. The lessors who have concluded a lease agreement in respect of movable or immovable property with the entity may find themselves in an unenviable position when the entity (lessee) is placed under business rescue.³¹ For instance, the property often remains occupied by the entity during business rescue and at worst without the rental payment. In this regard, Cassim submits that “it would be the harshest encroachment on the rights of the landlord if the tenant in the business rescue were permitted to stay on the leased premises indefinitely without paying rent or compensation and that this outcome must be avoided.”³² Furthermore, the landlord has the primary obligation to pay for other utilities such as but not limited to municipal rates and taxes, water, and electricity.³³ In this regard, a landlord is “effectively compelled to continue funding the tenant’s use of utilities and services for as long as the tenant remains in occupation of the premises and a landlord may often be unable to recover these costs from the tenant in business rescue.”³⁴ The same can be said about the lessors of the movable property who are responsible for the cost of servicing or maintaining the property.

The property owner is still required to fulfill their contractual obligation while the entity under business rescue may potentially not comply with its duties to pay rental or installment and this could be onerous to property owners. Therefore, this thesis seeks to analyze the conundrum regarding the proper application and interpretation of the business rescue moratorium on legal proceedings as espoused in Chapter 6 of the Act. More specifically in relation to any contractual obligations between a property owner and the entity undergoing business rescue that concerns movable and immovable property.

IV. RESEARCH OBJECTIVE

The purpose of this study is to provide an analysis of the consequences of a business rescue moratorium on legal proceedings on movable and immovable property owners. To answer this question, the following key research questions will be examined:

³¹ MF Cassim ‘The effect of the moratorium on property owners during business rescue’ (2017) 29/3 *SA Merc LJ* 420.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

1. What is the affect of a moratorium on legal proceedings on written lease agreements as well as property owners?
 - Is the property owner prevented by the moratorium from canceling its lease agreement with the entity?
 - What is the impact of a suspension of the agreement by the business rescue practitioner under section 136(2)(a) of the Act?
 - Can the property owner recover the property while the entity is under business rescue?
2. What are the protective measures available to property owners whose property is in the possession of an entity under business rescue?
3. What is the legal position of a comparable foreign jurisdiction on the moratorium on legal proceedings and its effect on property owners?

The foreign jurisdiction that will be compared is Australia's official management³⁵ and voluntary administration.³⁶ The reason for choosing Australia is because some of the provisions in the Australian legislation have similar wording and therefore analysis of the interpretation of the wording will provide insights for courts and the business rescue practitioners. Australia is also one of the countries that have long-standing experience and success with implanting corporate rescue procedures. Its longstanding success with the regime will be beneficial in providing insights into the challenges and best practices of implementing this regime.³⁷

V. PRELIMINARY LITERATURE REVIEW

It is generally accepted that the essence of the moratorium in section 133(1) of the Act is simply to provide crucial or necessary breathing space to enable the financially distressed company or close corporation to restructure its affairs in such a way as would allow the entity to resume

³⁵ Part IX of the Australian Companies Act no.6839 of 1961.

³⁶ Part 5.3A of the Australian Corporations Act no.50 of 2001.

³⁷ C Anderson 'Viewing the proposed South African Business Rescue provisions from an Australian perspective' (2008) Vol. 1 *PER/PEL* 1.

operations based on profitability.³⁸ The moratorium allows the business rescue practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of business rescue proceedings without the distraction of having to deal with legal proceedings.³⁹ Therefore, business rescue proceedings can only protect the entities who are caught in the eye of the economic storm. “Once a company is more than financially distressed, options other than business rescue become more attractive for ailing entities, such as liquidations or compromises.”⁴⁰

A respite from the claims of creditors is the key to success for any business rescue efforts as it allows the entity to make use of its resources on measures that contribute towards recovering the business from its economic storm instead of using the constrained resources to pay off the debts.⁴¹ It is submitted that using the constrained resources to pay off the debts instead of rescuing the business may lead the financially distressed entity into insolvency. Furthermore, as aforementioned, the insolvency of the entity has an adverse impact not only on the private interest of the insolvent debtor but also on other groups in society who have vested interest in the company or close corporation.⁴²

(a) *Section 133(1) of the Act*

Section 133(1) of the Act makes provision for a general moratorium on legal proceedings against a company in business rescue. In this regard, section 133(1) of the Act provides that:

“During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or concerning any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

³⁸ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA) para 18 and *Madodza (Pty) Ltd v ABSA Bank Ltd* [2012] ZAGPPHC 165 para 12.

³⁹ *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Limited v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) paras 7, 9 and 11.

⁴⁰ *Welman v Marcelle Props 193 CC* [2012] ZAGPJHC 32 para 28.

⁴¹ R Bradstreet op cite note 23.

⁴² FHI Cassim, MF Cassim, R Cassim et al op cite note 3.

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court considers suitable;
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
- (d) criminal proceedings against the company or any of its directors or officers; or
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee.”

However, as Nwafor cogently argued, the courts continue to grapple with the interpretation, effect, and application of the key elements of business rescue provisions while always striving to accord respect to the judicially identified legislative intention of business rescue as set out in section 7(k) of the Act.⁴³ Section 7(k) of the Act provides that the purpose of the Act is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.” Further, in the *Natal Joint Municipal Pension Fund v Endumeni Municipality* case, the court held that the starting point in interpreting a statute is the language of the provision itself, read in context, and having regard to its purpose.⁴⁴

Consequently, in *Redpath Mining South Africa (Pty) Ltd v Marsden*,⁴⁵ in an attempt to interpret the legislative purpose of section 133(1) of the Act the court held that the effect of a moratorium is that once business rescue proceedings have commenced, all legal proceedings and enforcement actions by creditors against a company, its property or any property in lawful possession of the company are prohibited.⁴⁶ However, the automatic stay on legal proceedings could be lifted in appropriate circumstances. In this regard, section 133(1)(a) and (b) of the Act provides that legal proceedings or enforcement action may be commenced with the written consent

⁴³ AO Nwafor ‘Moratorium in business rescue scheme and the protection of company’s creditors.’ 2017 *Corporate Board: role, duties and composition*, 13(1), 59-67 available at <https://doi.org/10.22495/cbv13i1p6> (Accessed 28 December 2020).

⁴⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 38.

⁴⁵ *Redpath Mining South Africa (Pty) Ltd v Marsden* [2013] ZAGPJHC 148, 2013 SA 148 (GPJHC).

⁴⁶ *Redpath Mining South Africa (Pty) Ltd v Marsden* op cite note 45 para 55.

of the business rescue practitioner or with the leave of the court.⁴⁷ Other exceptions to the general principle of a stay on legal proceedings or enforcement actions against the company are listed in section 133(1)(c)–(f) of the Act. Therefore, while the moratorium has, in the past, been considered as an all-encompassing bar against legal proceedings and enforcement action during the business rescue, the Act and recent judicial decisions provide that it is not an absolute bar.⁴⁸

One of the relevant stakeholders that need to be taken into account is the secured creditors of the entity. The secured creditors are included under the moratorium because if secured creditors are allowed to freely exercise their rights in terms of the security they hold, this may interfere with the objectives of the business rescue proceedings.⁴⁹ The secured creditors have a lien or interest on an item of property which allows the secured creditors to have the property sold to satisfy the debt owed. However, it is important to note that when a company under business rescue disposes of the property in the ordinary course of its business the rights of the secured creditors in respect of the security over property or interest therein are protected.⁵⁰ Furthermore, the property of the entity under business rescue can only be disposed of under three circumstances enshrined in section 134(1)(a) of the Act. Therefore, the inclusion of the secured creditors of the company under the moratorium is necessary as it enhances the chances of realization of successful business rescue proceedings.

Further, section 132(3) of the Act directs that the business rescue proceedings should generally not exceed three months, and therefore implies temporary restriction. However, the court has the power to extend that period upon the application of the business rescue practitioner.⁵¹ Such an extension should always have in contemplation the statutorily stated ‘temporary’ nature of the moratorium “to ensure that this legislative scheme is not turned into a dubious mechanism to deprive the creditors of their legitimate right of recourse against the company to enforce mutual contractual obligations.”⁵² In *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty)*

⁴⁷ s133(1)(a)(b) of the Companies Act 71 of 2008.

⁴⁸ s133(1)(a)–(f) of the Companies Act 71 of 2008. See also *Kythera Court v Le Rendez-Vous Cafe CC* [2016] ZAGPJHC 172, 2016 (6) SA 63 (GJ) para 8 and *FHI Cassim, MF Cassim, R Cassim et al* op cite note 3 at 880.

⁴⁹ s128(1)(b)(iii) of the Companies Act 71 of 2008, and *FHI Cassim, MF Cassim, R Cassim et al* op cite note 3 at 878.

⁵⁰ s134(3) of the Companies Act 71 of 2008.

⁵¹ s132(3)(a)(b) of the Companies Act 71 of 2008.

⁵² *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* supra note 4 para 10.

Ltd,⁵³ the court held that Chapter 6 of the Act indicates a legislative intention that the business rescue proceedings must be conducted with reasonable speed, and the court suggested that the proceedings should take between two to three months.⁵⁴

(b) *The meaning of legal proceedings as espoused in section 133(1) of the Act*

The general moratorium on legal proceedings has a wide scope and requires a clear determination of the meaning of ‘legal proceedings’ as espoused in section 133(1) of the Act. The Act does not define the term ‘legal proceedings’ and this has led to a dispute regarding whether certain proceedings constitute legal proceedings. In this regard, the Supreme Court of Appeal (hereinafter referred to as the SCA) in the *Chetty v Hart*⁵⁵ case had to determine, inter alia, whether arbitration constitutes legal proceedings for the purpose of a moratorium in section 133(1) of the Act. Cachalia JA submitted that “the phrase legal proceeding may be interpreted restrictively, to mean court proceedings or more broadly, to include proceedings before other tribunals including arbitral tribunals.”⁵⁶ The court held that the fact that arbitrations are often used to resolve commercial disputes, legal proceedings as contemplated in section 133(1) should be interpreted to include arbitrations.⁵⁷ The court further submitted that “language employed in section 133(1) of the Act itself suggests that a broader interpretation commends itself.”⁵⁸ The broader interpretation approach seems to be the preferred approach in pursuing legislative intention.⁵⁹ In *Investec Bank Ltd v Bruyns*,⁶⁰ Rogers AJ described section 133(1) as a “general provision that affords the company protection against legal proceedings on claims in general.”⁶¹

⁵³ *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* [2012] ZAGPJHC 24, 2012 (5) SA 515 (GSJ).

⁵⁴ *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* supra note 53 para 29.

⁵⁵ *Chetty v Hart* [2015] ZASCA 112, 2015 (6) SA 424 (SCA).

⁵⁶ *Chetty v Hart* supra note 55 para 35.

⁵⁷ *Chetty v Hart* supra note 55 paras 28 and 29.

⁵⁸ *Chetty v Hart* supra note 55 para 35.

⁵⁹ *Ibid.*

⁶⁰ *Investec Bank Ltd v Bruyns* [2011] ZAWCHC 423, 2012 (5) SA 430 (WCC).

⁶¹ *Investec Bank Ltd v Bruyns* supra note 60 para 16.

Delport opined that although no definition of the term ‘legal proceeding’ or ‘enforcement action’ is provided in Chapter 6 of the Act, the provision intends to “cast the net as wide as possible to include any conceivable type of action against the company.”⁶²

(c) *The ability of creditors to cancel an agreement with an entity under business rescue and the ability of the entity under business rescue to suspend contractual obligations*

In *Murray v FirstRand Bank Ltd t/a Wesbank*⁶³, SCA ruled that cancellation of the contract by the creditor does not amount to ‘enforcement action’ as contemplated in section 133(1) of the Act and therefore it is not prohibited by business rescue moratorium.⁶⁴ In addition, the SCA reiterated that “the law of contract provides for a unilateral cancellation in the case of a breach of contract.”⁶⁵

Cassim concurs with the SCA’s ruling in *Murray v FirstRand Bank Ltd t/a Wesbank* that if a company under business rescue breaches its contractual obligations to the property owner, (such as its obligation to pay rent or other charges) the property owner is at liberty to cancel the agreement during the business rescue process.⁶⁶ Cassim further submits that “it makes no difference whether the breach of contract occurs before or after the commencement of business rescue proceedings.”⁶⁷ The cancellation of an agreement is patently not obstructed by the moratorium.⁶⁸ However, in *Murray v FirstRand Bank Ltd t/a Wesbank*, the SCA did not rule on whether, following a lawful cancellation, the landlord can freely institute legal proceedings for the recovery of the property or whether the landlord remains restricted from claiming the repossession of its property from the company by the general moratorium in section 133(1) of the Act. In this regard, subsequent case law has dealt with this issue and set out the factors to be considered by the courts regarding the repossession of the property after lawful cancellation.⁶⁹

⁶² PA Delport, Q Vorster, D Burdette at al *Henocheberg on the Companies Act 71 of 2008* (2012) 480.

⁶³ *Murray v Firststrand Bank Ltd t/a Wesbank* [2015] ZASCA 39, 2015 (3) SA 438 (SCA).

⁶⁴ *Murray v Firststrand Bank Ltd t/a Wesbank* supra note 63 para 40.

⁶⁵ Ibid.

⁶⁶ MF Cassim op cite note 31 at 424.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ See *Mabote v Van der Merwe* [2016] ZAGPJHC 185.

It is worth noting that the cancellation of the contract by the creditor can be avoided by the company under business rescue. In this regard, the prerogative of the lessor to cancel its obligation or contract with a company in business rescue may be restricted by the suspension of the agreement by the business rescue practitioner in terms of section 136(2) of the Act. In terms of section 136(2) of the Act:

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

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

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

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

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

Therefore, the effect of invoking this provision is that the business rescue practitioner could preclude a property owner from instituting action and repossessing or attaching property in the company’s possession.

In *178 Stamford Hill CC v Velvet Star Entertainment CC*,⁷⁰ wherein a close corporation in business rescue reneged on its obligations to pay arrear rental in terms of a lease agreement. The court found that the suspension of the lease by the business rescue practitioners had no effect on the claim for rental due *before* the commencement of business rescue proceedings and that the landlord was accordingly entitled to cancel the lease agreement.⁷¹ In this regard, it is submitted

⁷⁰ *178 Stamford Hill CC v Velvet Star Entertainment CC* [2015] ZAKZDHC 34.

⁷¹ *178 Stamford Hill CC v Velvet Star Entertainment CC* supra note 70 para 25.

that the literal meaning of section 136(2) of the Act suggests that the power of suspension of the business rescue practitioner applies only to contractual obligations of the company that would become due during the business rescue proceedings, and therefore only post-commencement obligations of the company may be suspended, but not pre-commencement obligations.

(d) *Repossession of the property by the property owner from an entity in business rescue*

Initially, the High Courts had ruled that the moratorium will not apply where the lessor or other property owner had cancelled its agreement with the company under business rescue due to a breach of contract by the company. Since there was no contract between the parties, the company would not be in lawful possession of the property as required by the Act.⁷² As a result, the lessor is at liberty to institute legal proceedings or enforcement action against the company to reclaim the leased property.⁷³ This meant that the probability of successful legal proceedings or enforcement action against the company was quite high. For instance, in *Madodza (Pty) Ltd v Absa Bank Ltd*,⁷⁴ the court ruled that since the lease agreements had been canceled and court orders had been obtained for the return of the motor vehicles by the applicant, the vehicles were not ‘lawfully in its possession’ and it had therefore failed to meet the requirements for reliance on section 133(1) of the Act.⁷⁵ Similarly, in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*,⁷⁶ the court ruled that section 133(1) of the Act does not impede the repossession of the vehicle. The court stated that the execution or enforcement of an order of court made before the commencement of business rescue would amount to ‘enforcement action’ within the meaning of section 133(1), however, the applicant could not rely on this section because it was not in ‘lawful

⁷² *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165, *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* [2016] ZAKZDHC 24, 2016 (6) SA 448 (KZD), *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* [2015] ZAWCHC 174, 2016 (6) SA 501 (WCC), *Kythera Court v Le Rendez-Vous Cafe CC* [2016] ZAGPJHC 172, 2016 (6) SA 63 (GJ).

⁷³ *Ibid.*

⁷⁴ *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165.

⁷⁵ *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 para 17.

⁷⁶ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* [2016] ZAKZDHC 24, 2016 (6) SA 448 (KZD).

possession' of the relevant vehicle as required by the operative phrase in section 133(1) and 134(1)(c) of the Act.⁷⁷

However, the *Mabote v Van Der Merwe*⁷⁸ case introduced factors that need to be considered by the courts in deciding whether to grant the upliftment of the moratorium following a cancellation of the agreement by the property owner due to a breach of the contract by the company. The High Court in *Mabote v Van Der Merwe* held that the court has a wide discretion to grant the upliftment of the moratorium in terms of section 133(1)(b) of the Act.⁷⁹ Furthermore, the court will consider certain factors in its assessment on whether uplifting the moratorium will not hinder the objectives of business rescue proceedings.⁸⁰ In this regard, inter alia, these following factors must be considered:

“The effect of the granting or refusal of leave on the applicants’ rights, as opposed to other affected persons and relevant stakeholders; the impact of the proposed legal proceedings on the wellbeing of the company and its ability to regain financial viability; and whether the granting of leave would be contrary to the objective and purpose of business rescue proceedings.”⁸¹

The factor-based analysis is aligned with section 7(k) of the Act and will lead to instances where the creditor may be prevented from repossessing the property provided that the property is fundamental to successful business rescue proceedings.

Cassim concurs with the High Court factor-based analysis in *Mabote v Van Der Merwe* and opined that the decisions of the High Courts before *Mabote v Van Der Merwe* were whittling away at the moratorium contemplated in section 133(1) of the Act and that approach was at odds with the intention of the legislature and it undermines the very purpose of business rescue.⁸² The cardinal policy is that the property of third parties that is in the possession of the company, maybe

⁷⁷ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 paras 1 and 3.

⁷⁸ *Mabote v Van der Merwe* [2016] ZAGPJHC 185.

⁷⁹ *Mabote v Van der Merwe* supra note 78 paras 11, 13 and 29.

⁸⁰ *Ibid.*

⁸¹ *Mabote v Van der Merwe* supra note 78 para 28, Also see *Arendse v Van der Merwe* [2016] ZAGPJHC 292, 2016 (6) SA 490 (GJ) para 28.

⁸² MF Cassim op cite note 31 at 432.

a fundamental component of the company's business, and its continued use may therefore be vital to the rescue of the company and the repossession of property by the property owner would in many cases defeat the very purpose of the business rescue endeavor.

It also follows that where the property is no longer needed by the company, the business rescue practitioner cannot unreasonably withhold consent to property owners. *178 Stamford Hill CC v Velvet Star Entertainment CC* case presents a typical scenario wherein the practitioner ought simply to consent to the repossession of the premises by the landlord and refrain from involving the courts in an application for leave to bring ejection proceedings under section 133(1)(b) of the Act. In this regard, the practitioners had notified creditors that there was no longer any point in continuing the business rescue proceedings, as there was no prospect of success.⁸³ Therefore, any concern that the success of the business rescue process would be frustrated by legal proceedings by the property owner had fallen away. Further, while the upliftment of the moratorium may not be possible in certain circumstances the Act provides protective measures to property owners such as ongoing payment of rent or other compensation through section 133(1)(b) of the Act.

VI. RESEARCH DESIGN AND METHODOLOGY

This research will be a non-empirical desktop-based study. The following primary sources will be considered: the relevant legislation and judicial decisions. The following secondary sources will be considered: journal articles, books, theses, and internet-based sources that have attempted to deal with the concept of the moratorium.

VII. DELINEATIONS AND LIMITATIONS

Attention will be devoted to the business rescue moratorium and its impact on movable and immovable property owners. This dissertation will focus on analyzing the interpretation of relevant provisions of Chapter 6 of the Act. This, inter alia, includes sections 7(k), 128, 129, 131, 132, 133, 134, 136(2), 145(1) and 150(1) of the Act.

⁸³ *178 Stamford Hill CC v Velvet Star Entertainment CC* supra note 70 para 29.

VIII. STRUCTURE OF DISSERTATION

This dissertation has five chapters. Chapter one sets out a brief historical background of corporate rescue procedure in South Africa, outlining the concept of business rescue proceedings and the aim of the study as well as setting out the research questions, conducting a preliminary review, as well as setting out the methodology, and delineations and limitations of the study.

Chapter two is an overview of the moratorium and its impact on contractual obligations as well as property owners.

Chapter three discusses the protective measures contained in the Act available to property owners whose property is in the possession of an entity under business rescue.

Chapter four will provide a comparative analysis of the legal position of Australia on the moratorium and its effect on property owners.

The final chapter sets out the conclusions and recommendations.

CHAPTER TWO

The affect of a moratorium on legal proceedings on written lease agreements as well as property owners

I. INTRODUCTION

It is worth noting that the success of business rescue proceedings provided in Chapter 6 of the Act can only be achieved by a moratorium. As a result, the effect of this moratorium is that once business rescue proceedings have commenced, all legal proceedings and enforcement actions by creditors against a company, its property, or any property in lawful possession of the company and assets are prohibited.⁸⁴ Therefore, it is generally accepted that the moratorium as espoused in section 133(1) of the Act is a crucial element towards achieving the successful turn-around of a financially distressed company as it provides breathing space to enable the financially distressed company to restructure its affairs to resume operation based on profitability.⁸⁵ This chapter discusses the business rescue moratorium and its interpretation by the courts. In addition, the chapter will discuss the effect of a moratorium on lease agreements between property owners and entities under business rescue.

II. THE MEANING OF THE BUSINESS RESCUE MORATORIUM

The concept of business rescue moratorium in chapter 6 of the Act entails the legal suspension of lawful remedies against debtor companies during times of general financial distress of the company.⁸⁶ Rogers AJ described section 133(1) of the Act as “a general provision that affords the company protection against legal proceedings on claims in general.”⁸⁷ Delpont notes that although no definition of the term moratorium is provided in Chapter 6 of the Act, the provision intends to “cast the net as wide as possible to include any conceivable type of legal proceedings against the

⁸⁴ s133(1) of the Companies Act 71 of 2008, See also *Redpath Mining South Africa (Pty) Ltd v Marsden* supra note 45 para 55.

⁸⁵ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

⁸⁶ J Law, A Elizabeth & MA Martin *Dictionary of Law* 8th ed (2015) 405.

⁸⁷ *Investec Bank Ltd v Bruyns* supra note 60 para 16.

company.”⁸⁸ Therefore, the fundamental goal underlying the business rescue moratorium is to allow or give the financially distressed company a crucial period of respite to restructure its affairs to keep operating as a fruitful business concern.⁸⁹

Furthermore, during the period of respite, the appointed business rescue practitioner has an opportunity to formulate a business rescue plan initiated to turn around the company.⁹⁰ This is the primary objective of the business rescue proceedings. Moreover, Coetzee AJ emphasized that the legislative intent of the Act is that the business rescue proceedings must be conducted reasonably speedily.⁹¹ Thus, the judicially accepted notion of the moratorium is to provide the company a period of respite to restructure its affairs in such a way as it would allow it to resume operation based on profitability. However, Lightman and Moss opined that even though it is convenient to refer to it as a moratorium, “the period of respite that the company is allowed or given is not an authorization to the company to postpone payment of its debt but merely a limited immunity against enforcement of some legal rights by the creditors.”⁹² When the primary objective is not achieved the secondary objective of business rescue proceedings is to gain a better return for creditors during the liquidation of the company.⁹³

III. GENERAL MORATORIUM ON LEGAL PROCEEDINGS

Section 133(1) of the Act makes provision for a general moratorium on legal proceedings against a company in business rescue. The Act in section 133(1) provides that:

⁸⁸ PA Delport, Q Vorster, D Burdette et al op cite note 62.

⁸⁹ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894, RS Dzvimbó op cite note 1 at 86.

⁹⁰ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

⁹¹ *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* supra note 53 para 29.

⁹² G Lightman, G Moss, H Anderson et al *The Law of Administrators and Receivers of Companies* 4th ed (2007).

⁹³ s128(1)(b)(iii) of the Companies Act 71 of 2008. Also see FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

“During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or concerning any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court considers suitable;
- (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
- (d) criminal proceedings against the company or any of its directors or officers; or
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee.”

As a result, the creditors will not be able to take action against a company for non-payment of debts during business rescue proceedings. However, the Act does not define the term *legal proceedings* or *enforcement action* as used in section 133 of the Act.

The interpretation of the extent and implications of this moratorium and the meaning of the term legal proceedings and enforcement action has been dealt with in different cases. In *Murray v FirstRand Bank Ltd t/a Wesbank*, Wesbank (respondent) entered into an installment sale agreement with Skyline Crane Hire (Pty) Ltd. In terms of this contract, Wesbank sold movable goods to Skyline Crane Hire (Pty) Ltd but reserved ownership of the goods pending full payment of the purchase price. Before the full payment of the purchase price was made, Skyline was placed under voluntary business rescue in terms of section 129 of the Act. After voluntary business rescue by Skyline, Wesbank canceled the installment sale agreement with immediate effect on the ground that Skyline was in arrears with the payment of the monthly installments due under the agreement.

The SCA in this case cogently reasoned that the concepts of enforcement and cancellation are mutually exclusive in our law of contract.⁹⁴ The SCA held that enforcement action “in our legal parlance usually refers to the enforcement of obligations.”⁹⁵ On the other hand, “cancellation

⁹⁴ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

⁹⁵ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 para 32.

connotes the termination of obligations between the parties to an agreement.”⁹⁶ Furthermore, the SCA held that “a cancellation is a unilateral act by a party to an agreement in the event of a breach of contract, while enforcement action is considered a species of a legal proceeding or, at least, is meant to have its origin in legal proceedings.”⁹⁷ This is indicated by the inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceeding’ in section 133(1) of the Act.⁹⁸ Enforcement action thus relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders through writs of execution or attachment.⁹⁹ In addition, cancellation, in contrast with enforcement action, is not ‘commenced or proceeded with in any forum’ as envisaged by section 133(1) of the Act.¹⁰⁰

In *Chetty v Hart*, the SCA held that a general moratorium on the rights of creditors enforcing their rights against the company is crucial to achieving the primary objective of business rescue proceedings.¹⁰¹ Furthermore, the SCA held that:

“[G]iven the ubiquitous use of arbitrations to resolve commercial disputes, an interpretation of section 133(1) of the Act that excludes them from the moratorium on legal proceedings against financially distressed companies would significantly hinder the attainment of business rescue objectives.”¹⁰²

In this regard, Cachalia JA submitted that “once the purpose of business rescue is properly understood, it becomes apparent that only an interpretation that *includes* arbitrations within the meaning of legal proceedings in section 133(1) of the Act is acceptable.”¹⁰³ This interpretation is further supported by the wording of section 142(2)(b) of the Act which requires the board of directors of the company to disclose any information and provide a statement of affairs relating to

⁹⁶ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 para 33.

⁹⁷ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32, 33 and 40.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Chetty v Hart* supra note 55 para 28.

¹⁰² *Ibid.*

¹⁰³ *Chetty v Hart* supra note 55 para 29.

any court arbitration or administration proceedings including enforcement proceedings involving the company.¹⁰⁴ Thus, such an interpretation is in line with the well-known canon of statutory construction, which is that if by any reasonable construction the two can be made to be compatible, not contradictory, that is the interpretation that should be given.¹⁰⁵

Furthermore, Cachalia JA submitted that the phrase ‘legal proceeding’ may, depending on the context within which it is used, be interpreted restrictively, to mean court proceedings or more broadly, to include proceedings before other tribunals including arbitral tribunals.¹⁰⁶ “The language employed in section 133(1) of the Act itself suggests that a broader interpretation commends itself.”¹⁰⁷ An approach with which academic commentators concur.¹⁰⁸ Moreover, the purpose of the moratorium provision, which is to give breathing space to the practitioner to get the company’s financial affairs in order, “also requires it to be construed widely because arbitrations, like court proceedings, also involve diversion of resources – both time and money – that may hinder the effectiveness of business rescue proceedings.”¹⁰⁹ To construe the term legal proceedings narrowly would be at odds with its language, defeat its purpose and lead to insensible and impractical consequences.¹¹⁰

The approach to include, under a moratorium, any conceivable types of claims against the company seems to be in line with international thinking. In this regard, a similar approach was also followed in an English case in *Environmental Agency v Administrator of Rhondda Waste Disposal Ltd*.¹¹¹ Barker LJ, in an attempt to interpret the phrase *no other proceedings* in section 11(3)(d) of the United Kingdom Insolvency Act (c 45) of 1986, opined that the provision has a plain and clear meaning.¹¹² Furthermore, Barker LJ submitted that the phrase ‘no other proceedings

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ *Chetty v Hart* supra note 55 para 35.

¹⁰⁷ Ibid.

¹⁰⁸ See FHI Cassim, MF Cassim, R Cassim et al note 3 at 881 and PA Delpont, Q Vorster, D Burdette et al op cite note 62 at 478.

¹⁰⁹ *Chetty v Hart* supra note 55 para 35.

¹¹⁰ Ibid.

¹¹¹ *Environmental Agency v Administrator of Rhondda Waste Disposal Ltd* [2000] EWCA Civ 38.

¹¹² *Environmental Agency v Administrator of Rhondda Waste Disposal Ltd* supra note 111 para 27.

and no executions or other legal proceedings may commence or be continued against the company or its property' employed in section 11(3) of the United Kingdom Insolvency Act (c 45) of 1986, covers all judicial and quasi-judicial proceedings and the words used are entirely apt to include all judicial proceedings.¹¹³

Therefore, it is submitted that the phrase legal proceedings employed in section 133(1) of the Act includes all legal proceedings including arbitrations.

IV. MORATORIUM ON PROPRIETARY INTEREST OF CREDITORS

The exercise of a right by property owners over their property that is in the possession of the company under business rescue is suspended by the Act. In this regard, section 134(1)(c) of the Act provides the scope of the restriction imposed on the creditors' proprietary rights. It provides that:

“Subject to subsections (2) and (3), during a company's business rescue proceedings...despite any provision of an agreement to the contrary, no person may exercise any right in respect 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.”

This provision, directly and indirectly, affects all creditors of the company including secured creditors. This is because it does not make an exception that secured creditors may exercise their rights in respect of the property while the company is under business rescue. Therefore, by this provision, it is submitted that the rights of all property owners whose property is in the lawful possession of the company can legitimately be curbed.

Nwafor opined that section 134(1)(c) of the Act “impacts directly on the private agreement between the creditor and the company in that every right which the creditor may have on the property, even as little as demanding for rent accruing from the creditor's property occupied by the company, is suspended for the duration of the business rescue moratorium.”¹¹⁴ In an English

¹¹³ Ibid.

¹¹⁴ AO Nwafor op cite note 43 at 62.

case of *AIB Capital Markets Plc & Anor v Atlantic Computer Systems Plc & Ors*¹¹⁵ where the court was called upon to interpret and determine the meaning and effect of a similar provision,¹¹⁶ the court held that the owners of the property, are disabled from exercising their proprietary rights unless the administrator consents or the court gives leave. Similarly, in South Africa, the property owners may only exercise any right in respect of any property in the lawful possession of the company provided that the business rescue practitioner consents in *writing*. The exception being that cancellation of the agreement by the property owner due to breach by an entity is not prohibited by the moratorium provisions. As discussed above, the SCA *Murray v Firstrand bank Ltd t/a Wesbank* that cancellation, in contrast with enforcement action, is not ‘commenced or proceeded with in any forum’ as envisaged by section 133(1) of the Act.¹¹⁷

Further, the SCA in *Murray v Firstrand bank Ltd t/a Wesbank* has provided clarity regarding the seemingly strict requirement in section 134(1)(c) of the Act that consent can only be given in *writing*. In this regard, Fourie AJA found that the requirement of *writing* is *merely* a directory and not a peremptory.¹¹⁸ Fourie AJA further pointed out that there is no sanction added in case the requirement is not met, nor does the section state that a failure to meet the requirement of written consent should be visited with nullity.¹¹⁹ Further, once again the SCA in *Chetty v Hart* found that:

“The requirement for the practitioner’s consent to be obtained is to give him the opportunity, after his appointment, to consider the nature and validity of any existing or pending claim and how it is to be dealt with, for example by settling it or continuing with the litigation.”¹²⁰

¹¹⁵ *AIB Capital Markets Plc & Anor v Atlantic Computer Systems Plc & Ors* [1990] EWCA Civ 20.

¹¹⁶ s11(3)(c) of the UK Insolvency Act c. 45 of 1986. The section provides that “during the period for which an administration order is in force: (c) no other steps may be taken to enforce any security over the company’s property, or to repossess goods in the company’s possession under any hire purchase agreement, except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as the court may impose.”

¹¹⁷ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32, 33 and 40.

¹¹⁸ *Murray v Firstrand bank Ltd t/a Wesbank* supra note 63 para 24.

¹¹⁹ *Ibid*.

¹²⁰ *Chetty v Hart* supra note 55 para 28.

In particular, the practitioner's concern is directed at assessing how the claim will impact the well-being of the company and its ability to regain its financial health.¹²¹ Cachalia JA submitted that "the formal requirement for consent to be sought from the practitioner and given in *writing* was inserted to promote legal certainty and avoid later disputes."¹²² Further, Nwafor added that the company cannot be heard to say: 'I did not consent in writing as required of me by the law, I only consented orally'.¹²³ In other words, the company cannot rely on its fault as a defense to the exercise of the creditor's right. Therefore, it is submitted that non-compliance with the *written* requirement does not have a vitiating effect on the consent as given, however, it is recommended that it is given in *writing* to promote legal certainty and avoid later disputes.

Beyond the issue of the *written* consent is the need to explore in context the specific meanings of the operative words used in section 134(1)(c) of the Act. The operative words used in the provision are *owned* and *possession* of the property. In this regard, where the company *merely* asserts the right of possession over the property, especially where the property is in the actual physical control of a third party, there will always be the question as to whether the property is indeed in the possession of the company, and what does being in *possession* entail.¹²⁴ The Constitutional Court (hereinafter referred to as the CC), in *FNB v The Commissioner for the South Africa Revenue Services*,¹²⁵ held that "the possession of a movable requires both physical control and the necessary state of mind (intention to take control)."¹²⁶ Furthermore, the CC held that when used in a statute the context will determine what state of mind is required for possession in terms of such statute. In other words, having regard to the purpose of the statute as a whole will assist in determining the requisite intention. Nwafor noted that section 134(1)(c) of the Act refers to *lawful possession* and not *actual possession*, and further submitted that "it would ordinarily include actual and constructive possession so long as the company can legitimately lay a claim on the property while under business rescue process."¹²⁷

¹²¹ Ibid.

¹²² *Chetty v Hart* supra note 55 para 46.

¹²³ AO Nwafor op cite note 43 at 62

¹²⁴ AO Nwafor op cite note 43 at 63.

¹²⁵ *FNB v The Commissioner for the South Africa Revenue Services* [2002] ZACC 5, 2002 (4) SA 768 (CC).

¹²⁶ *FNB v The Commissioner for the South Africa Revenue Services* supra note 125 paras 45 and 49(c).

¹²⁷ AO Nwafor op cite note 43 at 63.

Despite the moratorium precluding creditors from exercising their rights in respect of that property, it is submitted that there are statutory safeguards available to creditors.¹²⁸ These statutory safeguards empower the business rescue practitioner to lift or relax the moratorium in appropriate cases for the repossession of the property and sell the secured creditor's property provided the creditor consented or without the consent if the proceeds will be enough to pay off the creditor.¹²⁹ The safeguard in this regard is the fact that they will be paid.¹³⁰ However, an intricate balancing act is involved. It is in the hands of the business rescue practitioner to find and preserve a proper balance. Two essential policy factors must be weighed by the business rescue practitioner. On the one hand, the aim of business rescue, and the fundamental role of the moratorium in achieving this aim. On the other hand, the business rescue endeavor should not be conducted to the prejudice of those who hold proprietary rights. Furthermore, the legislature has entrusted the courts with the task of fleshing out guiding principles as to when the moratorium may be lifted or relaxed with the sanction of the court under section 133(1)(b) of the Act. The protective measures will be discussed in more detail in chapter 3.

V. THE MEANING OF “LAWFUL POSSESSION” OF THE PROPERTY AS USED IN THE ACT

In terms of section 128(1)(b)(ii) of the Act, business rescue is defined as proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for, inter alia, a temporary moratorium on the rights of claimants against the company or in respect of property in its *possession*. This is the first part of the Act that introduces the concept of *possession* of the property. The essence of this moratorium is that it protects any property in the company's *possession*. At this stage, the Act does not specify whether the possession is lawful or unlawful.

¹²⁸ s133(1)(b) and s134 of the Companies Act 71 of 2008.

¹²⁹ s134(2) and s134(3) of the Companies Act 71 of 2008.

¹³⁰ s134(3)(b) of the Companies Act 71 of 2008 provides that “[i]f, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must... promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”

Therefore, provided that it is established that the company is in possession of the property it suffices to warrant protection by moratorium at that time.

Elsewhere in the Act, there is an added requirement – the requirement that the company must be in *lawful possession* of the property. In its material part section 133(1) of the Act provides that “during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or concerning any property belonging to the company, or *lawfully in its possession*, may be commenced or proceeded with in any forum, ...” In addition to this, section 134(1)(c) of the Act provides that “subject to subsections (2) and (3), during a company’s business rescue proceedings ... despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the *lawful possession* of the company, ...” Therefore, it is submitted that the added requirement of *lawfulness* meant that when it is established by the aggrieved property owner that the company is occupying or keeping the property unlawfully then it follows that moratorium does not apply.

However, the conundrum to this added requirement is that the Act does not define or provide guidance as to what constitutes a *lawful possession* of the property while the company is under business rescue. It becomes an issue to be decided by the courts. In the *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*, the issue arose in the context of an assertion by the first respondent, Standard Bank of South Africa Limited, that it is entitled to repossess a Nissan motor vehicle currently possessed by the applicant, JVJ Logistics (Pty) Limited (a company under business rescue).¹³¹ JVJ Logistics (Pty) Limited acquired *possession* of that vehicle under an instalment sale agreement concluded with Standard Bank of South Africa Limited, in terms of which ownership of the vehicle was retained by the first respondent. The applicant fell into arrears with its instalments owed to the first respondent by a considerable margin, as a result of which the first respondent cancelled the instalment sale agreement and instituted proceedings against the applicant seeking an order confirming the validity of the cancellation and an order for the immediate return of the vehicle.¹³²

Olsen J held that “a decision in the present application cannot be reached without first considering the proper construction of the phrase *lawfully in its possession* where it appears in

¹³¹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 1.

¹³² *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 2.

section 133(1) of the Act.”¹³³ What can be discerned from Olsen J’s judgment regarding the interpretation of the *possession* of the property is that possession is a correlation of physical detention of the property linked with an existence of the intention to keep benefit from control of the property in question.¹³⁴ In this regard, the court held that the mere fact of possession generates a right which is generally referred to as the “*jus possessionis*” or the right of possession.¹³⁵ Furthermore, Olsen J submitted that “the content of this right of possession does not proceed beyond the right to the assistance of the courts to restore bare possession when dispossession against the will of the possessor takes place without the sanction of law.”¹³⁶

Furthermore, Olsen J submitted that there are two possible meanings to be ascribed to the word *lawfully* in sections 133(1) and 134(1)(c) of the Act.¹³⁷ The first meaning of the word regards the affected company’s possession of the property as unlawful, and therefore not protected by sections 133(1) and 134(1)(c) of the Act, whenever the company lacks the so-called ‘*jus possidendi*’.¹³⁸ In other words, the company does not have a right that justifies a person’s claim to have a thing in his possession.¹³⁹ For instance, a purchaser under a normal bank instalment agreement reserving ownership to the bank acquires a ‘*jus possidendi*’ when put in possession of the property in terms of the agreement, and loses it if the agreement is cancelled.

This approach meant that the probability of successful legal proceedings or enforcement action against the company was quite high. In many cases, the High Court followed this approach and ruled that the moratorium will not apply where the lessor or other property owner has cancelled its agreement with the company under business rescue due to a breach of contract by the company.¹⁴⁰ The reasoning was that since there was no contract between the parties, the company

¹³³ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 1.

¹³⁴ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 22.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 24.

¹³⁸ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 25.

¹³⁹ H Silberberg, J Schoeman, DG Kleyn *The Law of Property* 1st ed (1975) 72.

¹⁴⁰ See *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165, *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* [2016] ZAKZDHC 24, 2016 (6) SA 448 (KZD), *Southern Value Consortium v Tresso Trading 102 (Pty)*

would not be in lawful possession of the property. As a result, the lessor is at liberty to institute legal proceedings or enforcement action against the company to reclaim the leased property. For instance, in *Madodza (Pty) Ltd v Absa Bank Ltd*, the High Court ruled that since the lease agreements had been cancelled and court orders had been obtained for the return of the motor vehicles by the applicant, the vehicles were not ‘lawfully in its possession’ and it had therefore failed to meet the requirements for reliance on section 133(1) of the Act.¹⁴¹

The harsh consequences of this approach are that it disregards the purpose and objectives of the business rescue proceedings. This will inevitably lead to a failure of business rescue like its predecessor judicial management. As was noted earlier, the Companies Act 61 of 1973 took a notably creditor-friendly approach to corporate rescue.¹⁴² The focus was on securing the payment of creditors’ claims rather than rescuing a struggling corporate entity.¹⁴³ For instance, in *De Jager v Koroo Koeldranke and Roomys (Edms) Bpk*,¹⁴⁴ it was held, in the context of granting an order for judicial management, that the court should give primary consideration to the interests of creditors and shareholders. “This approach had the result that financially distressed companies seldom resorted to judicial management and of those that did, more than 80% were ultimately liquidated.”¹⁴⁵

Therefore, it is submitted that a financially distressed company is expected to have difficulty in honoring its agreements, and this is the very reason the company resorts to business rescue proceedings to restructure its affairs and resume operations based on profitability. If this initiative is hindered by the fact that the creditors have cancelled their contracts due to breach and therefore at liberty to repossess the fundamental property that can help the company to restructure, there would be no need for a business rescue moratorium. This would encourage every creditor to cancel an agreement and then institute proceedings to recover the property. Further, the

Ltd [2015] ZAWCHC 174, 2016 (6) SA 501 (WCC), *Kythera Court v Le Rendez-Vous Cafe CC* [2016] ZAGPJHC 172, 2016 (6) SA 63 (GJ).

¹⁴¹ *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 para 17.

¹⁴² DA Burdette “Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)” (2004) 16 *SA Merc LJ* 244.

¹⁴³ *Ibid.*

¹⁴⁴ *De Jager v Koroo Koeldranke and Roomys (Edms) Bpk* 1956 (3) SA 594.

¹⁴⁵ H Olver “Judicial Management-A Case for Law Reform” 1986 *THRHR* 84.

approach would dissipate the companies¹⁴⁶ because it does not find the proper balance premised in section 7(k) of the Act.

The second possible meaning of the word *lawfully* involves a distinction not unknown to our law between “iusta” and “iniusta” possession.¹⁴⁷ In this regard, Olsen J submitted that for the sake of convenient expression, the first concept refers to “civil” unlawfulness, and the second meaning refers to “criminal” unlawfulness.¹⁴⁸

“For instance, from the moment that the installment agreement relating to the vehicle between the hirer purchaser and the bank is cancelled, the former’s possession of the vehicle is precarious, dependent as it is on the will of the bank as to whether it would or would not exercise its right to dispossess the hire purchaser.”¹⁴⁹

However, such precarious possession is not an uncommon occurrence in modern commercial relationships.¹⁵⁰ The possession which is unlawful in the criminal sense is possession unlawfully acquired, such as is the case when it is acquired by fraud or theft.¹⁵¹ The court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* concluded that the Act requires the possession to be unlawful in the civil sense.¹⁵²

In *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd*,¹⁵³ the question here was whether the moratorium operates in circumstances where, before the initiation of business rescue proceedings, the property owner merely cancelled the lease agreement and launched an application to eject the company from the property. In this case, an agreement of lease was entered into between the owner of the leased premises and the respondent. Due to the failure of the respondent to pay rent and other additional charges owed by it (including utility consumption, operating costs,

¹⁴⁶ HS Cilliers, ML Banade, JJ du Plessis at al op cite note 6.

¹⁴⁷ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 26.

¹⁴⁸ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 28.

¹⁴⁹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 27.

¹⁵⁰ Ibid.

¹⁵¹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 29.

¹⁵² Ibid.

¹⁵³ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* [2015] ZAWCHC 174; 2016 (6) SA 501 (WCC).

and municipal charges), the lessor validly cancelled the lease agreement. Three months later, an application was brought to eject the respondent from the property. The respondent thereafter the cancellation and the application to eject by the applicant was voluntarily placed in business rescue in terms of section 129 of the Act.¹⁵⁴ The business rescue practitioners raised a defence that the ejection proceedings were precluded by the moratorium in section 133(1) and by the provisions of section 134(1)(c) of the Act.¹⁵⁵

However, the High Court held that after the cancellation of the lease agreement, the respondent was no longer in ‘lawful’ possession of the property. Since ‘lawful possession’ is an essential requirement for both the application of the moratorium in section 133(1) and the protection afforded by section 134(1)(c) of the Act, the court decided that the business rescue practitioners could not rely on these provisions as a defence to the applicants.¹⁵⁶ The court held that “it could not have been the legislature’s intention that a company in business rescue could restructure its affairs by utilizing assets to which it had no lawful claim.”¹⁵⁷

However, Cassim disagrees and submitted that this interpretation by the High Courts is not only wrong but also at odds with the intention of business rescue proceedings. In this regard, Cassim submitted that:

“The moratorium is designed and intended by the legislature to prevent the property owner from mechanically or automatically claiming repossession of its goods or property from a company under business rescue, as this would in many cases defeat the very purpose of the business rescue endeavor by depriving the company of any chance to trade out of its financial distress or to be successfully restructured.”¹⁵⁸

It is a stated purpose of the Act in section 7(k), to provide for the efficient rescue and recovery of financially distressed companies, in a manner that *balances the rights and interests of*

¹⁵⁴ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 para 4.

¹⁵⁵ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 paras 12 and 14.

¹⁵⁶ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 paras 29 – 32.

¹⁵⁷ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 para 35, see also *Kythera Court v Le Rendez-Vous Cafe CC* [2016] ZAGPJHC 172, 2016 (6) SA 63 (GJ) para 12.

¹⁵⁸ MF Cassim op cite note 31 at 434.

all relevant stakeholders. Therefore, the business rescue moratorium is not a piece of machinery through which the creditors will obtain the property from the company following a cancellation of the contract.

According to Cassim, the moratorium is intended to be an all-encompassing bar against legal proceedings and enforcement action during the business rescue, but the courts are making ill-advised inroads into the scope of the moratorium.¹⁵⁹ In effect, the courts are permitting the property owner to circumvent the moratorium and proceed to recover its property by a simple cancellation of its agreement with the company, whether the cancellation takes place before or after the commencement of business rescue proceedings, and this judicial approach appears to be that “it could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings”.¹⁶⁰

In interpreting sections 133(1) and 134(1)(c) of the Act, the courts have focused on the phrase ‘lawful possession’ or ‘lawfully in its possession’, and interpreted these phrases broadly. But, as acknowledged by the courts, the phrase ‘lawful possession’, read alone, can bear two meanings in its literal sense.¹⁶¹ It may either be interpreted broadly to mean that when a company acquires possession of the property in terms of an agreement, it loses ‘lawful’ possession if the agreement is cancelled. This is referred to by the court as ‘lawful possession’ in the civil sense. Alternatively, it may be interpreted more narrowly to mean that the possession must be lawful in the criminal sense, to exclude possession obtained by fraud or theft.¹⁶²

Furthermore, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* the SCA held that where more than one literal meaning is possible, the correct approach is to weigh each possibility in the light of all the factors, including the purpose of the provision, and to prefer a sensible meaning to one that undermines the apparent purpose of the document.¹⁶³ As can be seen from the analysis of the aforementioned cases, the lower courts have taken a linear approach to understand the concept of *lawful possession*. In other words, if there is no contract between the

¹⁵⁹ MF Cassim op cite note 31 at 432.

¹⁶⁰ Ibid.

¹⁶¹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 paras 32 and 50.

¹⁶² MF Cassim op cite note 31 at 439.

¹⁶³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 44.

parties the retained possession of the property is unlawful. However, the SCA's approach to interpreting the phrase *lawful possession* is more holistic as it takes into account the purpose of the provision. Therefore, the effect of the judgment by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* is that the courts have to follow an approach that will be in line with the purpose of the Act in terms of section 128(1)(b)(ii) read with section 7(k).

Despite the SCA judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, the High Courts continue with the linear approach. In this regard, Cassim opined that "by favoring the literal meaning of the phrase *lawful possession*, the High Courts effectively 'undermined the apparent purpose' of the legislation."¹⁶⁴ For instance, in the *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* case, the applicant needed the vehicle to continue operating its business during the business rescue process and therefore sought an interdict restraining the service and implementation of the warrant under which the motor vehicle would be seized and returned to Standard Bank. The court denied the interdict and instead concurred with the ruling in *Madodza (Pty) Ltd v Absa Bank Ltd* case that section 133(1) of the Act was not an obstacle to the recovery of the vehicle.¹⁶⁵ The court stated that the applicant could not rely on section 133(1) of the Act because it was not in *lawful possession* of the relevant vehicle as required.¹⁶⁶ According to the court, the applicant acquired 'lawful' possession when put in possession of the vehicle in terms of the installment sale agreement, but lost it when the agreement was cancelled. The court thus adopted an unduly restrictive interpretation of *lawful possession* to prevent the application of the moratorium in section 133(1) of the Act.

The practical implication of the interpretation of *lawful possession in the civil sense* is that the property owner, by a simple unilateral cancellation of the agreement, can prevent the company in business rescue from relying on the moratorium to protect its ongoing possession of the property, even if such property is crucial to the prospects of a successful business rescue endeavor. In other words, the practical outcome is that the property owner may easily circumvent the moratorium in business rescue, merely by cancelling its agreement with the company. Cassim opined that in the light of the fundamental purpose of the moratorium, to promote rather than to hinder the purpose

¹⁶⁴ MF Cassim op cite note 31 para 439.

¹⁶⁵ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 1.

¹⁶⁶ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 paras 3 and 51.

of business rescue, the phrases *lawful possession* and *lawfully in its possession* in sections 133(1) and 134(1)(c) of the Act, must be interpreted to mean *lawful possession* in the criminal sense and only the property obtained by the company through fraud or theft will be excluded from the ambit of the moratorium.¹⁶⁷ Further, as long as the company's possession of the property is attributable to or derives its legal origin from a valid agreement or other lawful causa, and provided that the property has remained in the company's possession and is required for the successful rescue of the company, it ought to be regarded as property that is *lawfully* possessed—with the result that it would fall under the protection of both sections 133(1) and 134(1)(c) of the Act.¹⁶⁸

VI. EXCEPTIONS TO GENERAL MORATORIUM

(a) *Written consent by business rescue practitioner*

In terms of section 133(1)(a) and (b) of the Act, a property owner who wishes to institute legal proceedings against a company in business rescue must obtain *consent* from the business rescue practitioner or apply to the court for *leave*. The Act explicitly states that consent from the business rescue practitioner should be in *writing*. As discussed in detail above, the issue of the *written* requirement has since been settled by the SCA in *Murray v Firstrand bank Ltd t/a Wesbank*¹⁶⁹ and *Chetty v Hart*¹⁷⁰ cases. In this regard, Fourie AJA found that the requirement of *writing* is *merely* a directory and not a peremptory.¹⁷¹ However, Cachalia JA submitted that the formal requirement for consent to be sought from the business rescue practitioner and given in *writing* was inserted to promote legal certainty and avoid later disputes.¹⁷² Therefore, it is submitted that non-compliance with the *written* requirement does not have a vitiating effect on the consent as given, however, it is recommended that it is given in *writing* to promote legal certainty and avoid later disputes.

¹⁶⁷ MF Cassim op cite note 31 para 440.

¹⁶⁸ Ibid.

¹⁶⁹ *Murray v Firstrand bank Ltd t/a Wesbank* supra note 63 para 24.

¹⁷⁰ *Chetty v Hart* supra note 55 paras 28 and 46.

¹⁷¹ *Murray v Firstrand bank Ltd t/a Wesbank* supra note 63 para 24.

¹⁷² *Chetty v Hart* supra note 55 para 46.

(b) *Leave of the court*

In *Redpath Mining South Africa (Pty) Ltd v Marsden* the court held that “only in exceptional circumstances may a court grant leave against a business rescue plan or related thereto.”¹⁷³ However, the court in *Arendse v Van der Merwe*¹⁷⁴ disagreed with the finding in the *Redpath Mining South Africa (Pty) Ltd v Marsden* case that the leave in terms of section 133(1)(b) of the Act may only be granted in exceptional circumstances.¹⁷⁵ Further, the court in *Arendse v Van der Merwe* held that the learned judge in *Redpath Mining South Africa (Pty) Ltd v Marsden* did not refer to any authority or provide any reasoning for the conclusion that *exceptional circumstances* should apply generally to an application brought in terms of section 133(1)(b) of the Act.¹⁷⁶ The court cogently argued that “if the legislature had intended to limit the granting of leave to *exceptional circumstances* that test would have been expressly stated in the section.”¹⁷⁷ In this regard, the court is given wide powers not only to grant leave but also to determine the terms on which such leave is granted.¹⁷⁸

However, the courts in both the *Redpath Mining South Africa (Pty) Ltd v Marsden* and *Arendse v Van der Merwe* case took cognizance of the authority for the proposition that a court being asked for leave to proceed against business rescue moratorium must receive a well-motivated application so that it could apply its mind to the facts and the law and then be in a position to make a ruling following any terms it may consider suitable in peculiar circumstances.¹⁷⁹ It is to be noted that in neither of these cases did the court lay down a general test or pronounce on what constitutes a well-motivated application or define the minimum threshold that must be met by the applicant to obtain such leave to initiate or continue with the legal proceedings against the company.

¹⁷³ *Redpath Mining South Africa (Pty) Ltd v Marsden* supra note 45 para 71.

¹⁷⁴ *Arendse v Van der Merwe* [2016] ZAGPJHC 292; 2016 (6) SA 490 (GJ).

¹⁷⁵ *Arendse v Van der Merwe* supra note 174 para 29.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Arendse v Van der Merwe* supra note 174 para 10 and *Redpath Mining South Africa (Pty) Ltd Marsden* supra note 45 para 71.

The court in *Arendse v Van der Merwe* further reiterated that section 133(1)(b) of the Act does not specify the criteria or procedural requirements that must be met to obtain the leave of the court and that on the face of the provision, the court would appear to enjoy wide and unfettered discretion to make an order on any terms the court considers suitable.¹⁸⁰ However, that being the position, “it is implicit that the court’s discretion must be exercised judiciously, having regard to the purpose and objects of section 133(1)(b) of the Act, read in the context of the purpose of business rescue proceedings and considerations of fairness and convenience are fundamentally important.”¹⁸¹ Furthermore, to properly contextualize section 133(1)(b) of the Act, reference should be made to sections 5 and 7(k) of the Act.¹⁸² Section 5 of the Act directs that the Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7(k) of the Act.

In *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd*,¹⁸³ Kgomo J held that “such application for leave must be motivated in the same way as criteria for departure from the Rules of Court to justify a prayer for urgency.”¹⁸⁴ Further, in *2001 Management Services (Pty) Limited v Anappa*,¹⁸⁵ the court held that “it is a necessary responsibility of an applicant who seeks leave of the court to take the court into his/her confidence and disclose to the court the legal proceedings which he or she intends initiating.”¹⁸⁶ In other words, any court being asked for leave to institute or continue with legal proceedings against a company under business rescue moratorium must receive a well-motivated application so that the court could apply its mind to the facts and the law if necessary and then be in a position to make a ruling following any terms it may consider suitable in the peculiar

¹⁸⁰ *Arendse v Van der Merwe* supra note 174 para 11.

¹⁸¹ *Ibid.*

¹⁸² *Arendse v Van der Merwe* supra note 174 para 12.

¹⁸³ *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109.

¹⁸⁴ *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd* supra note 183 para 67.

¹⁸⁵ *2001 Management Services (Pty) Limited v Anappa* [2016] ZAGPPHC 353.

¹⁸⁶ *2001 Management Services (Pty) Limited v Anappa* supra note 185 para 42.

circumstances.¹⁸⁷ Therefore, the application for leave must contain all the relevant facts to enable the court to make an informed decision.

Moreover, in the *Mabote v Van der Merwe* case, the court held that it is incumbent upon the applicant seeking to obtain leave to establish a prima facie case against the company under business rescue proceedings.¹⁸⁸ Therefore, it is incumbent upon the applicant to include evidence of a prima facie case against the company under business rescue in the application for leave and show the court that the leave may be granted.

A conundrum still exists in section 133(1)(b) of the Act. The Act does not indicate what test should be applied by the court in determining whether to grant leave for an aggrieved party to initiate or continue with legal proceedings against a company in business rescue. In this regard, the High Court in *Mabote v Van der Merwe* held that there is no closed list of the factors that may be taken into account in deciding whether or not to grant leave as each case must be determined on its facts. Boruchowitz J provided a list, though not exhaustive, of relevant considerations. What has to be taken into consideration includes, inter alia, the effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders,¹⁸⁹ the impact that the proposed legal proceedings would have on the well-being of the company and its ability to regain its financial health, and whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(1)(b) of the Act.¹⁹⁰ It is submitted that the factor-based analysis approach is in line with the purpose of the business rescue proceedings as envisaged in section 7(k) of the Act.

Another question that arises is whether the leave may be sought as *part* of the application procedure for the relief sought, or an application for leave to institute or continue with legal proceedings should be made *separate*. In *Elias Mechanicos Building and Civil Engineering*

¹⁸⁷ *Arendse v Van der Merwe* supra note 174175 para 10, *Redpath Mining South Africa (Pty) Ltd Marsden* supra note 45 para 71 and *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd* supra note 183 para 67.

¹⁸⁸ *Mabote v Van der Merwe* supra note 78 para 16.

¹⁸⁹ *Mabote v Van der Merwe* supra note 78 para 28.

¹⁹⁰ *Ibid.*

Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd,¹⁹¹ the court held that that “the moratorium on legal proceedings against a company has the result that the *leave* to institute proceedings must be obtained by way of separate proceedings before the commencement of main proceedings and not as part of relief in the main proceedings.”¹⁹²

In contrary to this position, the court in the *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd*¹⁹³ case granted the requisite leave to commence proceedings as part of the relief claimed in the main proceedings. Furthermore, in *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd*,¹⁹⁴ the court found no basis to concur with the decision in *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* case that an application for the requisite leave of the court to continue with such already commenced proceedings may not be made during such proceedings.¹⁹⁵ In this regard, the court cogently argued that there is no reason why a litigant already engaged in legal proceedings would have to incur further costs, expenses, and time (including judicial time) in dealing with what might be a defective application or an abuse of process.¹⁹⁶ Such a litigant should not be precluded from requesting the requisite leave during the prior existing main proceedings.¹⁹⁷ Furthermore, in *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited*,¹⁹⁸ Tuchten J submitted that there is no requirement for a formal application for the leave of the court in section 133(1) of the Act.¹⁹⁹ In other words, Tuchten J concurs with other decisions discussed above that

¹⁹¹ *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015(4) SA 485 (KZD).

¹⁹² *Elias Mechanicos Building and Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* supra note 191 para 19.

¹⁹³ *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* [2013] ZAGPPHC 259, 2013 (6) SA 471 (GNP).

¹⁹⁴ *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd*, [2015] ZAGPPHC 832; 2016 (3) SA 209 (GP).

¹⁹⁵ *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd* supra note 194 para 4.13.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* [2015] ZAGPPHC 78.

¹⁹⁹ *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* supra note 198 para 27.

it is not a requirement to first obtain the leave of the court before initiate or continue with legal proceedings against the company in business rescue.

Therefore, “it is legally competent for a litigant to request the requisite leave to continue with the already commenced legal proceedings during those proceedings themselves.”²⁰⁰

VII. THE EFFECTS OF BUSINESS RESCUE MORATORIUM ON CONTRACTUAL OBLIGATIONS

This section, specifically, answers the question of whether a creditor and or a property owner can cancel an agreement with a company in business rescue, and what are the consequence of a business rescue practitioner suspending an agreement before the cancellation.

(a) *Cancellation of a contract by the creditor and the consequences thereof*

Since the inception of the business rescue moratorium, it has been uncertain whether the cancellation of the agreement by creditors/property owners constitutes ‘enforcement action’ prohibited by section 133(1) of the Act. Initially, the *court a quo* in *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* held that the cancellation of an agreement *during* business rescue constituted the legal process, which falls under the moratorium in section 133(1) of the Act. As a result, this meant that the cancellation of the contract by creditors/property owners is prohibited when the company is under business rescue as this would constitute ‘enforcement action’ against the company.

However, on appeal, this decision was overturned. In this regard, Tuchten J opined that the reasoning of the *court a quo* incorrectly equates a juristic act with the legal process.²⁰¹ It is submitted that the essence of this finding is that the cancellation of the contract is a juristic act provided by common law principles of the law of contract. Further, the court held that section 133(1) of the Act, which imposes the general moratorium which flows from the commencement of business rescue proceedings, limits the right to commence or proceed with legal process, not the performance of juristic acts. Section 133(1) of the Act limits the right of a creditor to commence or proceed with legal proceedings *in any forum*. In this regard, it is submitted that “the dispatch of

²⁰⁰ *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd* supra note 194 para 4.14.

²⁰¹ *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* supra note 198 para 43.

letters of demand, the making of elections to cancel a contract and the communication of such elections do not take place within a *forum*, but is rather a unilateral juristic act.”²⁰²

Furthermore, in *Murray v Firstrand Bank Ltd t/a Wesbank* the SCA ruled on the question of whether the cancellation of an agreement constitutes ‘enforcement action’. Fourie AJA at the outset asserted that the question to be decided is whether the creditor of a company under business rescue can unilaterally cancel an existing agreement that he had concluded with the company before the latter being placed under business rescue moratorium. The SCA found that the concepts of enforcement action and cancellation are mutually exclusive in our law of contract.²⁰³ Further, the SCA held that “enforcement action in our legal parlance usually refers to the enforcement of obligations, and on the other hand, cancellation connotes the termination of obligations between the parties to an agreement.”²⁰⁴ In this regard, cancellation of a contract is a unilateral act by a party to an agreement in the event of a breach of contract, while enforcement action is considered a species of a legal proceeding or, at least, is meant to have its origin in legal proceedings.²⁰⁵ This is indicated by the inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceeding’ in section 133(1).²⁰⁶ “Enforcement action thus relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders through writs of execution or attachment.”²⁰⁷ Moreover, cancellation, in contrast with enforcement action, is not ‘commenced or proceeded with in any forum’ as envisaged by section 133(1) of the Act.²⁰⁸

The effect of these judgments in *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited*²⁰⁹ and *Murray v Firstrand Bank Ltd t/a Wesbank*²¹⁰ are that the creditors/property owners can cancel the agreement before and while the company is under business rescue proceedings. Further, neither the consent of the business rescue practitioner nor the leave of the court is required

²⁰² Ibid.

²⁰³ *Murray v Firstrand Bank Ltd t/a Wesbank* supra note 63 paras 32 and 33.

²⁰⁴ Ibid.

²⁰⁵ *Murray v Firstrand Bank Ltd t/a Wesbank* supra note 63 paras 32,33 and 40.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ *LA Sport 4X4 Outdoor CC v Broadsword Trading 20 (Pty) Limited* supra note 198 para 43.

²¹⁰ *Murray v Firstrand Bank Ltd t/a Wesbank* supra note 63 paras 32,33 and 40.

in terms of section 133(1) of the Act to cancel the contract. Cassim concurred with the courts' ruling that if a company in business rescue breaches its contractual obligations to the property owner, such as its obligation to pay rent or other charges, the property owner is at liberty to cancel the agreement during the business rescue process.²¹¹ Further, Cassim pointed out that it makes no difference whether the breach of contract occurs before or after the commencement of business rescue proceedings.²¹²

(b) Suspension of the contract by business rescue practitioner

Section 136(2) of the Act provides that:

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

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

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

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

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

In *Murray v Firstrand Bank Ltd t/a Wesbank* the SCA held that by invoking section 136(2) of the Act, the practitioner could prevent a creditor from instituting action and repossessing or attaching property in the company's possession.²¹³ Although a creditor is generally entitled to cancel a contract during business rescue proceedings, the validity of a specific cancellation turns largely on whether the business rescue practitioner has suspended any obligation in terms of the agreement *before the notice of cancellation*. Fourie AJA cogently opined that the privilege of the lessor to cancel its lease agreement with a company in business rescue may be thwarted by the

²¹¹ MF Cassim op cite note 31 at 426.

²¹² Ibid.

²¹³ *Murray v Firstrand Bank Ltd t/a Wesbank* supra note 63 para 35.

suspension of the agreement by the business rescue practitioner in terms of section 136(2)(a) of the Act.²¹⁴

Further, where the business rescue practitioner invokes section 136(2)(a) of the Act, there may be no legal basis on which the property owner may cancel the agreement. In this regard, Cassim submitted that where the business rescue practitioner has suspended the company's obligations — for example, its duty to pay its monthly rental and municipal utilities in terms of a pre-existing agreement of lease, or to pay its monthly instalments under a pre-existing instalment sale agreement — the effect of the suspension is that in failing to make these ongoing payments, the company will not be in breach of the agreement.²¹⁵

In practice, the business rescue practitioners would only suspend those agreements that are not vital to the operation of the company's business or those that would be strenuous on the company's cash flow during the business rescue proceedings. For instance, this includes inter alia, lease agreements with very high rentals, loan agreements with excessive interest payment terms, supply agreements with unfair pricing arrangements, service or maintenance agreements. Furthermore, in practice, a business rescue practitioner frequently suspends an obligation in terms of the agreement before the creditor of the company furnishes a notice of cancellation. It is submitted that the power of suspension applies only to contractual obligations of the company that would become due during the business rescue proceedings, as appears from a literal reading of section 136(2)(a)(ii) of the Act.

As a result, only post-commencement obligations of the company may be suspended, but not pre-commencement obligations. In other words, when the company defaulted on its obligation to make a certain payment to the property owner just before it is placed under business rescue, that defaulted payment is not suspended and the company is obliged to pay. In support of this assertion Cassim submits that if the property owner has already canceled the breached contract before the initiation of business rescue proceedings, the business rescue practitioner may not suspend the (cancelled) contract in the first place.²¹⁶

²¹⁴ Ibid.

²¹⁵ MF Cassim op cite note 31 at 427.

²¹⁶ Ibid.

Furthermore, if a business rescue practitioner suspends a provision of a contract relating to security granted by the company, such suspension does not mean that the company may circumvent the provisions of section 134(3) of the Act, which, inter alia, forces a company, “despite being in business rescue, to seek the consent of the holder of the security interest before disposing of the property to which the security relates.”²¹⁷ This shows that the Act does not take away the rights of the creditors but it places a suspension only to obligations that the company has to perform that would be strenuous to already limited financial resources during business rescue proceedings.

Moreover, the Act protects creditors whose contracts are suspended by the business rescue practitioner. In this regard, Section 136(3) of the Act provides that claims against the company may be made only for damages arising from suspension in terms of section 136(2) of the Act. It is submitted that this is a positive aspect provided by the Act in case the company decides to suspend the contractual obligation. Further, in *178 Stamford Hill CC v Velvet Star Entertainment CC* the High Court held that the essence of section 136(2) of the Act is that rentals due after the business rescue proceedings have commenced cannot be claimed, but that the claim for rental due before the business rescue proceedings commenced is not affected by the business rescue and could be claimed.²¹⁸ The essence of this finding is that when the company defaulted on its obligation to make a certain payment to the property owner just before it is placed under business rescue, that defaulted payment is not suspended and the company is obliged to make the payment thereof. Consequently, the court held that the suspension of the lease by the business rescue practitioners had no effect on the claim for rental due before the commencement of business rescue proceedings, and the landlord was accordingly entitled to claim that rental.²¹⁹

VIII. CONCLUSION

The courts have described section 133(1) of the Act as “a general provision that affords the company protection against legal proceedings on claims in general.”²²⁰ Further, the academics

²¹⁷ s136(2A)(c) of the Companies Act 71 of 2008.

²¹⁸ *178 Stamfordhill CC v Velvet Star Entertainment CC* supra note 70 para 25.

²¹⁹ *178 Stamfordhill CC v Velvet Star Entertainment CC* supra note 70 para 27.

²²⁰ *Investec Bank Ltd v Bruyns* supra note 60 para 16.

concur with the courts' interpretation of the general moratorium as a protection against legal actions on claims in general.²²¹ For example, Delpont opined that although no definition of the term moratorium is provided in Chapter 6 of the Act, the provision intends to "cast the net as wide as possible" to include any conceivable type of legal proceedings against the company.²²² Furthermore, it is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs.²²³ This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.

However, the SCA has ruled that the cancellation of the agreement by the creditor/property owner does not amount to 'enforcement action' or legal proceedings against the company, therefore, it is not prohibited by the moratorium in the Act. In this regard, the SCA cogently reasoned that the concepts of enforcement and cancellation are mutually exclusive in our law of contract.²²⁴ The SCA held that "enforcement action in our legal parlance usually refers to the enforcement of obligations, on the other hand, cancellation connotes the termination of obligations between the parties to an agreement."²²⁵ Moreover, cancellation, in contrast with enforcement action, is not 'commenced or proceeded with in any forum' as envisaged by section 133(1) of the Act.²²⁶

However, such cancellation may be avoided by the business rescue practitioner. In this regard, a decision may be made to suspend wholly, or in part, various obligations of the company in business rescue, arising in terms of any agreement. This will prevent the property owner from being able to validly cancel an agreement. In other words, if the property owner wishes to cancel the agreement it should do so before the business rescue practitioner suspending the company's

²²¹ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

²²² PA Delpont, Q Vorster, D Burdette et al op cite note 62.

²²³ *Murray v Firstrand Bank Ltd t/a Wesbank* op cite note 63 para 14, *Chetty v Hart* supra note 55 para 28. See also FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

²²⁴ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

²²⁵ Ibid.

²²⁶ Ibid.

obligations. Further, when the business rescue practitioner suspended the contract, the property owner is entitled to damages arising from the suspension.

Despite the moratorium precluding creditors from exercising their rights in respect of that property, it is submitted that there are statutory safeguards available to creditors.²²⁷ These statutory safeguards empower the business rescue practitioner to lift or relax the moratorium in appropriate cases for the repossession of the property and sell the secured creditor's property provided the creditor consented or without the consent if the proceeds will be enough to pay off the creditor.²²⁸ The safeguard in this regard is the fact that they will be paid.²²⁹ However, an intricate balancing act is involved. It is in the hands of the business rescue practitioner and the court to find and preserve a proper balance. Two essential policy factors must be weighed by the business rescue practitioner. On the one hand, the aim of business rescue, and the fundamental role of the moratorium in achieving this aim. On the other hand, the business rescue endeavor should not be conducted to the prejudice of those who hold proprietary rights. Furthermore, the legislature has entrusted the courts with the task of fleshing out guiding principles as to when the moratorium may be lifted or relaxed with the sanction of the court under section 133(1)(b) of the Act.

²²⁷ s133(1)(b) and s134 of the Companies Act 71 of 2008.

²²⁸ s134(2) and s134(3) of the Companies Act 71 of 2008.

²²⁹ s134(3)(b) of the Companies Act 71 of 2008 provides that “[i]f, during a company’s business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must... promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”

CHAPTER THREE

THE PROTECTIVE MEASURES CONTAINED IN THE ACT AVAILABLE TO PROPERTY OWNERS WHOSE PROPERTY IS IN THE POSSESSION OF AN ENTITY UNDER BUSINESS RESCUE

I. INTRODUCTION

The objectives of business rescue as espoused in section 128(1)(b) of the Act must be carefully balanced with the detriment caused to property owners by the moratorium during business rescue proceedings. In this regard, two crucial policy factors must be weighed by the business rescue practitioner and the court. On the one hand, the fundamental role of the moratorium is achieving the aim of business rescue proceedings.²³⁰ On the other hand, the business rescue moratorium should not be conducted to the prejudice of those who hold proprietary rights, save where this is unavoidable.²³¹

The purpose of this chapter is to discuss the protective measures which the legislature has built into the provisions of sections 133(1) and 134(1)(c) of the Act for the protection of the property owners during the business rescue proceedings. These protective measures include, *inter alia*, the guiding principles for the payment of rent; alternatively the payment of other compensation to property owners during business rescue proceedings. Furthermore, the chapter will build on a previous chapter by exploring the guidelines for the actual repossession of property by property owners after they have received consent from the business rescue practitioner or leave of the court to institute the action against the company.

II. PROTECTION OF THE PROPERTY OWNERS BY THE ACT

The legislative protective measures give the business rescue practitioner and the court the discretion to lift the moratorium during a business rescue when it is necessary and justified to do

²³⁰ MF Cassim ‘The safeguards and protective measures for property owners during business rescue’ (2018) 30/Part 1 SA *Merc LJ* at 42.

²³¹ *Ibid.*

so.²³² In practice, the lifting of the moratorium during the business rescue proceedings not only assists the property owner to recover its property from the company in business rescue but alternatively if the repossession of the property is not possible it enables the property owner to receive ongoing payment of rent from the company for its use of the property during the business rescue proceedings.²³³

(a) *Protection of property interest in terms of section 134 of the Act*

Section 134 of the Act is crucial to business rescue proceedings. It does not only protect the interests of both the company in business rescue and the creditors but also other third parties related to the company.²³⁴ In this regard, section 134(1)(b) of the Act provides that:

“[A]ny person who, as a result of an agreement made in the ordinary course of the company’s business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136”.

Therefore, simply because the company is placed under business rescue, it does not mean that all contracts are automatically cancelled.

Section 134(1)(a) of the Act also allows for the disposal by the company of property, provided that the disposal is made in the ordinary course of business.²³⁵ Further, the disposal must be in terms of a bona fide transaction for fair value approved in advance and writing by the business rescue practitioner.²³⁶ Another circumstance wherein a company can dispose of property is when the transaction is part of the implementation of an approved business rescue plan.²³⁷ Importantly, section 134(1)(a) of the Act is subject to section 134(3) of the Act which governs the protection of *property interests during business rescue proceedings*. In terms of section 134(3) of the Act, “if

²³² s133(1)(a)(b) and 134 of the Companies Act 71 of 2008.

²³³ MF Cassim op cite note 230 at 43.

²³⁴ s134(1)(b) of the Companies Act 71 of 2008.

²³⁵ s134(1)(a)(i) of the Companies Act 71 of 2008.

²³⁶ s134(1)(a)(ii) of the Companies Act 71 of 2008.

²³⁷ s134(1)(a)(iii) of the Companies Act 71 of 2008.

during business rescue proceedings the company wishes to dispose of any property over which another person has any *security* or *title interest*²³⁸, the company must obtain the prior consent of that person unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's *security* or *title interest*.²³⁹ In addition, the company must "promptly pay to that other person the proceeds attributable to that property equal to the amount of the company's indebtedness"²⁴⁰ or "provide security for the amount of those proceeds to the reasonable satisfaction of the other person."²⁴¹

The provisions of sections 134(1)(a) and 134(3) of the Act found application in the case of *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd*.²⁴² In this case, the Energydrive Systems (Pty) Limited leased a power-saving variable-speed drive system (equipment) to Winplaas (Pty) Limited (Second Respondent) by way of a written lease.²⁴³ The lease contained a reservation of ownership clause in favour of the applicant. The value of the equipment was approximately R800 000.²⁴⁴ The equipment was installed in the plant of the second respondent on the Tin Can Man (Pty) Limited premises.²⁴⁵ The second respondent went into business rescue. The fourth respondent was the business rescue practitioner of the second respondent. The business rescue practitioner, in his capacity, concluded a sale agreement with Tin Can Man (Pty) Limited. The concluded sale agreement described the goods sold to include the equipment that belonged to Energydrive Systems (Pty) Limited.²⁴⁶

The applicant brought an application, in the form of a *rei vindicatio*, and claimed from Tin Can Man (Pty) Limited the return of possession of the equipment on the basis that the applicant,

²³⁸ In *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* 2017 (3) SA 539 (GJ) paras 12,13 and 15 the court conceded that reference to *title interest* in section 134(3) of the Act is more difficult to deal with and that the meaning of *title interest* is novel in South African law. Further, the court found that the legislature chose to refer to *title interest* as an alternative to *security* and that it must have been intended to mean something other than *security*.

²³⁹ s134(3)(a) of the Companies Act 71 of 2008.

²⁴⁰ s134(3)(b)(i) of the Companies Act 71 of 2008.

²⁴¹ s134(3)(b)(ii) of the Companies Act 71 of 2008.

²⁴² *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* 2017 (3) SA 539 (GJ).

²⁴³ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 4.

²⁴⁴ *Ibid*.

²⁴⁵ *Ibid*.

²⁴⁶ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 5.

according to the reservation of ownership clause, remained the owner of the equipment.²⁴⁷ However, on the other hand, Tin Can Man (Pty) Limited claimed that it became the owner of the goods on the premises in terms of the sale agreement and delivery when it took possession. The court held that due to the reservation of ownership clause the applicant retained the ownership of the equipment, and therefore the second respondent could not transfer more rights than it had.²⁴⁸ Tin Can Man (Pty) Limited also relied on section 134(3) of the Act as outlined above. Tin Can Man (Pty) Limited argued that the business rescue practitioner had the right to sell the equipment without the consent of the applicant because the proceeds of the disposal were sufficient to fully discharge the indebtedness of the second respondent to the applicant.

The court, in determining whether the equipment constituted security or title interest in terms of section 134(3) of the Act, considered the SCA judgment in the *Natal Joint Municipality Pension Fund v Endumeni Municipality*.²⁴⁹ The court reiterated that the Act does not define the word *security* as used in section 134(3) of the Act. The court concluded that in general terms, the phrase ‘property over which another person has any security’ in section 134(3) of the Act refers to the property of the company under business rescue which secures an indebtedness of the company, for example, property subject to a notarial bond.²⁵⁰ Furthermore, the court found that the applicant’s case is not that the equipment was the property of the second respondent over which the applicant held security.²⁵¹ Therefore, it follows that the reference to security in section 134(3) of the Act does not assist the applicant.

The court conceded that reference to title interest in section 134(3) of the Act is more difficult to deal with and that the meaning of title interest is novel in South African law.²⁵² The court further held that ‘title interest’ must have been intended to mean something other than

²⁴⁷ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 1.

²⁴⁸ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 7.

²⁴⁹ *Natal Joint Municipality Pension Fund v Endumeni Municipality* supra note 38. The effect of this is that in essence, the courts now approach the interpretation of legislation by attributing meaning to the words used in a document and by having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

²⁵⁰ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 11.

²⁵¹ *Ibid.*

²⁵² *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 paras 12 and 13.

security.²⁵³ In addition, the court found that the last portion of subsection 134(3)(a) indicates that, like security, title interest is something that safeguards the payment of the indebtedness due to the creditor of the company under business rescue.²⁵⁴ Considering that it is not unusual for the word title to be used as a synonym for ownership, the court held that the term title interest “would include a reservation of ownership clauses such as the one in the lease between the applicant and the second respondent.”²⁵⁵

The court concluded, after finding that the purpose and context of business rescue are not aimed at the destruction of the rights of a secured creditor,²⁵⁶ that section 134(3) of the Act allows a company under business rescue to dispose of property which is subject to security or a reservation of ownership clause without the consent of the creditor concerned only if the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by the security.²⁵⁷ Section 134(3)(a) of the Act authorizes a business rescue practitioner to dispose of the property of the company under business rescue by selling and delivering such property. In such event section 134(3)(b) requires “the business rescue practitioner to promptly pay the debt due to the secured creditor or owner, or provide security to the reasonable satisfaction of the applicant.”²⁵⁸

What is crucial for creditors in this position is the finding by the court that the obligation to pay or secure the debt is not a mere personal right against the business rescue practitioner but that the obligation to promptly pay or secure the debt and the consideration is a requirement for the valid transfer of ownership by the business rescue practitioner to the third party in terms of section 134(3) of the Act without the consent of the creditor.²⁵⁹ The rights of the creditor will only be terminated on payment or the provision of other security. However, on the facts, the court held

²⁵³ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 15.

²⁵⁴ *Ibid.*

²⁵⁵ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 16.

²⁵⁶ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 18. See also *Diener N.O. v Minister of Justice* [2017] ZASCA 180, 2018 (2) SA 399 (SCA) para 44 and *National Union of Metalworkers of SA v VR Laser Services (Pty) Ltd* [2020] ZAGPJHC 47, [2020] 2 All SA 536 (GJ) para 37.

²⁵⁷ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 19.

²⁵⁸ *Ibid.*

²⁵⁹ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 20.

that “the business rescue practitioner did not pay or secure the debt due to the applicant.”²⁶⁰ Therefore, the business rescue practitioner did not validly destroy the right of ownership of the applicant. In other words, the applicant is still the owner of the equipment.

The *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* judgment provides some comfort to creditors who reserve their rights of ownership. In this regard, section 134(3) of the Act protects property owners by making sure that the proceeds of the sale must be paid over to the property owners if not then the reservation of ownership clause will protect them. In other words, the rights of the creditor will only be terminated on payment or the provision of other security.

The most important provision is section 134(1)(c) of the Act, which provides that “no person may exercise any right in respect 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 business rescue practitioner consents in writing.” Section 134(1)(c) of the Act is important because it supplements the moratorium found in section 133(1) of the Act.²⁶¹ Similar to section 133(1) of the Act, the only requirement or qualification of this moratorium is that the property concerned must be in the *lawful possession* of the company.²⁶² Further, 134(1)(c) of the Act is subject to section 134(2) of the Act which specifies that “the business rescue practitioner may not *unreasonably* withhold consent having regard to the purposes of Chapter 6 of the Act,”²⁶³ “the circumstances of the company,”²⁶⁴ and “the nature of the property, and the rights claimed in respect of it.”²⁶⁵ Therefore, it is submitted that this provision presupposes that if the business rescue practitioner does withhold his consent then an application can be brought to court for an order declaring that the withholding of the consent is unreasonable. In other words, an application to the court should be brought as a last resort and every attempt should be made to get the business rescue practitioner to consent before an application is brought.

In some cases, the business rescue practitioner will readily consent. In this regard, the *178 Stamford Hill CC v Velvet Star Entertainment CC* case presents a typical scenario wherein the

²⁶⁰ *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd* supra note 242 para 21.

²⁶¹ R Sharrock, K Van der Linde, A Smith *et al Hockly's Insolvency Law* 9th ed (2012) 281.

²⁶² *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 paras 10 and 11.

²⁶³ s134(2)(a) of the Companies Act 71 of 2008.

²⁶⁴ s134(2)(b) of the Companies Act 71 of 2008.

²⁶⁵ s134(2)(c) of the Companies Act 71 of 2008.

business rescue practitioner ought simply to consent to the repossession of the property by the landlord and refrain from involving the court in an application for leave to bring ejection proceedings under section 133(1)(b) of the Act. The business rescue practitioner had already notified the creditors that there was no longer any point in continuing the business rescue proceedings as there was no prospect of success.²⁶⁶ Therefore, any concern that the success of the business rescue proceedings would be frustrated by the legal proceedings by the property owner had fallen away. Further, Thatcher AJ in *178 Stamford Hill CC v Velvet Star Entertainment CC*, obiter dictum, stated that if the leave were required, the court was of the view that this was a case where the court should grant such leave and the repossession of the property as the refusal by the business rescue practitioner would have been unreasonable.²⁶⁷ In other words, the success of the property owners' application for leave for the repossession of property is dependent on the property owners showing that the refusal to grant consent by the business rescue practitioner was unreasonable because if the leave was granted it would not undermine the proposed business rescue plan.

Likewise, the business rescue practitioner should not refuse consent unless doing so would frustrate the proposed business rescue plan. The provisions of section 134(2) of the Act cannot be looked at in isolation when determining whether to allow the property owner to exercise his rights in respect of the property. If the property owner seeks an order to override the business rescue practitioner's refusal of consent merely by setting out the purpose of Chapter 6 by quoting section 7(k) of the Act, this will not be sufficient. It will also not be sufficient for the property owner to bring the court's attention to the circumstances of the company and the nature of the property and the rights claimed in respect of it without linking these to the business rescue plan. This is because all the affected parties are involved or consulted in the development of the business rescue plan.²⁶⁸ In this regard, negotiations should have taken place between all the affected parties about the business rescue plan, before the voting for approval. During negotiations, it will become apparent that certain rights will have to be exercised in respect of property in possession of the company to achieve the implementation of the business rescue plan. Therefore, the property owner must then

²⁶⁶ *178 Stamford Hill CC v Velvet Star Entertainment CC* supra note 70 para 29.

²⁶⁷ *178 Stamford Hill CC v Velvet Star Entertainment CC* supra note 70 paras 30 and 31.

²⁶⁸ s145(1)(d) and 150(1) of the Companies Act 71 of 2008.

frame his or her application for leave in accordance with that and not merely by way of rote repetition of the provisions of sections 134(2)(a), (b), and (c) of the Act.

(i) *The actual repossession of the property by the property owners*

In *Madodza (Pty) Ltd v Absa Bank Ltd*, the court was called upon to decide whether the respondent could repossess the property from the applicant. In this case, the respondent contends that the vehicles did not form part of the assets of the applicant nor was the applicant in *lawful possession* of the vehicles at the time of the commencement of the business rescue proceedings as required by sections 133(1) and 134(1)(c) of the Act.²⁶⁹ The reason being that the finance agreements in respect of the vehicles were cancelled before the commencement of business rescue proceedings because of the failure of the applicant to pay the monthly rentals in respect of the finance agreements.²⁷⁰ The court held that it was common cause that the vehicles were not the property of the applicant. Further, the court held that since the agreements were cancelled before business rescue proceedings were instituted and the fact that the respondent had sought to remove the vehicles from the applicant's possession while the applicant was under business rescue, the applicant was not in *lawful possession* of the vehicles.²⁷¹ In this case, it also appeared that a revised business plan was rejected by the creditors during the voting meeting.²⁷² It is submitted that the company could not rely on the business rescue plan that certain rights will have to be exercised in respect of property in possession of the company to achieve the implementation of the business rescue plan. This is because the plan was not approved by all the affected parties as required by the Act and as a result, it could not have been apparent from the creditors during negotiations what certain rights will have to be exercised in respect of property in possession of the company.

Similarly in *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd*, the question was whether the moratorium operates in circumstances where, before the initiation of business rescue proceedings, the property owner merely cancelled the lease agreement and launched an application to eject the company from the property. In this case, the High Court held that after the cancellation

²⁶⁹ *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 para 7.

²⁷⁰ *Ibid.*

²⁷¹ *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 para 17.

²⁷² *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 para 5.

of the lease agreement, the respondent was no longer in *lawful possession* of the property. Since *lawful possession* is an essential requirement for both the application of the moratorium in section 133(1) and the protection afforded by section 134(1)(c) of the Act, the court decided that the business rescue practitioners could not rely on these provisions as a defence to the applicants.²⁷³ The court held that it could not have been the legislature's intention that a company in business rescue could restructure its affairs by utilizing assets to which it had no lawful claim.²⁷⁴

Furthermore, in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*, the High Court ruled that section 133(1) of the Act does not impede the repossession of the vehicle. The court stated that the execution or enforcement of an order of court made before the commencement of business rescue would amount to 'enforcement action' within the meaning of section 133(1) of the Act. However, the applicant could not rely on this section because it was not in *lawful possession* of the relevant vehicle as required by the operative phrase in sections 133(1) and 134(1)(c) of the Act.²⁷⁵ The applicant was not in *lawful possession* because the contract was already cancelled by the property owner.

The High Court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*, further gave substance to the term *lawful possession*. The court held that two meanings can be ascribed to the phrase *lawfully*. There is *lawful possession* in the civil sense and *lawful possession* in the criminal sense.²⁷⁶ *Lawful possession* in the civil sense entails a situation in terms of which a purchaser under an instalment agreement reserving ownership to the seller becomes a lawful possessor when put in possession of the property in terms of the agreement and becomes an unlawful possessor if the agreement is cancelled. On the other hand, "*lawful possession* in the criminal sense is where the company acquires possession of the property unlawfully, such as when the company acquires possession of the property by fraudulent means or through theft."²⁷⁷ The court held that the moratorium in sections 133(1) and 134(1)(c) of the Act will protect possession that is lawful in the civil sense.²⁷⁸

²⁷³ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 paras 29 and 32.

²⁷⁴ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 para 35.

²⁷⁵ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 paras 1 and 3.

²⁷⁶ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 24.

²⁷⁷ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 29.

²⁷⁸ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 32.

A similar position was also followed by the High Court in *Kythera Court v Le Rendez-Vous Cafe CC*. In this case, the High Court held that a property owner of the immovable property who cancels a lease agreement with a company that is already in business rescue is still allowed to evict the company from the premises.²⁷⁹ The court reasoned that to apply the moratorium to all legal proceedings of whatever nature, including those brought by persons who legitimately seek to vindicate or protect their property would be a drastic interference with their common law rights of ownership.²⁸⁰ Further, the court held that “it could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings.”²⁸¹ Therefore, this case illustrates where a company is under business rescue and fails to pay rent in terms of the lease agreement in respect of immovable property the court will allow a property owner to institute eviction proceedings in terms of 133(1) of the Act.

(ii) *A suggested interpretation of the moratorium on the repossession of property by property owners from an entity*

The development of a proper approach to business rescue proceedings entails a shift in philosophy away from that of winding up the entities.²⁸² Unlike liquidation, as discussed above, the paramount purpose of business rescue proceedings is the rehabilitation and restructuring of the entities so that they may continue to operate, provide jobs to their employees, pay the claims of their creditors, and produce a return for their shareholders.²⁸³ In deciding business rescue proceedings cases “the courts must bear in mind that the business rescue processes, as well as the moratorium, are grounded on the company continuing in business and trading its way out of its financial problems.”²⁸⁴ In other words, this should be the backdrop upon which the courts interpret the provisions of business rescue proceedings to further its progress and realization in the modern South African emerging economy, and preserve the entities that help comprise the economy. Further, by ruling that property owners who simply cancel their agreements with the entity under

²⁷⁹ *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 para 12.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² MF Cassim op cite note 31 at 438.

²⁸³ FHI Cassim, MF Cassim, R Cassim et al op cite note 3.

²⁸⁴ MF Cassim op cite note 31 at 438.

business rescue, may mechanically claim the repossession of their property, the courts are destabilizing a cornerstone of the business rescue proceedings and undermining its purpose.²⁸⁵

As held by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, the 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.²⁸⁶ Further, where the words used are capable of more than one meaning, a meaning that is likely to further rather than hinder the purpose of the provision should be adopted.²⁸⁷ In this regard, it is submitted that the purpose of the provision and the background to the preparation and production of the document is apparent. The Act and the provisions of business rescue proceedings redress the previous failures of the judicial management under which many entities were liquidated.²⁸⁸

In the light of the fundamental purpose of the moratorium, Cassim opined that to promote rather than to hinder the purpose of business rescue proceedings, the phrases lawful possession and lawfully in its possession in sections 133(1) and 134(1)(c) of the Act, must be “interpreted to mean lawful possession in the criminal sense, to exclude from the ambit of the moratorium property obtained by the company as a result of fraud or theft.”²⁸⁹ This would limit the number of cases where the property is recovered easily by the property owners following the cancellation of an agreement with the entity under business rescue. Therefore, the suggested approach by Cassim would require a proper application of the moratorium as espoused in chapter 6 of the Act. This will allow the balancing act between the affected persons as required by the Act.²⁹⁰

Following the above-discussed judgments on the repossession of the property by the property owners,²⁹¹ the High Court in *Mabote v Van Der Merwe*, even though the matter was an application for leave and not an actual repossession of the property, Boruchowitz J held that in

²⁸⁵ Ibid.

²⁸⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra note 38 para 18.

²⁸⁷ Ibid. See also *Chetty v Hart* supra note 55 para 8.

²⁸⁸ P Kloppers ‘Judicial Management reform : steps to initiate a business rescue’ (2001) 13 *SA Merc LJ* 359 at 375 and 426.

²⁸⁹ MF Cassim op cite note 31 at 440.

²⁹⁰ s7(k) of the companies Act 71 of 2008.

²⁹¹ See discussion in this chapter sub-sub para (i) above.

applying the balancing test under sections 133(1)(b) and 134(1)(c) of the Act, several important factors are relevant.²⁹² Further, Boruchowitz J held that the court must apply the balancing test that would weigh up the detriment caused to the property owner who is compelled against its will to leave its property in the possession of the company undergoing business rescue proceedings, against the detriment that would be caused to the company, its other creditors as a whole, its employees and other relevant stakeholders should the property owner be permitted to repossess its property.²⁹³

As aforementioned, this factor analysis approach was not about the actual repossession of the property by the property owner, however, it is submitted that if a mere application for leave to bring proceedings to repossess the property from an entity requires this level of scrutiny therefore it follows that the actual repossession should require the same or even higher standard.²⁹⁴ Further, it is submitted that where the property owners' property is used by an entity in business rescue in terms of an existing lease, resulting in substantial loss to the property owner, this state of affairs ought to provide an adequate basis for allowing the property owner to repossess the property. It only makes sense because the property owners are not merely creditors but are also in business to be profitable, and it could not have been the intention of the legislature to unjustly benefits other businesses at the expense of the other.

Cassim concurs with Boruchowitz J finding that there must be a factor-based analysis and that each case will depend on its facts and circumstances.²⁹⁵ Furthermore, Cassim opined that scrutiny for the actual repossession of the property should require a higher standard and making sure that the objectives of the business rescue moratorium are not defeated.²⁹⁶ In this regard, Cassim provided other factors that the court should consider in determining whether to grant an order for the repossession of the property from an entity in business rescue by the property owners. Cassim opined that even though the courts are not mandated to take into account the factors given to the business rescue practitioner in terms of section 134(2) of the Act in assessing whether to

²⁹² *Mabote v Van Der Merwe* supra note 78 para 28.

²⁹³ *Ibid.*

²⁹⁴ MF Cassim op cite note 230 at 50 – 54.

²⁹⁵ MF Cassim op cite note 230 at 49.

²⁹⁶ MF Cassim op cite note 230 at 50 – 54.

allow the property owner to recover its property there is nothing in the Act which suggest that the courts are not allowed to do so.²⁹⁷

Cassim submitted that when considering the circumstances of the company, as required by section 134(2)(b) of the Act, the courts should also have regard to the financial position of the entity and its ability to compensate the property owner, for example, by continuing to pay current rental and other charges as well as any arrear rental and interest.²⁹⁸ It is submitted that this presupposes that in the circumstances where an entity can make ongoing payment of its rental and other charges during the business rescue proceedings, the court may justifiably refuse the property owner permission to repossess the property on the basis that he or she would benefit only marginally, while others would suffer a far greater loss.²⁹⁹ Further, in assessing the purposes of business rescue in terms of section 134(2)(a) of the Act read with the circumstances of the company in terms of section 134(2)(b) of the Act, the courts ought to consider inter alia:

“[W]hether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act, the prospects of success of the business rescue, the length of time business rescue has already been in force and how long it is expected to continue, the proposals of the business rescue practitioner. Where, for example, the business rescue practitioner has specifically undertaken to make rental payments to the property owner during business rescue proceedings, the likelihood or degree of probability of each of the above factors.”³⁰⁰

Furthermore, the history of the business rescue proceedings and the conduct of the parties should be taken into account. This enables the court to have regard to considerations such as whether the business rescue practitioner had made misrepresentations to the property owner, or has prolonged the course of the business rescue process, or whether the property owner has accepted certain benefits during the business rescue proceedings.³⁰¹

²⁹⁷ MF Cassim op cite note 230 at 51.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ MF Cassim op cite note 230 at 53.

³⁰¹ MF Cassim op cite note 230 at 54.

Further, the High Court judgment in *Kythera Court v Le Rendez-Vous Cafe CC* shows the interplay of the balancing act between the rights of the property owner and the objectives of the moratorium.³⁰² In this regard, the dispute involved a lease agreement concluded in 2010 between Kythera Court, being the landlord, and Newscafé. Newscafé had failed to pay rental since October 2015 but remained in occupation of the premises. After receiving breach notices from the landlord the members of Newscafé voluntarily resolved to place the close corporation into business rescue in December 2015. By the time the matter was argued in court in April 2016 the business rescue plan had still not been published and no rental payments had been made.³⁰³ In other words, the court found it unfair for the property owner to be without its property while not receiving the rental due and there was no business rescue plan upon which the close corporation would rely. Cassim cogently submitted that “it would be a harsh and improper encroachment of proprietary rights if property owners are denied to recover their property from distressed companies, and are also deprived of payment of rent or compensation.”³⁰⁴

(b) Suggested protective measures for the payment of current rental or installments, and damages to property owners

Where a lease agreement has been cancelled, but the entity under business rescue retains possession of the property by the moratorium, it follows that the property owner remains entitled to the continued payment of rent or monthly installments or obtains a right to compensation.³⁰⁵ This position is aligned with the balancing act that is required by the Act in terms of section 7(k). Furthermore, it is also aligned with the factor-based analysis that is provided by section 134(2) of the Act to the business rescue practitioner when assessing whether to allow the repossession of the property. In this regard, Cassim opined that when considering the circumstances of the company, as required by section 134(2)(b) of the Act, the courts should also have regard to the financial

³⁰² See discussion in this chapter sub-sub para (i) above.

³⁰³ *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 para 3.

³⁰⁴ MF Cassim op cite note 230 at 55.

³⁰⁵ MF Cassim op cite note 31 at 442.

position of the entity and its ability to compensate the property owner, for example, by continuing to pay current rental and other charges as well as any arrear rental and interest.³⁰⁶

In this regard, to afford protection to property owners who wish to enforce their right to be paid ongoing rent, hire, and other charges or compensation during the business rescue, the discretion afforded to the court can in and of itself be regarded as a protective measure to property owners.³⁰⁷ It falls to the courts to level the playing field using the tools furnished by the legislature in the Act. The court has wide powers to impose any terms the court considers suitable for the grant of leave under section 133(1)(b) of the Act. However, wide discretion to grant leave must be exercised judicially having regard to the purpose and objects of section 133(1)(b) of the Act, read in the context of the Act as a whole, including the provisions of sections 7(k) of the Act and 128(1)(b) of the Act.³⁰⁸ Accordingly, Cassim submitted that where the property owner seeks leave to bring legal proceedings to recover an asset that is fundamental to the successful rescue of the company, the court, in refusing leave for the return of the property, may require that the business rescue practitioner makes ongoing payment of rent to the property owner.³⁰⁹ Further, the property owner would be well-advised, when seeking the leave of the court for the recovery of its property, “to seek in the alternative and failing a recovery of its property, the leave of the court to receive the continued payment of rent or other compensation from the company during the business rescue.”³¹⁰

Therefore, while there may be valid reasons for depriving the property owner of recovering its property from an entity under business rescue, it is important to balance this, where possible, by preventing a situation where entities in business rescue can indefinitely occupy rented premises or enjoy the use of the property without the payment of any rent or compensation. As a result, if judicial leave is refused to the property owner to repossess its property under section 133(1)(b) of the Act, “it is only reasonable to minimize the detriment suffered by the property owner by its inability to reclaim the property by ordering the company to make ongoing payment of current rent

³⁰⁶ MF Cassim op cite note 230 at 51.

³⁰⁷ s133(1)(b) of the Companies Act 71 of 2008.

³⁰⁸ *Arendse v Van der Merwe* supra note 174 paras 28 and 29.

³⁰⁹ MF Cassim op cite note 230 at 55.

³¹⁰ *Ibid.*

or periodic payment of other compensation to the property owner.”³¹¹ However, for the courts inflexibly to order, as a rigid rule, the immediate payment of current rental and or other charges by entities undergoing business rescue would be to confer on property owners an unfair priority over other creditors.³¹² Therefore the facts and circumstances of the matter before the court will inform the court's discretion.

In exceptional circumstances, the property owner may be refused leave for both the return of its property and the payment of its rent or other compensation.³¹³ Rental payments may not be necessary, for instance, if the moratorium is likely to be shortlived, while in other situations rental payments may not be immediately possible, for instance where the company does not have the liquidity to pay the rent.³¹⁴ Furthermore, where an entity under business rescue does not have the financial resources to pay ongoing rent or other compensation for the use of property, and the court finds in favor of the company to keep the property, it is submitted that the court should, wherever possible, “limit the period for which the company may continue to use the property without reciprocal payment of any rent or compensation.”³¹⁵

Cassim submits that the threshold period of three months without the payment of rent or other compensation would be a useful guideline for the courts to adopt.³¹⁶ It is submitted that the period of three months is derived from section 132(3) of the Act. Furthermore, the wide discretion afforded to the court in terms of section 133(1)(b) of the Act could also include the right of a property owner to sue for the payment of rent on the condition that the business rescue practitioner has failed to resume rental payments after three months' period of respite.³¹⁷ Further, the property owner could be authorized to bring legal proceedings for the return of its property in three months unless the payment has by then resumed.³¹⁸

³¹¹ Ibid.

³¹² MF Cassim op cite note 230 at 57.

³¹³ MF Cassim op cite note 230 at 57.

³¹⁴ Ibid.

³¹⁵ MF Cassim op cite note 230 at 57 – 58.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

What is evident is that the principal grievances of the property owners are the continued non-payment of its rent or other compensation, and where this is not possible, the prevention of the recovery of possession of the property. Another one of the protective measures afforded by the legislation is that the lifting of the moratorium is not left to the exclusive discretion of the business rescue practitioner. If the property owner is not satisfied with the decision of the business rescue practitioner, the property owner can approach the court. In this regard, whenever the property owners want to institute legal proceedings against the company for the payment of current rent or the repossession of the property, they need to first consult with the business rescue practitioner. The business rescue practitioner is understood to have a better insight into the affairs of the company, thus, procedurally, given the first preference over the court.

The business rescue practitioner ought to act impartially and reasonably having regard to all the factors.³¹⁹ This presupposes that the failure to act impartially and reasonably allows the court to intervene, and the property owner can approach the court at any time for the leave to institute legal proceedings for the payment of current rent or other compensation and the recovery of the property.

It submitted that the effectiveness of protective measures contained in the Act rests in the proper interpretation and application of the provisions and principles by the business rescue practitioner and the courts. The legislature entrusted the two parties to find a proper balance between the fundamental purpose of the business rescue proceedings and the rights of the affected parties – including the property owners.³²⁰

However, it is submitted that certain elements may somewhat hinder the effectiveness of the protective measures. For example, unlike the business rescue practitioner, the courts are not directly given factors to consider when deciding whether to grant leave under section 133(1)(b) of the Act. To counteract this, it can be argued that the Act intentionally gives the court the wide discretion to consider as many factors as possible to find a better solution or proper balance between the goals of the business rescue process and the prejudice caused to property owners. Therefore, the feasibility of an order for recovery of the property or ongoing payment of rent or

³¹⁹ s134(2) of the Companies Act 71 of 2008.

³²⁰ s7(k) of the Companies Act 71 of 2008.

other compensation during business rescue ultimately depends on the unique circumstances of each case, and, in particular, the financial position of an entity in distress.

III. CONCLUSION

The moratorium as the most important consequence of the commencement of business rescue proceedings provides an entity with the necessary breathing space while the business rescue practitioner attempts to rescue the entity and return it to a state of being financially viable.³²¹ As a result, without the moratorium, it would be difficult to rescue an entity. Flowing from the suggested interpretation, “the moratorium, in relation to property belonging to the company or which is in the lawful possession of the company, prevents property owners from recovering their properties from an entity under business rescue proceedings.”³²² This is because such property may be fundamental to the rescuing of an entity and taking it away may defeat the purpose of business rescue proceedings. Furthermore, by preventing the property owner from repossessing its property, the business rescue practitioner will be able to formulate a rescue plan to attempt to rescue an entity to return to a state of being financially viable.³²³

As discussed above, the cancellation of the lease agreement in itself is not patently prohibited by the moratorium,³²⁴ however, it does not automatically enable the property owner to proceed to recover its property from an entity under business rescue proceedings.³²⁵ The moratorium in sections 133(1) and 134(1)(c) of the Act would prevent the property owner from commencing with legal proceedings to repossess its property unless it is granted the consent of the business rescue practitioner or the leave of the court.

The business rescue practitioner is guided by section 134(2) of the Act. Further, the question of whether the court should, under section 133(1)(b) of the Act, allow the property owner to repossess its property from an entity under business rescue proceedings, should be determined by a balancing act between the interests of the property owner and the interests of the company

³²¹ FHI Cassim, MF Cassim, R Cassim et al op cite note 3.

³²² MF Cassim op cite note 31 at 441.

³²³ MF Cassim op cite note 31 at 422.

³²⁴ *Murray v Firststrand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

³²⁵ MF Cassim op cite note 31 at 441.

together with its other creditors, its employees, and other stakeholders.³²⁶ In doing this, due and proper weight must be given to the proprietary interests of the property owner so that the courts as far as possible avoid undue encroachment on proprietary interests whereby the property owner is denied its property without the payment of rent or other compensation.

Furthermore, Cassim argued that by cancelling the agreement, the property owner crystallizes or perfects its right to repossession of the property — which right may be exercised when the business rescue comes to an end.³²⁷ As a result, the property owner who has cancelled the lease agreement for breach of the contract for non-payment of rent or monthly installment “retains its vested right to bring legal proceedings for the repossession of its property, although it may be unable to enforce that right during the business rescue.”³²⁸ Therefore, the property owner’s inability to enforce its right to repossession while the company under business rescue does not extinguish or alter its substantive right to repossession.

While there may be valid reasons for depriving the property owner of recovering its property from an entity under business rescue, it is important to balance this, where possible, by preventing a situation where entities in business rescue can indefinitely occupy rented premises or enjoy the use of the property without the payment of any rent or compensation. Where a lease agreement has been cancelled, but the entity under business rescue retains possession of the property by the moratorium, it follows that the property owner remains entitled to the continued payment of rent or monthly installments or obtains a right to compensation.³²⁹ In this regard, Cassim opined that when considering the circumstances of the company, as required by section 134(2)(b) of the Act, “the courts should also have regard to the financial position of the entity and its ability to compensate the property owner, for example, by continuing to pay current rental and other charges as well as any arrear rental and interest.”³³⁰ Further, to afford protection to property owners who wish to enforce their right to be paid ongoing rent, hire, and other charges or compensation during the business rescue, the discretion afforded to the court can in and of itself

³²⁶ s7(k) of the Companies Act 71 of 2008.

³²⁷ MF Cassim op cite note 31 at 441 – 442.

³²⁸ Ibid.

³²⁹ MF Cassim op cite note 31 at 442.

³³⁰ MF Cassim op cite note 230 at 51.

be regarded as a protective measure to property owners as the court has wide powers to impose any terms considers suitable in terms of section 133(1)(b) of the Act.³³¹

³³¹ s133(1)(b) of the Companies Act 71 of 2008.

CHAPTER FOUR

Comparative Analysis with Australia

I. INTRODUCTION

South Africa and Australia have inherited certain common attributes from English law in legal terms due to its colonial ties.³³² For instance, company law in both South Africa and Australia has much in common.³³³ However, it is one matter to have similar legislation it is another to have that legislation operate in the same manner given different social conditions and a different commercial environment.³³⁴ Further, it is important to note that there is a difference between developed and developing countries. Developed countries tend to have stable currencies and robust financial markets, making them attractive to investors from all over the world thus boosting their economic activities. On the other hand, developing countries have a less developed industrial base thus resulting in an emerging economy.³³⁵ These are some of the social and commercial conditions that may result in similar legislation operating differently in two countries.

South Africa is a developing country with an emerging economy compared to Australia which is among the world's economic powerhouses.³³⁶ However, there is value in making comparisons of the legislations in each jurisdiction where the stated aims or purpose are similar and where one jurisdiction may give direction on how the other legislation in another jurisdiction may be interpreted. The wording of these two legislations is similar. Hence, this chapter compares the existing Australian *voluntary administration*³³⁷ and the current South African *business rescue moratorium* provisions.³³⁸

³³² C Anderson op cite note 37 at 104.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ N Correa 'Industrila development in least developed countries' 2018 at 1—2.

³³⁶ World Bank. "[World Development Indicators](#)." Accessed Dec. 23, 2020.

³³⁷ Part 5.3A of the Australian Corporations Act no.50 of 2001.

³³⁸ Ch 6 of the Companies Act 71 of 2008.

The aim or objectives of the voluntary administration procedure is to ensure that the business, property, and affairs of the company are administered in such a way that maximizes the chances of the company surviving.³³⁹ Furthermore, “where the survival of the company is not possible, the next objective is to generate results that will bring a better return for the company’s creditors than would be from an immediate winding up of the company.”³⁴⁰ Therefore, primarily the voluntary administration is designed to resolve the company’s financial woes to save the company. If the administrator cannot come up with a plan to save the company, then voluntary administration aims to administer the company’s affairs to obtain a better return (payment) to creditors than if the company had been immediately winding up.

This is similar to the South African business rescue provision. It is similar in wording and more importantly, the aim or purpose of the procedure is the same. In South Africa, the term *business rescue* means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

“[T]he temporary supervision of the company, and the management of its affairs, business, and property; a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; 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 equity in a manner that maximizes the likelihood of the company continuing in existence on a solvent basis or if it is not possible for the company to so continuing in existence, results in a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company.”³⁴¹

Interestingly, the mechanism for achieving these aims is similar in both countries. In Australia, a plan for achieving the aim of voluntary administration takes into consideration the present condition of the company, and the ultimate goal of restoring the company to a going concern is incorporated in a Deed of Company Arrangement by the administrator.³⁴² Similarly, in

³³⁹ s435A of the Australian Corporations Act no.50 of 2001.

³⁴⁰ s435B of the Australian Corporations Act no.50 of 2001.

³⁴¹ s128(1)(b)(i)(ii)(iii) of the Companies Act 71 of 2008.

³⁴² s444(A)(4) of the Australian Corporations Act no.50 of 2001.

South Africa, the business rescue plan contains detailed material that assists the creditors in making an informed decision as to whether to vote in favour of the plan.³⁴³

By so doing the comparison with Australia (as one of the countries that have long-standing experience and success with the corporate rescue), it will assist in providing insights into how the challenges facing the creditors (property owners) in Australia during the voluntary administration moratorium have been dealt with.

Initially, this chapter will look at the historical background of both voluntary administration and business rescue proceedings, then discuss how voluntary administration and business rescue are commenced with, and discuss the impact of moratorium under both voluntary administration and business rescue proceedings. The comparison will look at how the moratorium affects the property owners' proprietary interests and payment of rent by the company during the voluntary administration, and if there are some words/sections that are interpreted differently and hence the consequences for the property owner might be different. Further, the corporate rescue procedure is extensive and thus only the major components that make up this process, and that are relevant to the scope of the thesis will be discussed in this chapter.

II. HISTORICAL BACKGROUND OF CORPORATE RESCUE PROCEDURES IN BOTH SOUTH AFRICA AND AUSTRALIA

(a) *Introduction*

The previous corporate rescue procedures have assisted to shape the formation of modern corporate rescue. In South Africa, *judicial management* is the precursor to the business rescue espoused in chapter 6 of the Act. The Companies Act 61 of 1973 (hereinafter referred to as 1973 Companies Act) did not contain a definition of judicial management, however, an inference can be drawn from the requirements as well as case law that judicial management had only one recognized purpose – the rescue of the company as defined in section 427(1) of the 1973 Companies Act.³⁴⁴ However, judicial management was criticized.³⁴⁵

³⁴³ s150 of the Companies Act 71 of 2008.

³⁴⁴ A Loubser op cite note 9 at 18.

³⁴⁵ *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C) at 238.

Some of the criticism or shortcomings of judicial management include the unavoidable involvement of the court which renders the procedure costly, slow, and cumbersome.³⁴⁶ This situation is exacerbated by the fact that only a provisional order is issued on the first application and an applicant, therefore, has to approach the court for a second time to obtain a final judicial management order.³⁴⁷ Another serious disadvantage is “the excessively stringent requirements for both a provisional and a final judicial management order and the burden of proof on the applicant which is almost impossible to discharge.”³⁴⁸

On the other hand, from the Australian perspective, *official management*³⁴⁹ is the precursor to the voluntary administration encapsulated. As with South Africa, in Australia, the official management was criticized for its shortcomings which warranted a change to voluntary administration. Some of the criticism included that the process was time-consuming, costly, cumbersome, and not often used. The Harmer Report expressed the view that official management did not offer a satisfactory range of alternatives for a company in the zone of insolvency to deal with its affairs.³⁵⁰ Further, the Harmer Report expressed the view that official management was too conservative for dealing with the affairs of the company in financial difficulty. Therefore, the Harmer Report recommended that “a new voluntary procedure was needed that allowed companies to take action where they had a debt problem, not requiring them to be insolvent *per se*.”³⁵¹ Further, the Harmer Report recommended a new voluntary procedure that allowed the appointment of an administrator as well as providing appropriate notice to creditors with a stay on action to enable productive cooperation between the directors and administrator to help ensure the company’s prospects for recovery.³⁵²

Through its Companies Act no.6839 of 1961 (hereinafter referred to as the 1961 Australian Companies Act), Australia introduced official management as a corporate rescue procedure.³⁵³

³⁴⁶ A Loubser op cite note 9 at 44.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Part IX of the Australian Companies Act no.6839 of 1961.

³⁵⁰ RW Harmer, Australian Law Reform Commission, *General Insolvency Inquiry* (Report No. 45, 1988) para 8.

³⁵¹ RW Harmer op cite note 350 paras 53 and 54.

³⁵² Ibid.

³⁵³ Part IX of the Australian Companies Act no.6839 of 1961.

Although the 1961 Australian Companies Act did not define the purpose of official management, it could be discerned from the wording of the provisions that the purpose was to enable a failing company that is on the brink of collapse to restructure therefore providing an alternative to liquidation.³⁵⁴ In this regard, it has been argued that an attempt at the rescuing of companies is not only important to stakeholders but also the livelihood of the community since companies play an important role in an economy and their demise affects not only stakeholders but also the economic activities of the country.³⁵⁵ Therefore, by providing for official management the Australian legislature recognized the need to preserve the economy of the country as far as was possible.

Olver opined that Australia followed the example of South Africa by introducing official management in 1961 as a corporate rescue procedure.³⁵⁶ This could be because South Africa introduced the concept of judicial management as early as 1926.³⁵⁷ However, due to some practical difficulties, judicial management in South Africa underwent several positive amendments. This includes, inter alia, the Companies law Amendment Act 11 of 1932 which introduced the concept of the *moratorium*.³⁵⁸ In this regard, section 196(1) of the Companies law Amendment Act 11 of 1932 allowed the court to order a stay of any action against the company for the duration of judicial management and such action could only be pursued on application to the court. However, the court was not required to grant the moratorium. It was a matter that the court had discretion over provided the applicant had made their case. Therefore, it can be seen that judicial management as it appears in the 1973 Companies Act was a result of several amendments.

(b) Commencement of judicial management and official management

Section 427 of the 1973 Companies Act set out the judicial management chapter and provided the circumstances under which a company or any person designated under section 346 of the same

³⁵⁴ s202(1)(a) Australian Companies Act no.6839 of 1961.

³⁵⁵ A Loubser 'Judicial management as a business rescue procedure in South African corporate law' (2004) *16 SA Merc LJ* 137 at 137.

³⁵⁶ AH Olver *Judicial management in South Africa: its origin, development and present-day practice and a comparison with the Australian system of official management* (LLD thesis, University of Cape Town, 1980) 19.

³⁵⁷ Companies Act 46 of 1926 introduced Judicial Management in South Africa.

³⁵⁸ AH Olver op cite note 356 at 3.

Act could apply to the court for an order of judicial management.³⁵⁹ On the other hand, section 202 of the 1961 Australian Companies Act provided the circumstances under which the creditors of the company could place the company under *official management* following the meeting of creditors of a company called under section 199 of the same Act.³⁶⁰

The objectives of placing the company under judicial management or official management were similar.³⁶¹ In this regard, the purpose was to facilitate the restructuring or rehabilitation of the company so that it will be able to pay its debts as and when they become due and payable. However, the difference lay in the method by which companies were placed under judicial management or official management. In South Africa, the company or any person designated under section 346 of the 1973 Companies Act could approach the court for a judicial management order when the company was unable to pay its debts, unable to meet its obligations, and had not become or is prevented from becoming a successful concern because of mismanagement or for any other cause.³⁶² Further, the company or any designated person in terms of section 346 had to show that there was a *reasonable probability*³⁶³ that the company would be able to pay its debts.³⁶⁴ The court also had the discretion to grant the order if it was just and equitable to do so.³⁶⁵ However, the courts would not grant an order if the company itself is capable of resolving the problem that led to its circumstances.³⁶⁶ Therefore, in South Africa, judicial management procedure was heavily reliant on courts which led the procedure to be costly, slow, and cumbersome.³⁶⁷

On the other hand, in Australia, the procedure of placing the company under official management was not dependent on courts. Unlike the South African provisions, the company was placed under official management through the resolution of the creditors. In this regard, the 1961 Australian Companies Act provides that:

³⁵⁹ s427(1)(a)(b) of the Companies Act 61 of 1973.

³⁶⁰ s202(1)(a) of the Australian Companies Act no.6839 of 1961.

³⁶¹ See s427(1)(a)(b) of the Companies Act 61 of 1973 and s202(1) of the Australian Companies Act no.6839 of 1961.

³⁶² s427(1)(a)(b) of the Companies Act 61 of 1973.

³⁶³ 1973 Companies Act did not define the phrase “reasonable probability” and set a high threshold for an applicant.

³⁶⁴ s427(1)(a)(b) of the Companies Act 61 of 1973.

³⁶⁵ Ibid.

³⁶⁶ HS Cilliers, ML Benade, B Henning et al op cite note 6.

³⁶⁷ A Loubser op cite note 9 at 44.

“Where at a meeting the creditors have passed a resolution to the effect that in their opinion the company is unable to pay its debts as and when they become due and payable but that if the company was placed under official management there would be a reasonable probability that it would be able to pay its debts, the creditors may at the meeting by special resolution determine that the company shall be placed under judicial management for such period commencing on the date of the passing of the resolution and not exceeding two years from that date, as is specified in the resolution.”³⁶⁸

Further, the creditors had the power to appoint the official manager to oversee the company while it is under judicial management. On the other hand, the judicial manager was appointed by the courts in South Africa. Therefore, the Australian system was ‘creditor management’ as opposed to ‘judicial management’, one relied on the resolution of creditors and the other was court oriented.³⁶⁹

Despite the obvious difference in the commencement of the two procedures, it could be argued that both procedures had their weaknesses. In this regard, Olver opined that the approach used under official management also had its weaknesses as a resolution had to be passed by creditors and creditors are not always objective compared to the court which may consider the facts impartially.³⁷⁰ On the other hand, the creditors had a minimal role under judicial management.³⁷¹ In South Africa, the judicial manager had to report to the courts after a meeting with the creditors, which report the courts considered in deciding whether to award a final order. However, “the courts were not bound to follow the views of the creditors and were at liberty to consider other factors.”³⁷² Therefore, the procedure of judicial management was subject to the

³⁶⁸ s202(1)(a) of the Australian Companies Act no.6839 of 1961.

³⁶⁹ AH Olver op cite note 356 at 290.

³⁷⁰ Ibid.

³⁷¹ The creditors could only apply to the court for the provisional judicial management order through section 346(1)(b) of the Companies Act 61 of 1973, and the final order could only be granted by the court after consideration of different factors as envisaged in section 432 of the Companies Act 61 of 1973.

³⁷² AH Olver op cite note 356 at 290.

courts as they could disagree with the views of the creditors in making a final order, hence the judicial management has been criticized for its heavy reliance on court proceedings.³⁷³

(c) *Moratorium under judicial management and official management*

The Companies 61 of 1973 Act required that the company had to be unable to pay its debts or meet its obligations before a court could use its discretion to grant a provisional judicial management order.³⁷⁴ Notably, a downfall of this requirement is that it increases the distress already suffered by the company because it does not help them before they become insolvent. Further, the affected parties could still pursue the legal proceedings and or enforcement actions against the company to protect their interest as the commencement of the judicial management did not automatically trigger the moratorium.³⁷⁵

The moratorium could only be “triggered if an applicant specifically included a prayer thereof in the application and such prayer is granted by the court.”³⁷⁶ Further, the court had to use its discretion to assess the effects of granting a moratorium on the creditors. Where it was not granted it deprived the company of the much-needed breathing space that is vital to achieving the objectives of judicial management.³⁷⁷ Therefore, it is submitted that judicial management placed more emphasis on the protection of creditors' interests as the moratorium was perceived as an infringement on the rights of creditors.³⁷⁸ As a result, the moratorium was not seen as a balancing act of the rights of creditors as well as the importance of saving the company or its business.³⁷⁹ This further undermined the objectives of judicial management and entrenched the status of judicial management as an extraordinary procedure because of the cost associated with it.

³⁷³ See AH Olver op cite note 356 at 291, and A Loubser op cite note 9 at 44.

³⁷⁴ s427(1)(a) of the Companies Act 61 of 1973.

³⁷⁵ s133(1) of the Companies Act 71 of 2008 triggers an automatic moratorium upon the commencement of the business rescue proceedings.

³⁷⁶ A Laubser ‘Business rescue in South Africa : a procedure in search of a home?’ (2007) 40 *Comparative and International Law Journal of Southern Africa* 154.

³⁷⁷ P Kloppers ‘Judicial management : a corporate rescue mechanism in need of reform?’ (1999) 3 *Stell LR* 417 at 430.

³⁷⁸ s434(1) of the Companies Act 61 of 1973.

³⁷⁹ s434(1) of the Companies Act 61 of 1973.

In terms of section 428(2)(c) of the 1973 Companies Act, the judicial management order shall contain directions that “while the company is under judicial management, all actions, proceedings, the execution of all writs, summonses, and other processes against the company be stayed and be not proceeded with without the leave of the Court.” The 1973 Companies Act did not provide the time limit for both judicial management and the moratorium. It was upon the court’s discretion to decide how long the moratorium would subsist and if needed to be extended. This shows the heavy reliance on courts for every decision to be taken during judicial management.³⁸⁰ Therefore, judicial management seemed rather expensive, lengthy, and cumbersome. These characteristics of judicial management might have discouraged the would-be users of the procedure which would have decreased its popularity.

Australia’s official management provided for a stay of proceedings against the company in terms of section 203B(1) of the 1961 Australian Companies Act the moment the creditors approved the resolution to place the company under official management. The provision provided that where a company is under official management, “no action or proceedings in any court shall, except with the leave of the court and under such terms and conditions as the court may impose, be commenced or proceeded with against the company until the company ceases to be under official management.”³⁸¹ The importance of this provision is that it protected the company against the would-be proceedings by creditors that have the potential of derailing the company from focusing on restructuring its affairs.

Unlike South African judicial management, official management was clear in terms of the time limit for the moratorium. The time limit for a moratorium was for the duration of official management which was for “such period commencing on the date of the passing of the resolution and not exceeding two years from that date, as was specified in the resolution.”³⁸² Therefore, official management had fixed the period of the moratorium.

The time limit could also be extended by the official manager following a meeting with the creditors of the company “to consider and, if thought fit, pass a special resolution extending the official management for such further period, not exceeding twelve months, as was specified in the

³⁸⁰ H Rajak and J Henning ‘Business Rescue for South Africa’ (1999) 116 *SALJ* 262 at 268.

³⁸¹ s203B(1) of the Australian Companies Act no.6839 of 1961.

³⁸² s202(1)(a) of the Australian Companies Act no.6839 of 1961.

resolution.”³⁸³ However, it is submitted that a period of two years was too long, and considering that it could still be extended by a year. The official management was costly and lengthy because the creditor did not have another option but to approach the court all the time for the lifting of the moratorium.

(d) *Conclusion*

The major difference between the two systems is that the official management was not reliant on judicial supervision whereas the judicial management was subject to the supervision of the courts. In other words, the Australian system relied on the resolution of creditors as opposed to judicial management that was court-oriented. As a result, judicial management discouraged would-be users as the whole procedure was costly, lengthy, and cumbersome. However, both procedures were seen as an extraordinary measure because of the stringent requirement for placing the company under corporate rescue procedure.

Section 427(1)(a) of the 1973 Companies Act requirement that the company *must not be able to pay its debts* before a judicial management order could be granted greatly undermined the objectives of the judicial management and was counter-productive to the overall aim of judicial management which is rescuing the business because at such time it might have been too late to restructure the affairs of the company.³⁸⁴ Likewise in Australia, the company had to be insolvent before it can be placed under official management, and that created hardship for companies. Following such criticism by different commentators, a review of judicial management in South Africa and official management in Australia was necessary as the existing systems were not effective.

There was a need for a drive and move towards the trend of adopting a modernized approach that would recognize that the company has a direct impact on the economic and social well-being of the community in which it operates through its employees, creditors, and suppliers, consequently, the insolvency of the company has an adverse impact not only on the private interest of the insolvent debtor but also on other groups in society who have vested interest in the company.

³⁸³ s203C(1) of the Australian Companies Act no.6839 of 1961.

³⁸⁴ P Kloppers op cite note 288 at 375.

III. COMMENCEMENT OF BOTH BUSINESS RESCUE PROCEEDINGS IN SOUTH AFRICA AND VOLUNTARY ADMINISTRATION IN AUSTRALIA

(a) *Introduction*

The first segment of this chapter set out a brief analysis of the law relating to *judicial management* and *official management*; its history, development, and use. Judicial management has been replaced by *business rescue proceedings* in chapter 6 of the Act. On the other hand, official management has been replaced by *voluntary administration* as set out in Part 5.3A of the Corporations Act (hereinafter referred to Australian Corporations Act).³⁸⁵ Even though both judicial management and official management have been regarded as failures, they served as a basis on which corporate rescue procedures can evolve, and to that end, both judicial management and official management have been useful.

This part of the chapter provides a critical analysis of the commencement of both business rescue proceedings and voluntary administration; how it differs from its respective precursors and how does it compare to each other.

(b) *Analysis of the commencement of business rescue and voluntary administration by the board of the company*

In South Africa, as an attempt to make business rescue proceedings a more viable option for financially distressed companies as compared to judicial management, the legislature simplified the commencement procedure.³⁸⁶ The Act provides two avenues in which business rescue may be commenced. The one involves a resolution by the board of the company³⁸⁷ and the other is by an application to the court by affected persons.³⁸⁸ In this regard, section 129(1) of the Act states that the commencement may be done by way of a resolution made by the board of a company to

³⁸⁵ The Australian rescue procedure is encapsulated in Part 5.3A of the Corporations Act no.50 of 2001.

³⁸⁶ s128 of the Companies Act 71 of 2008.

³⁸⁷ The board of a company in the Companies Act 71 of 2008 refers to the 'board of directors' of a company.

³⁸⁸ s128(1)(a) of the Companies Act 71 of 2008 defines 'affected persons' to mean a shareholder or creditor of the company; any registered trade union representing employees of the company; and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

voluntarily begin business rescue proceedings, this may be done if “the board of a company has reasonable grounds to believe that the company is *financially distressed* and there appears to be a reasonable prospect of rescuing the company.”³⁸⁹

A *financially distressed* company is defined by the Act as meaning that “it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months, or it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.”³⁹⁰ Notably, the above-mentioned provision does not specifically speak of the present inability of the company to pay its debts which was the requirement for the commencement of the previous judicial management. Arguably, this is one of the advantages of the business rescue as it allows the company to commence business rescue proceedings at the first signs of it being financially distressed. Further, in a decision of the High Court, in the case of *Welman v Marcelle Props 193 CC*, the court emphasized that “business rescue proceedings are not for terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which given time will be rescued and become solvent.”³⁹¹ Therefore, this statement supports the contention that at the first signs of financial distress, a company should apply for business rescue proceedings. Once a company is more than *financially distressed*, options other than business rescue become more attractive such as liquidations or compromises.

Furthermore, the fact that the Act allows the board of a company itself to decide when to start the business rescue procedure does not only encourages the board of financially distressed companies to seek help at an early stage but also puts the company in an advantageous position as the board is in the best position (as opposed to the court under judicial management) to decide when this action should be taken. Therefore, by allowing the board of a company to initiate a business rescue, the legislature has reduced the role of the court which in turn has reduced the unnecessary delays and costs associated with corporate rescue and presumably made it more accessible to small companies.

³⁸⁹ s129(1)(a)(b) of the Companies Act 71 of 2008.

³⁹⁰ s128(1)(f)(i)(ii) of the Companies Act 71 of 2008, also See *Louw v Forres Farm Properties (Pty) Ltd* [2019] ZANWHC 29 para 15.

³⁹¹ *Welman v Marcelle Props 193 CC* supra note 40 para 28.

Comparably, the legislature in Australia's *voluntary administration* has also allowed the board of a company³⁹² to commence or initiate the administration of the company. In terms of the Australian Corporations Act, “the company may appoint an administrator where the board has resolved that in their opinion, the company is *insolvent* or that it is likely to become insolvent at some future time.”³⁹³ As with South Africa, this makes sense as it is the board of a company that is in the best position to decide when *voluntary administration* should begin. Further, Anderson submitted that although no statistics are kept on the manner of appointment, “the widely accepted view is that this is by far the most common manner in which an administrator is appointed in Australia.”³⁹⁴ Murray and Harris also opined that in most cases the company’s board makes the appointment as a precaution to avoid potential liability for insolvent trading,³⁹⁵ and the board is not required to examine the entirety of the company’s financial position or call in experts, they just need to form a genuine opinion with regards to the company’s solvency.³⁹⁶ In other words, the legislature intended to allow the board to readily and quickly appoint an administrator without unnecessary procedures, and as Murray and Harris cogently submitted that “if directors were required to engage in the substantial examination, administrations could not be commenced speedily once the directors realized that the company had a financial problem.”³⁹⁷

Notably, in contrast to South Africa’s requirement to place the company under business rescue, Australia’s legislature retained the requirement of the present ‘inability’ of the company to pay its debts as and when they become due and payable as one of the two requirements.³⁹⁸ In this regard, it is submitted that the shift from the official management has been minimal. Further, the current business rescue requirements in South Africa show that the legislature wanted to entirely

³⁹² The board of a company in the Australian Corporations Act no.50 of 2001 refers to the ‘board of directors’ of a company.

³⁹³ s436A(1)(a)(b) of the Australian Corporations Act no.50 of 2001.

³⁹⁴ C Anderson op cite note 37 at 112.

³⁹⁵ M Murray and J Harris *Keay’s Insolvency Personal and Corporate Law and Practice* 8th ed (2014) 608.

³⁹⁶ M Murray and J Harris op cite note 395 at 609.

³⁹⁷ Ibid.

³⁹⁸ This was a requirement under official management, s202(1) of the of the Australian Companies Act no.6839 of 1961 provided that “[w]here at a meeting of creditors of a company... the creditors have passed a resolution to the effect that in their opinion the company is unable to pay its debts as and when they become due and payable...”.

move away from the previous requirements and saw the need for the board of a company to act urgently, proactively, and in a dynamic manner in dealing with financially distressed companies. Arguably, the requirements in South Africa are suited for South Africa's economy that is still developing, hence Cilliers and Banade opined that "countries with developing economies cannot easily allow companies that help to comprise their industries and commercial enterprises to be dissipated by liquidation due to temporary setback in cases where there is a reasonable probability that they would if granted a business rescue moratorium, be salvaged."³⁹⁹ Therefore, it is submitted that the requirements of commencing business rescue in South Africa are more aligned with the legislative purpose of business rescue which is to avoid the liquidation of companies as the liquidation of the companies has serious collateral damage both economically and socially.⁴⁰⁰

(c) *Analysis of the commencement of the business rescue proceedings by the affected persons and analysis of the commencement of the voluntary administration in terms of sections 436B and 436C of the Australian Corporations Act*

In South Africa, when a resolution to commence business rescue has not been adopted by the board of a company, the Act provides that an *affected person* may approach a court at any time for an order placing the company under supervision and to commence business rescue proceedings.⁴⁰¹ Therefore, a shareholder or creditor of the company, an individual employee of the company, or a registered trade union representing the company's employees may bring an application to place the company under business rescue.⁴⁰²

Notably, a crucial element of business rescue being commenced by way of a court order (as opposed to commencement by a company resolution) is that an application may be made even if liquidation proceedings have already commenced. In this regard, the Act provides that if an application is brought after liquidation proceedings having already been commenced by or against the company, "such application will have the effect of suspending the liquidation proceedings until such time that the court has adjudicated upon the application, or the business rescue proceedings

³⁹⁹ HS Cilliers, ML Banade, JJ du Plessis et al op cite note 6.

⁴⁰⁰ *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* supra note 4.

⁴⁰¹ s131(1) of the Companies Act 71 of 2008.

⁴⁰² s128(1)(a) of the Companies Act 71 of 2008.

terminate if the court makes the order applied for.”⁴⁰³ Therefore, this strengthens the objectives of business rescue which is to avoid liquidating companies that help to comprise South Africa’s industries and commercial enterprises,⁴⁰⁴ thereby “avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation”.⁴⁰⁵

Further, the Act provides the criteria stating the fundamental factors that the affected person has to prove to place the company under business rescue proceedings. In this regard, the Act provides that:

“[t]he court may make an order placing the company under supervision and commencing business rescue proceedings if the court is satisfied that the company is financially distressed, the company has failed to pay over any amount in terms of an obligation under or in terms of public regulation, or contract, concerning employment-related matters, or it is otherwise just and equitable to do so for financial reasons, and there is a *reasonable prospect* for rescuing the company.”⁴⁰⁶

Regrettably, the legislative body once again missed an opportunity to define *reasonable prospects* as it is used in the Act. It is regrettable because a similar phrase, “reasonable probability”, was not defined in the Companies Act 61 of 1973 and the court had difficulty in interpreting it.⁴⁰⁷ Further, in *Panamo Properties (Pty) Ltd v Nel N.O.*⁴⁰⁸ Wallis JA submitted that the “commendable goals” of the business rescue proceedings are:

“[U]nfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted. Consequently, they have given rise to confusion as to their meaning and

⁴⁰³ s131(6) of the Companies Act 71 of 2008.

⁴⁰⁴ HS Cilliers, ML Banade, JJ du Plessis et al op cite note 6.

⁴⁰⁵ *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* supra note 4.

⁴⁰⁶ s131(4)(a)(i)(ii)(iii) of the Companies Act 71 of 2008.

⁴⁰⁷ EP Joubert ‘Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management?’ 2013 (76) *THRHR* 553.

⁴⁰⁸ *Panamo Properties (Pty) Ltd v Nel* [2015] ZASCA 76, 2015 (5) SA 63 (SCA).

provided ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose.”⁴⁰⁹

Once again it is for the court to grapple with the interpretation of the meaning of *reasonable prospect*. The decision of the Western Cape High Court, in the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd*⁴¹⁰ was instructive about the nature of the evidence that must be placed before a court to ensure that an applicant indicates that there is a *reasonable prospect* that the company can be rescued.⁴¹¹ Eloff AJ in considering the meaning of *reasonable prospect* emphasized that each case should be considered on its merits⁴¹² and that “a proposed business rescue plan should address the cause of the demise or failure of the company’s business and offer a remedy that has a reasonable prospect of being sustainable.”⁴¹³ Therefore, the High Court held that a “business rescue plan which is unlikely to achieve anything more than to prolong the agony, i.e. by substituting one debt for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice.”⁴¹⁴

The court went on to state that without such details, a court is not only unable to consider the prospects of the company continuing in existence on a solvent basis but is also unable to consider the alternative aim of securing a better return for the creditors of the company than would arise from a liquidation. However, the drawback of this seemingly stringent approach is that “at the time an application is brought before the court the required information may not be available or attainable to the applicant in a business rescue application.”⁴¹⁵ Van der Merwe J opined that this

⁴⁰⁹ *Panamo Properties (Pty) Ltd v Nel* supra note 408 para 1.

⁴¹⁰ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* [2011] ZAWCHC 442, 2012 (2) SA 423 (WCC).

⁴¹¹ *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd* supra note 410 para 24.

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ EP Joubert op cite note 407 at 557.

placed the bar too high in respect to information required and this seems to bear some resemblance to *judicial management*.⁴¹⁶

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*⁴¹⁷ the SCA had an opportunity to provide a binding interpretation of the term *reasonable prospect* of rescuing the company. The SCA held that “the question as to whether there exists a *reasonable prospect* of rescuing the company involves a value judgment.”⁴¹⁸ Brand JA accepted that a *reasonable prospect* requires something less stringent than a *reasonable probability* which was the yardstick for placing a company under *judicial management* in terms of section 427(1) of the Companies Act 61 of 1973 and emphasized that there must be more than an arguable possibility, there must be a prospect based on reasonable grounds.⁴¹⁹ However, Brand JA, in one aspect agreed with Van Der Merwe J in *Propspec Investments v Pacific Coasts Investments 97 Ltd*,⁴²⁰ that speculative suggestions would not suffice and that the “applicant should place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved.”⁴²¹ Therefore, the applicant is not required to set out a detailed business rescue plan, that can be left to the business rescue practitioner after a proper investigation in terms of section 141 of the Act. But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s 128(1)(b)(iii) of the Act.⁴²²

In this regard, Delpont suggested that if the SCA in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* had decided to adopt the stringent approach set out in *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pt) Ltd*, it would have “probably sounded the death knell for business rescue in South Africa and lead to the

⁴¹⁶ *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd* [2013] ZAGPJHC 54 para 12.

⁴¹⁷ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68, 2013 (4) SA 539 (SCA).

⁴¹⁸ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra note 417 para 21.

⁴¹⁹ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra note 417 para 29.

⁴²⁰ *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* [2012] ZAFSHC 130; 2013 (1) SA 542 (FB) para 11.

⁴²¹ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra note 417 paras 29 and 30.

⁴²² *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* supra note 417 para 31.

procedure becoming as ineffective as its precursor.”⁴²³ Cassim opined that this way of commencement helps in preventing malicious applications and other forms of applications made with the intent to abuse the business rescue process.⁴²⁴ This is because the application has to be approved by the court after an objective assessment of the company’s financial position.⁴²⁵ It is submitted that these thresholds are important as they may prevent *affected persons* from placing a company under business rescue simply because they want to pressurize the company.⁴²⁶

Comparably, South Africa’s business rescue commencement by an order of the court following an application by affected persons is much broader than Australia’s. This is because four parties can initiate the business rescue besides the board of a company.⁴²⁷ In this regard, a “shareholder or creditor of the company,”⁴²⁸ “any registered trade union representing employees of the company,”⁴²⁹ “and if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives”⁴³⁰ may make an application to place the company under business rescue. On the other hand, in Australia, only two parties can initiate voluntary administration besides the board of a company.⁴³¹

The appointment of the administrator may be made by a liquidator or provisional liquidator. In this regard, the Australian Corporations Act provides that “a liquidator or provisional liquidator of a company may by writing appoint an administrator of the company if he or she thinks that the company is insolvent, or is likely to become insolvent at some future time.”⁴³² The only limitation here is that if the liquidator wishes to appoint himself or herself, the company’s creditors

⁴²³ P A Delpont, Q Vorster, D Purdette et al op cite note 62 at 482.

⁴²⁴ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 873.

⁴²⁵ Ibid.

⁴²⁶ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 874.

⁴²⁷ s128(1)(a) of the Companies Act 71 of 2008.

⁴²⁸ s128(1)(a)(i) of the Companies Act 71 of 2008.

⁴²⁹ s128(1)(a)(ii) of the Companies Act 71 of 2008.

⁴³⁰ s128(1)(a)(iii) of the Companies Act 71 of 2008.

⁴³¹ See s436B(1) and s436C(1) of the Australian Corporations Act no.50 of 2001.

⁴³² s436B(1) of the Australian Corporations Act no.50 of 2001.

must pass a resolution approving the appointment,⁴³³ or leave of the court must be obtained.⁴³⁴ Further, an appointment of the administrator may be made by a secured creditor “who is entitled to enforce a security interest in the whole, or substantially the whole, of a company’s property if the security interest has become, and is still, enforceable.”⁴³⁵

It is submitted that the fact that no other creditor may make the appointment results in inequality among creditors with regards to effecting appointment.⁴³⁶ Anderson noted that somewhat unusually, the Australian corporate rescue regime has no provision that allows the court to make an order for the appointment of the administrator.⁴³⁷ The reasoning behind the exclusion of the court is the realization that court-based systems often lead to delays and costly litigation that may result in smaller dividends for creditors.⁴³⁸ In other words, the aim was to avoid the dissipation of the company's remaining funds in such activities. Further, the second reason for allowing the procedure to be commenced with in this way was to ensure that the directors of the company were able to deal with the company's insolvency swiftly and effectively.⁴³⁹ Nonetheless, “the court may intervene where the administrator is managing the affairs of the company in a manner that is prejudicial to the interests of some or all of the company’s creditors or members, thereafter making an order that it deems fit and appropriate.”⁴⁴⁰ Thus the court in the Australian voluntary administration only appears to play a supervisory role.

IV. MORATORIUM UNDER BOTH BUSINESS RESCUE AND VOLUNTARY ADMINISTRATION

⁴³³ s436B(2)(f) of the Australian Corporations Act no.50 of 2001.

⁴³⁴ s436B(2)(g) of the Australian Corporations Act no.50 of 2001. See also C Anderson op cite note 37 at 112.

⁴³⁵ s436C(1) of the Australian Corporations Act no.50 of 2001.

⁴³⁶ C Anderson and D Morrison ‘The Commencement of the Company Rescue: How and When Does it start?’ in: PJ Omar (ed) *International Insolvency Law: Themes and Perspectives* (2008) 83 at 99.

⁴³⁷ C Anderson op cite note 37 at 113.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ s447E of the Australian Corporations Act no.50 of 2001.

(a) *Introduction*

One of the essential consequences of *business rescue* and *voluntary administration* order is the stay of the legal proceedings against the company commonly known as a *moratorium*.⁴⁴¹ Unlike, under *judicial management*, in the current business rescue proceedings the moratorium is automatic and does not rest on the court exercising its discretion. Similarly, under Australia's voluntary administration once the administrator is appointed by the board,⁴⁴² liquidator,⁴⁴³ or secured creditor⁴⁴⁴ the stay of legal proceedings is automatic.

The moratorium is important in the corporate rescue procedure as it gives the company breathing space during which the company can reorganize and reschedule its debts and liabilities.⁴⁴⁵ According to Bradstreet, a moratorium prohibits “a rush by creditors seeking to enforce claims that would not only have the potential to deplete what little is left in the company coffers but would also distract the attention of the business’s management team from the rescue at hand.”⁴⁴⁶ Furthermore, “even though creditors may be inclined to view the moratorium as prejudicing their rights of recovery, it is designed to facilitate a successful business rescue which may result in them ultimately being repaid in full.”⁴⁴⁷

Therefore, this segment of the thesis compares and analyses the moratorium provided for under business rescue and voluntary administration and their impact on the property owners as creditors of the company.

⁴⁴¹ See s133(1) of the Companies Act 71 of 2008 and S440D of the Australian Corporations Act no.50 of 2001.

⁴⁴² s436A of the Australian Corporations Act no.50 of 2001.

⁴⁴³ s436B of the Australian Corporations Act no.50 of 2001.

⁴⁴⁴ s436C of the Australian Corporations Act no.50 of 2001.

⁴⁴⁵ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 879.

⁴⁴⁶ R Bradstreet op cite note 23.

⁴⁴⁷ R Bradstreet ‘The leak in the chapter 6 life boat: Inadequate regulation of Business Rescue Practitioners May adversely Affect Lenders Willingness and Growth of the Economy’ (2010) 22 *SA Merc LJ* 195 at 373.

(b) *Analysis of the moratorium (stay of the legal proceedings) under business rescue and voluntary administration*

In the South African business rescue procedure, as discussed in detail in previous chapters, the temporary moratorium against a company under business rescue is effective upon the commencement of business rescue proceedings.⁴⁴⁸ It is an automatic and general stay on legal proceedings against the company, its property, and the exercise of the rights of the creditors.⁴⁴⁹ Therefore, the effect of section 133(1) of the Act is that the existence of business rescue proceedings temporarily prohibits all legal proceedings inclusive of enforcement actions against the company under business rescue. Similarly, the appointment of the administrator in Australia's voluntary administration triggers a moratorium prohibiting proceedings against the company.⁴⁵⁰ Consequently, the court proceedings concerning company property or against the company cannot proceed or be commenced unless the administrator gives consent or the court grants leave.⁴⁵¹ Further, a common aspect between the business rescue and voluntary administration is that in both procedures the moratorium does not entirely remove the right to commence legal proceedings against the company; it simply places the discretion to do so under the consent of the business rescue practitioner/administrator or with leave of the court.

Another common aspect of business rescue and voluntary administration is the appointment of an independent business rescue practitioner or administrator to investigate and supervise the business or affairs of the company and then formulate a plan that needs to be proposed to the creditors of the company. Consequently, these parties are viewed as being an agent of the company because they have broad powers to deal with the company's property and carry on the company's business. Further, in cases that the business rescue practitioner or an administrator is unable to conduct investigations because of the actions of parties in the corporate rescue process, such a practitioner or an administrator may seek direction from the court, and for this reason, the process is flexible as the court is required to be involved where there are uncooperative parties.⁴⁵²

⁴⁴⁸ s133(1) of the Companies Act 71 of 2008.

⁴⁴⁹ Ibid.

⁴⁵⁰ s440D(1) of the Australian Corporations Act no.50 of 2001.

⁴⁵¹ s440D(1)(a)and(b) of the Australian Corporations Act no.50 of 2001.

⁴⁵² *JA Pty v Jonco Holdings (Pty) Ltd* 2000 NSWSC 147.

However, unlike in South Africa, in Australia, an administrator is required to be a registered liquidator.⁴⁵³ It is submitted that this would not be the best option for South Africa because the appointment of liquidators as judicial managers was one of the reasons for the failure of its former judicial management procedure.

Another difference between business rescue and voluntary administration is the effect of the moratorium. During voluntary administration, everyone is prohibited from enforcing their rights against the company “except for a secured creditor having a charge over the whole or substantially the whole of the asset of the company.”⁴⁵⁴ The security holder “has a *decision period* within which he can enforce his right subject to the security interest.”⁴⁵⁵ If the holder of the security interest decides not to enforce his right in the *decision period* which is ten days, he is prohibited from doing so until the voluntary administration is concluded.⁴⁵⁶ The court may also limit the secured creditor’s exercise of his right where the property hindered by the security interest is fundamental to the success of voluntary administration.⁴⁵⁷ This, however, may only occur where the court is satisfied that the secured creditor’s interest can be adequately protected.

On the other hand, during business rescue proceedings all creditors are prohibited from instituting claims against the company and may only do so with the consent of the practitioner or leave of the court. However, the Act provides for the *secured creditors* during the business rescue moratorium albeit in a different provision. For instance, the Act provides that “during business rescue proceedings, a company intending on disposing of property belonging to a *secured creditor* may only do so upon obtaining consent from a *secured creditor*, however, such consent will not be required where the proceeds of the disposal are sufficient enough to pay a *secured creditor* in full.”⁴⁵⁸

⁴⁵³ s448A and s448B of the Australian Corporations Act no.50 of 2001.

⁴⁵⁴ s440B of the Australian Corporations Act no.50 of 2001.

⁴⁵⁵ s441A of the Australian Corporations Act no.50 of 2001.

⁴⁵⁶ Ibid.

⁴⁵⁷ s441D(2) of the Australian Corporations Act no.50 of 2001.

⁴⁵⁸ s134(3)(a) of the Companies Act 71 of 2008.

(c) *Cancellation of the contract and repossession of the property during business rescue and voluntary administration by the property owner*

As discussed above, in South Africa, the Act is silent on whether the cancellation of the contract by the property owner either before or during the business rescue is prohibited. However, the SCA came to the rescue, and in *Murray v FirstRand Bank Ltd* the court held that cancellation of the contract does not amount to ‘enforcement action’ as contemplated in section 133(1) of the Act and therefore it is not prohibited by business rescue moratorium. The court reiterated that the law of contract provides for a unilateral cancellation in the case of a breach of contract.⁴⁵⁹ Further, Cassim concurred with the court’s ruling in *Murray v FirstRand Bank Ltd* that if a company in business rescue breaches its contractual obligations to the property owner, “such as its obligation to pay rent or other charges, the property owner is at liberty to cancel the agreement during the business rescue process.”⁴⁶⁰ It does not matter whether the breach of contract occurs before or after the commencement of business rescue proceedings, the cancellation of an agreement is patently not obstructed by the moratorium.⁴⁶¹

However, having provided clarity that the *mere cancellation* of the contract is not prohibited by the moratorium as envisaged in section 133(1) of the Act, the SCA did not rule on whether, following such lawful cancellation, the landlord or any property owner can freely institute legal proceedings for the recovery of the property or whether the property owner remains restricted from claiming the *repossession* of its property from the company by the general moratorium. This is an important consideration as it directly determines the effect and consequences that moratorium could have on the proprietary rights of the creditors.

The High Courts have ruled that the moratorium will not apply where the property owner has cancelled its contractual agreement with the company under business rescue due to a breach of contract by the company. Consequently, the property owner is at liberty to institute legal

⁴⁵⁹ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 para 40.

⁴⁶⁰ MF Cassim op cite note 31 at 426.

⁴⁶¹ *Ibid.*

proceedings or enforcement action against the company to reclaim the leased property.⁴⁶² The common denominator in most of these cases is that the courts focused on whether the company under business rescue was in *lawful possession* of the property or not, and the court found that the companies were not in *lawful possession* of the property as required by the Act.⁴⁶³ The courts found that the companies were not in *lawful possession* because the contracts were already cancelled by the property owners, therefore, the lawfulness was derived from the existence of the contracts between the parties and once the contracts were cancelled it meant that the companies occupied the property unlawfully. This meant that the chance or probability of the successful legal proceedings or enforcement action against the company was quite high.

Cassim opined that in deciding business rescue proceedings cases the courts must bear in mind that the business rescue processes, as well as the moratorium, are grounded on the company continuing in business and trading its way out of its financial problems.⁴⁶⁴ In other words, this should be the backdrop upon which the courts interpret the provisions of business rescue proceedings to further its progress and realization. Further, by ruling that property owners who simply cancel their agreements with the entity under business rescue, may mechanically claim the repossession of their property, the courts are destabilizing a cornerstone of the business rescue proceedings and undermining its purpose.⁴⁶⁵

Cassim submitted that to promote rather than to hinder the purpose of business rescue proceedings, the phrases *lawful possession* and *lawfully in its possession* in sections 133(1) and 134(1)(c) of the Act, must be interpreted to mean *lawful possession in the criminal sense*, to exclude from the ambit of the moratorium property obtained by the company as a result of fraud or theft.⁴⁶⁶ This would limit the number of cases where the property is recovered easily by the

⁴⁶² See *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165, *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* [2016] ZAKZDHC 24, 2016 (6) SA 448 (KZD), *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* [2015] ZAWCHC 174, 2016 (6) SA 501 (WCC), *Kythera Court v Le Rendez-Vous Cafe CC* [2016] ZAGPJHC 172, 2016 (6) SA 63 (GJ) as discussed above in chapter 3.

⁴⁶³ s133(1) and 134(1)(c) of the Companies Act 71 of 2008 requires the company to be in lawful possession of the property.

⁴⁶⁴ MF Cassim op cite note 31 at 438.

⁴⁶⁵ Ibid.

⁴⁶⁶ MF Cassim op cite note 31 at 440.

property owners following the cancellation of an agreement with the entity under business rescue. Therefore, the suggested approach by Cassim would require a proper application of the moratorium as espoused in chapter 6 of the Act. This will allow the balancing act between the affected persons as required by the Act.⁴⁶⁷

Furthermore, Cassim opined that scrutiny for the actual repossession of the property should require a higher standard and making sure that the objectives of the business rescue moratorium are not defeated.⁴⁶⁸ In this regard, Cassim provided factors that the court should consider in determining whether to grant an order for the repossession of the property from an entity by the property owners. Cassim opined that even though the courts are not mandated to take into account the factors given to the business rescue practitioner in terms of section 134(2) of the Act in assessing whether to allow the property owner to recover its property there is nothing in the Act which suggest that the courts are not allowed to do so.⁴⁶⁹

Cassim submitted that when considering the circumstances of the company, as required by section 134(2)(b) of the Act, the courts should also have regard to the financial position of the entity and its ability to compensate the property owner, for example, by continuing to pay current rental and other charges as well as any arrear rental and interest.⁴⁷⁰ It is submitted that this presupposes that in the circumstances where an entity can make ongoing payment of its rental and other charges during the business rescue proceedings, the court may justifiably refuse the property owner permission to repossess the property on the basis that he or she would benefit only marginally, while others would suffer a far greater loss.⁴⁷¹ Further, in assessing the purposes of business rescue in terms of section 134(2)(a) of the Act read with the circumstances of the company in terms of section 134(2)(b) of the Act, the courts ought to consider inter alia:

“[W]hether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act, the prospects of success of the business rescue, the length of time business rescue has already been in force and how long it is expected to

⁴⁶⁷ s7(k) of the companies Act 71 of 2008.

⁴⁶⁸ MF Cassim op cite note 230 at 50 – 54.

⁴⁶⁹ MF Cassim op cite note 230 at 51.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

continue, the proposals of the business rescue practitioner. Where, for example, the business rescue practitioner has specifically undertaken to make rental payments to the property owner during business rescue proceedings, the likelihood or degree of probability of each of the above factors.”⁴⁷²

Furthermore, the history of the business rescue proceedings and the conduct of the parties should be taken into account. This enables the court to have regard to considerations such as whether the business rescue practitioner had made misrepresentations to the property owner, or has prolonged the course of the business rescue process, or whether the property owner has accepted certain benefits during the business rescue proceedings.⁴⁷³

The High Court judgment in *Kythera Court v Le Rendez-Vous Cafe CC* shows the interplay of the balancing act between the rights of the property owner and the objectives of the moratorium. The High Court held that a property owner who cancels a lease agreement with a company in business rescue is entitled to repossess the leased property or evict the company from the premises.⁴⁷⁴ The close corporation had failed to pay rental since October 2015 but remained in occupation of the premises. After receiving breach notices from the landlord the members of Newscafé voluntarily resolved to place the close corporation into business rescue in December 2015. By the time the matter was argued in court in April 2016 the business rescue plan had still not been published and no rental payments had been made.⁴⁷⁵ In other words, the court found it unfair for the property owner to be without its property while not receiving the rental due. Cassim cogently submitted that “it would be a harsh and improper encroachment of proprietary rights if property owners are denied to recover their property from distressed companies, and are also deprived of payment of rent or compensation.”⁴⁷⁶

On the other hand, the Australian Corporations Act explicitly empowers the property owner to give notices in relation to the property to cancel the lease agreement or any other agreement relating to the use, occupation, or possession of its property by the company during the

⁴⁷² MF Cassim op cite note 230 at 53.

⁴⁷³ MF Cassim op cite note 230 at 54.

⁴⁷⁴ Ibid.

⁴⁷⁵ *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 para 3.

⁴⁷⁶ MF Cassim op cite note 230 at 55.

administration.⁴⁷⁷ Despite the cancellation of the agreement during administration, the property owner is prevented from taking steps to recover its property from the company during the administration, except with the administrator's written or the leave of the court.⁴⁷⁸ In South Africa, the Act does not provide for similar provisions. However, the South African court's decisions have provided clarity on this issue and the property owner is at liberty to cancel the contract as it is not precluded by the moratorium in section 133(1) of the Act. In this regard, the provisions in Australia are clear and this makes it easy for the court to interpret and apply the Australian Corporations Act. On the other hand, in South Africa, "the ambiguities of the text have left the courts in the laborious position to create a law to regulate situations that are not provided for in the Act."⁴⁷⁹ In this regard, the precedents "created by courts do not remain as stable as statute and may result in conflicting judgments on the same issue."⁴⁸⁰ Therefore, the position in Australia is that *during* administration the property owner is prohibited by the moratorium from recovering its property.

However, where the property owner begins an effective recovery of his property *before* the commencement of the administration, the property owner will be able to continue with his legal proceedings against the company to recover the property even during the administration.⁴⁸¹ In this regard, the property owner must have both cancelled the contract and demanded possession before the commencement of the administration.⁴⁸² However, the property owner does not have an absolute right to complete the recovery during the administration. This is because the court may order that the property may not be taken where it is clear that it is fundamental for a successful voluntary administration.⁴⁸³ In other words, the court retains a residual power, on application by the administrator, to order that the property not be repossessed by the property owner.⁴⁸⁴ Further, the administrator bears the onus to show why repossession should not be granted. The court to

⁴⁷⁷ s441J of the Australian Corporations Act no.50 of 2001.

⁴⁷⁸ s440C of the Australian Corporations Act no.50 of 2001.

⁴⁷⁹ AM Smit *Business Rescue and the abuse thereof, with compromise with creditors as an alternative* (unpublished LLM thesis, University of Pretoria, 2016) 37.

⁴⁸⁰ Ibid.

⁴⁸¹ s441F of the Australian Corporations Act no.50 of 2001.

⁴⁸² Ibid.

⁴⁸³ s441H of the Australian Corporations Act no.50 of 2001.

⁴⁸⁴ s441H(2) of the Australian Corporations Act no.50 of 2001.

make this order must be satisfied that the interests of the property owner or lessor are adequately protected.⁴⁸⁵

Where the property owner fails to act before voluntary administration is commenced with he will be prohibited from repossessing the property unless the administrator or the court consent.⁴⁸⁶ In *Re Java 452 Pty Ltd (admin apptd) v Stout*⁴⁸⁷ the court considered the position where the lessor cancelled the lease agreement after the voluntary administration process commenced and found that there should be a balancing act taking into consideration the interests of the creditor and the objectives of the administration process. Further, the court reiterated that section 443B of the Australian Corporations Act regulates the terms upon which the company may during the administration remain in possession of the land where at the beginning of the administration it was in possession of under an existing lease. The companion of this section is section 440C of the Australian Corporations Act which prohibits the lessor from disturbing this possession without consent or leave of the court. This prohibition, however, does not apply where, at the beginning of the administration, steps have already been taken by the lessor to recover the property.⁴⁸⁸ The court found that the purported termination of the lease before administration was ineffective, with the result that the lessor properly terminated the lease only after the appointment of the administrator.⁴⁸⁹ The court found that as the lease was still in effect at the time of the commencement of the administration, the lessor was precluded by section 440C of the Australian Corporations Act.

Therefore, the position in Australia is that the property owner who has taken action to recover its property from the possession of the company *before* the commencement of voluntary administration may repossess the property from the company during the administration without seeking the consent of the court or the administrator, unless the court, on application by the administrator, orders that the property may not be repossessed. In this regard, Smit opined that the Australian legislature has considered the rights of the creditors and the purpose of the

⁴⁸⁵ s441H(3) of the Australian Corporations Act no.50 of 2001.

⁴⁸⁶ s440B(3) of the Australian Corporations Act no.50 of 2001.

⁴⁸⁷ *Re Java 452 Pty Ltd (admin apptd) v Stout* 1999 32 ACSR 507.

⁴⁸⁸ s441F of the Australian Corporations Act no.50 of 2001.

⁴⁸⁹ *Re Java 452 Pty Ltd (admin apptd) v Stout* supra note 487 para 32.

administration and has given deeper thought to the process as a whole and the effect of a cancellation of the lease and the return of the property will have on the success of the administration.⁴⁹⁰ Cassim submitted that “the underlying basis is that the property of the property owner may yet be needed for the administration. If the property is a fundamental part of the company’s business, the prospects of a successful rescue of the company would otherwise be obstructed by the repossession.”⁴⁹¹

V. CONCLUSION

What is evident from the above analysis of corporate rescue procedures in South Africa and Australia is that both procedures have developed over the years to cater to the ever-changing needs of the economies. The merits of both procedures are that are addressing the importance of sustenance of the companies that help create the economy. This can be seen from the positive shift in the requirements for placing the company under business rescue in South Africa.⁴⁹² On the other hand, in Australia, the Australian Corporations Act retained the previous requirement of “inability” of the company to pay its debts when they become due before it can be placed under voluntary administration. However, what is positive is the added requirement that the company can be also be placed under voluntary administration when the board of a company or the liquidator, or the secured party believes that the company might be insolvent in “some future time”. This is a positive move by the Australian legislature even though the Australian Corporations Act is silent as to what constitutes “some future time”. In this regard, in South Africa, the Act is clear as to the time frame.⁴⁹³ Therefore, Australia can learn from this aspect in South Africa.

⁴⁹⁰ AM Smit op cite note 479.

⁴⁹¹ MF Cassim op cite note 31 at 445.

⁴⁹² The South African companies Act 71 of 2008 moved completely away from the requirement of “inability of the company to pay its debt when they become due”. The new requirements in section 128(f) of the Act allows for business rescue to resume at an early stage before the company is insolvent, thereby increasing the chances of turning around the company.

⁴⁹³ In South Africa the second requirement for placing the company under business rescue is similar to the one in Australia that “the board or liquidator or secured party may believe that company might be insolvent in the some future time”. However, in South Africa section 128(f)(ii) is clear as to the time frame and explicitly state that “it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.”

Further, South Africa can also learn from Australia. For example, the Australian Corporations Act explicitly empowers the property owner “to give notices in relation to the property to cancel the lease agreement or any other agreement relating to the use, occupation, or possession of its property by the company during the administration.”⁴⁹⁴ Despite the cancellation of the agreement during administration, the property owner is prevented from taking steps to recover its property from the company during the administration, except with the administrator’s written or the leave of the court.⁴⁹⁵ However, where the property owner begins an effective recovery of his property *before* the commencement of the administration, the property owner will be able to continue with his legal proceedings against the company to recover the property even during the administration,⁴⁹⁶ provided that the property owner have both cancelled the contract and demanded possession before the commencement of the administration.⁴⁹⁷

The legislature in South Africa can also take this positive aspect that makes it clear as to what actions can be taken during the administration regarding the property that is occupied by the company. In South Africa, the Act is silent on cancellation of the contract before or during business rescue proceedings. Further, the Act also does not address the issue of the repossession of the property following cancellation by the property owner. However, the SCA has pronounced that cancellation of the agreement is not prohibited by the moratorium.⁴⁹⁸ Further, the High Courts have also ruled that the repossession of the property is allowed when the property owner has cancelled the contract with the company.

⁴⁹⁴ s441J of the Australian Corporations Act no.50 of 2001.

⁴⁹⁵ s440C of the Australian Corporations Act no.50 of 2001.

⁴⁹⁶ s441F of the Australian Corporations Act no.50 of 2001.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

CHAPTER FIVE

Conclusions and Recommendations

I. CONCLUSIONS

The purpose of this study is to provide an analysis of the consequences of a business rescue moratorium on legal proceedings on movable and immovable property owners in so doing the research questions espoused in Chapter 1 were sequentially analyzed in the preceding chapters and the findings are noted in this chapter.

(a) *The affect of a moratorium on legal proceedings on written lease agreements as well as on property owners*

Section 133(1) of the Act has been described by the courts as “a general provision that affords the company protection against legal proceedings on claims in general.”⁴⁹⁹ The academics concur with the courts’ interpretation of the general moratorium as a protection against legal proceedings on claims in general.⁵⁰⁰ In this regard, Delpont opined that although no definition of the term moratorium is provided in Chapter 6 of the Act, “the provision intends to cast the net as wide as possible to include any conceivable type of legal proceedings against the company.”⁵⁰¹ Furthermore, it is generally accepted that the purpose of a moratorium on legal proceedings against a company under business rescue is to provide the crucial breathing space for a period of respite to enable the company to restructure its affairs.⁵⁰² This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.

However, as much as the courts and academics stated that moratorium is intended to protect the company against any types of claims in general, the cancellation of a contractual obligation by

⁴⁹⁹ *Investec Bank Ltd v Bruyns* supra note 60 para 16.

⁵⁰⁰ FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

⁵⁰¹ PA Delpont, Q Vorster, D Burdette et al op cite note 62.

⁵⁰² *Murray v Firstrand Bank Ltd t/a Wesbank* op cite note 63 para 14, *Chetty v Hart* supra note 55 para 28. See also FHI Cassim, MF Cassim, R Cassim et al op cite note 3 at 894.

the property owner is not prohibited by the moratorium in section 133(1) of the Act.⁵⁰³ In this regard, the SCA in *Murray v Firstrand Bank Ltd t/a Wesbank* had to determine whether the cancellation of the contract by the property owner amounted to “enforcement action” or “legal proceedings” as envisaged in section 133(1) of the Act and therefore barred by the general moratorium. The SCA ruled that the cancellation of the agreement by the creditor does not amount to “enforcement action” or “legal proceedings” against the company. The SCA cogently reasoned that the concepts of enforcement and cancellation are mutually exclusive in our law of contract.⁵⁰⁴ Furthermore, the SCA held that enforcement action usually refers to the enforcement of obligations, on the other hand, cancellation connotes the termination of obligations between the parties to an agreement.⁵⁰⁵ Moreover, cancellation, in contrast with enforcement action, is not “commenced or proceeded with in any forum” as envisaged by section 133(1) of the Act.⁵⁰⁶

However, such cancellation may be avoided by the business rescue practitioner. In this regard, a decision may be made to suspend wholly, or in part, various obligations of the company in business rescue, arising in terms of any agreement.⁵⁰⁷ The business rescue practitioner by invoking section 136(2) of the Act, the property owner will be prevented from being able to validly cancel an agreement. Further, theoretically, this would mean that the property owner would not be able to institute legal proceedings against the company for any breach of the contract after the contract has been suspended, and the property owner is prevented from repossessing or attaching property in the company’s possession. In this regard, Cassim submitted that “where the business rescue practitioner suspended the company’s obligations – for example, its duty to pay its monthly rental in terms of a pre-existing agreement of lease – the effect of the suspension is that failing to make these ongoing payments, the company will not be in breach of the agreement.”⁵⁰⁸

In other words, if the property owner wishes to cancel the agreement it should do so before the business rescue practitioner suspending the company’s obligations. Further, the power of suspension applies only to contractual obligations of the company that would become due during

⁵⁰³ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

⁵⁰⁴ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ s136(2) of the Companies Act 71 of 2008.

⁵⁰⁸ MF Cassim op cite note 31 at 425.

the business rescue proceedings as it appears from a literal reading of section 136(2) of the Act. Therefore, only post-commencement obligations of the company may be suspended, but not pre-commencement obligations.

In addition, when the business rescue practitioner suspended the contract, section 136(3) of the Act provides that the claims against the company may be made only for damages arising from the suspension of the agreement in terms of section 136(2) of the Act. Therefore, following the suspension of the agreement by the business rescue practitioner, the property owner may claim damages for losses.

(b) *Repossession of the property by the property owner while the company is under business rescue*

The SCA in *Murray v FirstRand Bank Ltd t/a Wesbank*, following the finding that cancellation of an agreement with the company under business rescue does not amount to enforcement action as envisaged in section 133(1) of the Act,⁵⁰⁹ did not rule on whether the repossession after cancellation is prohibited. However, the High Court has since ruled that the repossession of the property is permissible after an agreement is cancelled by the property owner. It does not matter whether cancellation is made before or after the company is placed under business rescue.⁵¹⁰ The High Court held that after the cancellation of the lease agreement, the company was no longer in *lawful possession* of the property. Since *lawful possession* is an essential requirement for both the application of the moratorium in section 133(1) and the protection afforded by section 134(1)(c) of the Act, the court decided that the business rescue practitioners could not rely on these provisions as a defence to property owners.⁵¹¹

Further, the High Court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd*, gave substance to the term *lawful possession*. The court held that two meanings can be ascribed to

⁵⁰⁹ *Murray v FirstRand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

⁵¹⁰ *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 para 12, the High Court held that a property owner of the immovable property who cancels a lease agreement with a company that is already in business rescue is still allowed to evict the company from the premises.

⁵¹¹ *Madodza (Pty) Ltd v Absa Bank Ltd* supra note 74 paras 7 and 17, *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* supra note 153 paras 29 and 32, *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 paras 24, 29 and 32, and *Kythera Court v Le Rendez-Vous Cafe CC* supra note 48 para 12.

the phrase *lawfully*. There is *lawful possession* in the civil sense and *lawful possession* in the criminal sense.⁵¹² *Lawful possession* in the civil sense entails that the company is lawfully in possession of the property when there is an agreement in place and once that agreement is cancelled, the possession will not be lawful. On the other hand, “*lawful possession* in the criminal sense is where the company acquires possession of the property unlawfully, such as when the company acquires possession of the property by fraudulent means or through theft.”⁵¹³ The court held that the moratorium in sections 133(1) and 134(1)(c) of the Act will protect possession that is lawful in the civil sense.⁵¹⁴

(c) *The protective measures contained in the Act for property owners while the entity is under business rescue*

Despite the moratorium precluding creditors from exercising their rights in respect of the property, there are statutory safeguards available to creditors.⁵¹⁵ These statutory safeguards empower the business rescue practitioner to lift the moratorium in appropriate cases for the repossession of the property and sell the secured creditor’s property provided the creditor consented or without the consent if the proceeds will be enough to settle the debt with the creditors.⁵¹⁶ In this regard, the safeguard is that ownership of the property does not pass until payment has been made to the property owner.⁵¹⁷

However, an intricate balancing act is involved. It is in the hands of the business rescue practitioner and the court to find and preserve a proper balance between the fundamental purpose of the business rescue proceedings and the rights of the affected parties – including the property

⁵¹² *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 24.

⁵¹³ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 29.

⁵¹⁴ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* supra note 76 para 32.

⁵¹⁵ s133(1)(b) and s134 of the Companies Act 71 of 2008.

⁵¹⁶ s134(2) and s134(3) of the Companies Act 71 of 2008.

⁵¹⁷ s134(3)(b) of the Companies Act 71 of 2008 provides that “[i]f, during a company’s business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must... promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.”

owners.⁵¹⁸ Therefore, two essential policy factors must be weighed by the business rescue practitioner. On the one hand, the aim of business rescue, and the fundamental role of the moratorium in achieving this aim. On the other hand, the business rescue endeavor should not be conducted to the prejudice of those who hold proprietary rights. Furthermore, the legislature has entrusted the courts with the task of fleshing out guiding principles as to when the moratorium may be lifted or relaxed with the approval of the court under section 133(1)(b) of the Act.

The moratorium as the most important consequence of the commencement of business rescue proceedings provides an entity with the necessary breathing space while the business rescue practitioner attempts to rescue the entity and return it to a state of being financially viable.⁵¹⁹ As a result, without the moratorium, it would be difficult to rescue an entity. Flowing from the suggested interpretation, the moratorium, in relation to property that is in the lawful possession of the company, prevents property owners from recovering their properties from an entity under business rescue proceedings.⁵²⁰ This is because such property may be fundamental to the rescuing of an entity and taking it away may defeat the purpose of business rescue proceedings. Furthermore, by preventing the property owner from repossessing its property, the business rescue practitioner will be able to formulate a rescue plan to attempt to rescue an entity to return to a state of being financially viable.⁵²¹

As discussed above, the cancellation of the lease agreement in itself is not patently prohibited by the moratorium,⁵²² however, it does not automatically enable the property owner to proceed to recover its property from an entity under business rescue proceedings.⁵²³ The moratorium in sections 133(1) and 134(1)(c) of the Act “would prevent the property owner from commencing with legal proceedings to repossess its property unless it is granted the consent of the business rescue practitioner or the leave of the court.”⁵²⁴

⁵¹⁸ s7(k) of the Companies Act 71 of 2008.

⁵¹⁹ FHI Cassim, MF Cassim, R Cassim et al op cite note 3.

⁵²⁰ MF Cassim op cite note 31 at 441.

⁵²¹ MF Cassim op cite note 31 at 422.

⁵²² *Murray v Firstrand Bank Ltd t/a Wesbank* supra note 63 paras 32 – 33.

⁵²³ MF Cassim op cite note 31 at 441.

⁵²⁴ Ibid.

The business rescue practitioner is guided by section 134(2) of the Act. Further, the question of whether the court should, under section 133(1)(b) of the Act, allow the property owner to repossess its property from an entity under business rescue proceedings, should be determined by balancing the interests of the property owner and the interests of the company together with its other creditors, its employees, and other stakeholders.⁵²⁵ In doing this, due and proper weight must be given to the proprietary interests of the property owner so that the courts as far as possible avoid undue encroachment on proprietary interests whereby the property owner is denied its property without the payment of rent or other compensation.

Furthermore, Cassim argued that by cancelling the agreement, the property owner crystallizes or perfects its right to repossession of the property — which right may be exercised when the business rescue comes to an end.⁵²⁶ As a result, the property owner who has cancelled the lease agreement for breach of the contract for non-payment of rent or monthly installment retains its vested right to bring legal proceedings for the repossession of its property, although it may be unable to enforce that right during the business rescue.⁵²⁷ Therefore, the property owner's inability to enforce its right to repossession while the company under business rescue does not extinguish or alter its substantive right to repossession.

The High Court judgment in *Kythera Court v Le Rendez-Vous Cafe CC* shows the interplay of the balancing act between the rights of the property owner and the objectives of the moratorium.⁵²⁸ The court found it unfair for the property owner to be without its property while not receiving the rental due. Furthermore, there was no business rescue plan in place upon which the company could rely on. Therefore, as Cassim cogently submitted “it would be a harsh and improper encroachment of proprietary rights if property owners are denied to recover their property from distressed companies, and are also deprived of payment of rent.”⁵²⁹

Another one of the protective measures afforded by the legislation is that the lifting of the moratorium is not left to the exclusive discretion of the business rescue practitioner. If the property

⁵²⁵ s7(k) of the Companies Act 71 of 2008.

⁵²⁶ MF Cassim op cite note 31 at 441 – 442.

⁵²⁷ Ibid.

⁵²⁸ See discussion in this chapter sub-sub para (i) above.

⁵²⁹ MF Cassim op cite note 230 at 55.

owner is not satisfied with the decision of the business rescue practitioner, the property owner can approach the court. In this regard, whenever the property owners want to institute legal proceedings against the company for the payment of current rent or the repossession of the property, they need to first consult with the business rescue practitioner. The business rescue practitioner is understood to have a better insight into the affairs of the company, thus, procedurally, is given the first preference to decide the matter over the court.

The business rescue practitioner ought to act impartially and reasonably having regard to all the factors.⁵³⁰ This presupposes that the failure to act impartially and reasonably allows the court to intervene, and the property owner can approach the court for the leave to institute legal proceedings for the payment of current rent or other compensation and the recovery of the property. Further, the effectiveness of protective measures contained in the Act rests on the proper interpretation and application of the provisions and principles by the business rescue practitioner and the courts. Therefore, the feasibility of an order for recovery of the property or ongoing payment of rent or other compensation during business rescue ultimately depends on the unique circumstances of each case, and, in particular, the financial position of an entity in distress.

(d) The legal position of a comparable foreign jurisdiction on the moratorium on legal proceedings and its effect on property owners

As previously discussed, the legal position of a comparable foreign jurisdiction is Australia's voluntary administration. Voluntary administration has some aspects which could inform South Africa's business rescue. For example, the legislature in South Africa can learn from the provisions in Australia that provide for the cancellation of the contract and the repossession of the property during voluntary administration. The provisions in Australia are clear and succinct which makes it easier for the courts in dealing with the issues of the cancellation of the contract by the property owner and the potential repossession of the property by the property owner.

In this regard, the Australian Corporations Act explicitly empowers the property owner "to give notices to cancel the lease agreement or any other agreement relating to the use, occupation, or possession of its property by the company during the administration."⁵³¹ Despite the

⁵³⁰ s134(2) of the Companies Act 71 of 2008.

⁵³¹ s441J of the Australian Corporations Act no.50 of 2001.

cancellation of the agreement during administration, the property owner is prevented from taking steps to recover its property from the company during the administration, except with the administrator's written or the leave of the court.⁵³² Therefore, the position is that during voluntary administration the property owner cannot repossess the property.

However, where the property owner begins an effective recovery of his property *before* the commencement of voluntary administration, the property owner will be able to continue with his legal proceedings against the company to recover the property even during the administration,⁵³³ provided that the property owner have both cancelled the contract and demanded possession before the commencement of the administration.⁵³⁴

II. RECOMMENDATIONS

In this section, I will recommend some legislative changes to Chapter 6 of the Act which I believe would strengthen its efficacy thereby increasing its chances of becoming the success that many in government, business, and practice hope it will be. However, I will not attempt to address every aspect of Chapter 6 of the Act that I consider to need improvement, but only some that I believe to be important. Further, as this section focuses on the imperfections of Chapter 6 of the Act, I trust that this will not be interpreted as an indication that there is nothing to recommend the new business rescue procedure. In this regard, Loubser cogently argued that the new business rescue procedures represent a genuine attempt on the part of the government to assist the many struggling and failing companies to survive,⁵³⁵ and I hope that in my discussions in the preceding chapters I have also indicated the many positive aspects of business rescue proceedings as espoused in Chapter 6 of the Act.

In *Panamo Properties (Pty) Ltd v Nel*, the SCA held that the “commendable goals” of the business rescue proceedings are sometimes hampered by the statutory provisions that are not clearly drafted.⁵³⁶ As a result, they have given rise to confusion as to their meaning and provided

⁵³² s440C of the Australian Corporations Act no.50 of 2001.

⁵³³ s441F of the Australian Corporations Act no.50 of 2001.

⁵³⁴ *Ibid.*

⁵³⁵ A Loubser op cite note 9 at 332.

⁵³⁶ *Panamo Properties (Pty) Ltd v Nel* supra note 408 para 1.

ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose.⁵³⁷ Further, Loubser argued that in general, Chapter 6 of the Act (and probably the rest of the Act) needs to be scrutinized for incorrect, conflicting, and inconsistent terminology.⁵³⁸ In this regard, regrettably, the legislature once again missed an opportunity to define *reasonable prospects* of rescuing the company as it is used in the Act. A similar phrase, “reasonable probability” of rescuing the company was also not defined in the Companies Act 61 of 1973 and the court had difficulty in interpreting it.⁵³⁹ Further, once again it is for the court to grapple with the interpretation of the meaning of *reasonable prospect* of rescuing the company.

Furthermore, another factor that has contributed to the confusion or uncertainty of provisions causing ample litigation is the failure to define the terms *moratorium* and *legal proceedings* and *enforcement action* as used in section 133(1) of the Act. As discussed above, the courts have described section 133(1) of the Act as “a general provision that affords the company protection against legal proceedings on claims in general.”⁵⁴⁰ Therefore, it is recommended that the legislature amend the Act and define these terms to prevent litigation on these technical points. It is further recommended that the meaning of these terms should mirror the findings that have already been given by the court. The wording should be improved to ensure that the provisions are clear, correct, and formulated in South African legal terminology with established and clear meanings.⁵⁴¹

Furthermore, as much as it is generally accepted that the moratorium intends to cast the net as wide as possible to include any conceivable type of legal proceedings against the company, the SCA has ruled that the *cancellation* of the agreement by the creditor/property owner does not amount to “enforcement action” or legal proceedings against the company, therefore, it is not prohibited by the moratorium in the Act. It is submitted that since the courts have already stated that cancelling a contract is not prohibited by the moratorium, the legislature can have this

⁵³⁷ Ibid.

⁵³⁸ A Loubser op cite note 9 at 332.

⁵³⁹ EP Joubert op cite note 407.

⁵⁴⁰ *Investec Bank Ltd v Bruyns* supra note 60 para 16.

⁵⁴¹ A Loubser op cite note 9 at 332.

conclusion inserted as an amendment to the Act. This recommendation is in line with the Australian Corporations Act, where this Act provides that cancellation of a contract by a property owner does not amount to enforcement action.⁵⁴²

Loubser suggested that even the name of the procedure should be changed to reflect the fact that its main purpose is not to rescue the business or part of it, and that the procedure should be termed “company supervision”, which is far preferable to the current confusing and cumbersome name of “business rescue proceedings”.⁵⁴³ Loubser further argued that “this would also avoid the very problematic use of the word ‘proceedings’ in the name, and maybe also some of the uncertainty it creates on whether a full procedure or merely court proceedings are meant when the same word is used in another context.”⁵⁴⁴

Further, Loubser suggested that the amendment of section 128(1)(b) of the Act would be a good starting point.⁵⁴⁵ In this regard, it is recommended that section 128(1)(b) of the Act, which contains the definition and purpose of this procedure, should be amended to read as follows:

“[B]usiness rescue company supervision” means ~~proceedings to facilitate the rehabilitation of a~~ procedure to rescue a company or the business 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~~ legal processes against the company or ~~in respect of~~ property legally 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 as a going concern; ~~on a solvent basis~~ or, if it is not possible for the company to so continue in existence, to rescue the business of the company or a major part thereof. ~~results in a better return for the~~

⁵⁴² s441F of the Australian Corporations Act no.50 of 2001.

⁵⁴³ A Loubser op cite note 9 at 334.

⁵⁴⁴ Ibid.

⁵⁴⁵ A Loubser op cite note 9 at 335.

~~company's creditors or shareholders than would result from the immediate liquidation of the company.~~⁵⁴⁶

Further, Loubser suggested that the definition of “rescuing the company” in section 128(1)(h) of the Act should be amended as follows:

“[R]escuing, or rescue of, the company” means achieving the goal of the continued existence of the company or, if that is not possible, of a major part of the company’s business as a going concern, set out in paragraph (b)(iii) set out in the definition of “business rescue”; ~~“business rescue”~~;

In addition, Chapter 6 of the Act expressly envisages that the business rescue proceedings would terminate within three months after the start of the proceedings.⁵⁴⁷ It is submitted that the time frame is unrealistic where any component of the business rescue proceedings is challenged. In contrast, the UK Insolvency Act c.45 of 1986 provides for the automatic termination of administration at “the end of the period of one year” from the date on which it commenced. It is recommended that the period of three months be extended to at least 6 months in respect of medium companies and 9 months in respect of large companies.⁵⁴⁸ This would allow the board of directors of the company to solely focus on rescuing the company instead of rushing the process which may be detrimental to the company.

Further, Loubser suggested that chapter 6 of the Act corporate rescue procedure should be strictly limited to companies since its structure and procedure have been specifically designed with companies in mind.⁵⁴⁹ It is submitted that Item 6 of Schedule 3 of the Act, which makes the business rescue proceedings available to close corporations, is not only unnecessary in the light of the rescue procedure available in the Close Corporations Act itself but may lead to extremely inappropriate and costly attempts by ill-advised members of close corporations to use a procedure

⁵⁴⁶ Ibid.

⁵⁴⁷ S132(3) of the Companies Act 71 of 2008.

⁵⁴⁸ E Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria, 2015) at 620.

⁵⁴⁹ A Loubser op cite note 9 at 336.

that is far too onerous, complicated, expensive and formal to be suitable for close corporations.⁵⁵⁰ Experience in England with company administration has shown that merely making a procedure designed for companies applicable to other business forms, such as partnerships, is not sufficient.⁵⁵¹ Every provision has to be reworked to adapt it to the particular structure and management of the other business form.⁵⁵² This has not been done in the case of close corporations and will undoubtedly lead to uncertainty and confusion regarding the exact meaning of many provisions and requirements when applied to close corporations. Item 6 of Schedule 3 to the Companies Act of 2008 should therefore be scrapped.⁵⁵³

It is further submitted that the lease agreements regarding the property that the company uses for its business are very important. It would be careless of the board of a company who are in the best position to know the financial position of the company to not act quickly and diligently before the company breaches its important contracts. In this regard, the board and other affected person has a period of six months to identify that the company is not doing well financially before a breach of contracts actually occurs. Furthermore, once the board has noticed the company is not doing well, the board is also empowered to suspend some of its contracts that may not be fundamental in the functioning of the company.⁵⁵⁴ This allows the company to be diligent and dynamic in dealing with its affairs before it gets out of hand. The board of the company should be encouraged to use its discretionary power to cancel any non-essential contracts to lessen the financial burden of a company and in so doing may even prevent a company from entering into business rescue proceedings.

In addition, it is recommended that the legislature amend the Act and allow an entity under business rescue to pay a reduced rental or instalment for the period of business rescue proceedings, and once has recovered then can start paying as per lease agreement as this will assist in balancing the interests of the property owners and the interests of the entity under business rescue which require the property owners property.

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid

⁵⁵³ Ibid.

⁵⁵⁴ s136(2) of the Companies Act 71 of 2008.

The overall support of the general moratorium on legal proceedings as set out in section 133(1) of the Act represents a recognition of the benefit of the moratorium in achieving the purposes of business rescue. However, to prevent this moratorium from giving rise to detrimental results for property owners, the Courts' holistic interpretation of the Act and the Courts' application of the Act to the unique circumstances of the entity is essential.

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Mr Samukelo Siyanda Ngubane (215004784)
School Of Law
Howard College

Dear Mr Samukelo Siyanda Ngubane,

Protocol reference number: 00008367

Project title: An analysis of the consequences related to a business rescue moratorium on legal proceedings on property owners.

Exemption from Ethics Review

In response to your application received on 14/09/2020, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

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.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,



Mr Simphiwe Phungula
Research and Higher Degrees Committee
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