

THE EFFECT OF BUSINESS RESCUE'S MORATORIUM ON PROPERTY BELONGING TO THE COMPANY OR IN ITS LAWFUL POSSESSION AND THIRD-PARTY CONTRACTS*

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SUMMARY

The rights of both company and property owner have been a burning issue when a company embarks on business rescue proceedings. This issue has been plagued by difficulties with the interpretation of "moratorium" as found in section 133(1) of the Companies Act 71 of 2008. Property owners who have concluded contracts of lease or instalment sale with a company constantly find themselves in difficult positions when the company commences business rescue proceedings. These difficulties include, *inter alia*, the business rescue practitioner's cancelling of agreements between the property owner and the company, and the associated procedure; the failure of the company to pay in accordance with the agreements and the property owners' recourse/cause of action; and the effect of a moratorium on those properties. This article therefore deals with the competing legal and commercial interests, including rights, of both company and property owners when a company has commenced business rescue proceedings.

1 INTRODUCTION

Once a company has commenced business rescue, several consequences follow. Among these consequences are a moratorium, and the appointment of and powers of a business rescue practitioner. In order to rehabilitate the company, business rescue proceedings provide for a temporary moratorium on the rights of claimants against the company, or in respect of property in

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its possession.¹ Section 133(1) of the Companies Act² (the Act) provides: “During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum.” Ever since the moratorium was introduced in 1932,³ the objective has always been to provide a financially distressed company with breathing space while being rescued. In *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank*,⁴ the court held:

“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. 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.”⁵

The idea is to give the company and the business rescue practitioner space and time to deal with rescuing the company, without having to deal with litigation by creditors.⁶

Although the moratorium has this important purpose, it has been subjected to academic and court scrutiny in relation to the meaning of “property belonging to the company or in its lawful possession”. This scrutiny is also evident when dealing with a company’s contracts with third-party owners of property in the company’s possession. This article therefore deals with the competing legal and commercial interests, including rights, of both company and property owners when a company has commenced business rescue proceedings. It looks at the meaning of “property belonging to the company or in its lawful possession” and what this entails in instances of a dispute between company and third-party owner of the property. Furthermore, the article looks at the cancellation of agreements that a company in business rescue may have with third parties. In the process, the article comments on instances where agreements are cancelled by the business rescue practitioner on behalf of the company, as well as where agreements are cancelled by property owners.

2 PROPERTY BELONGING TO THE COMPANY

No legal proceedings may be enforced against any property belonging to the company or lawfully in its possession except with the written consent of the

¹ S 128(1)(b) of the Companies Act 71 of 2008.

² 71 of 2008.

³ The moratorium was introduced by the Companies Amendment Act 11 of 1932.

⁴ 2015 (3) SA 438 (SCA).

⁵ Par 14.

⁶ *Cloete Murray NO v FirstRand Bank Ltd t/a Wesbank supra* 14; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC); [2015] JOL 34787 (WCC) 34; *Chetty t/a Nationwide Electrical v Hart* 2015 (6) SA 424 (SCA) 28 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd v Stedone Developments (Pty) Ltd* 2015 (4) SA 485 (KZD) 7, 9 and 11; *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd* [2013] ZAGPJHC 109 4.

practitioner or with the leave of the court.⁷ The inclusion of “property belonging to the company or in its lawful possession” is a new concept in the South African business rescue regime. There are two parts to the concept: on the one hand, the property must belong to the company or be in its lawful possession. If this is not the case, the moratorium will not apply. In *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd*,⁸ the court accepted that “property ‘belonging to the company’ in s 133(1), sensibly construed, could only mean property belonging in a legally valid sense, such as property owned by the company, which in s 133(1) is expressly distinguished from property ‘lawfully in its possession’”.

The facts in *Timasani* were briefly that the business rescue practitioner instructed the auctioneer to invite offers for the purchase of, *inter alia*, the farm, mineral rights and mining equipment. This invitation was published through the auctioneer’s website and a deposit of 15 per cent was payable on submission of an offer with the balance being payable within 30 days of confirmation of accepting that offer. After expressing interest and being provided with a draft offer, Afrimat made a counter-offer with certain amendments, including, *inter alia*, that: Afrimat was going to pay a deposit of 15 per cent of the purchase price; the deposit was to bear interest, which would accrue for Afrimat’s benefit; the balance of the purchase price was payable upon fulfilment of suspensive conditions, which included the conduct of a legal, technical and financial due-diligence investigation yielding satisfactory results and approval of an agreement by Afrimat’s Board of Directors; and Afrimat would not be liable for any liabilities of Timasani, including any costs associated with its business rescue. Afrimat’s counter-offer was accepted by the business rescue practitioner on behalf of Timasani with a deposit of 10 per cent instead of 15 per cent. The deposit was duly paid by Afrimat.

However, subsequent to the payment of the 10 per cent deposit, the sale agreements did not materialise and were never concluded. This was owing to a dispute concerning the amount of commission due to the auctioneer. The auctioneer claimed commission on the purchase price of all the assets, while Afrimat argued that it was only liable for 10 per cent commission on the purchase price of the farm. The dispute remained unresolved. A few days later, Afrimat informed Timasani’s business rescue practitioner that its offer to conclude sale agreements had lapsed, and it requested that the deposit be repaid.

The issue before the court was whether Afrimat was precluded from instituting legal proceedings against Timasani by the section 133 moratorium. The court found that Afrimat could rightly order Timasani to repay the deposit. It was held by the court that “[n]o purpose connected to the process of business rescue warrants the company under business rescue being protected against proceedings to recover property that it neither owns, nor lawfully possesses.”⁹ Since Timasani and Afrimat had not concluded the sale agreements, there was no right to retain the deposit

⁷ S 133(1)(a) and (b) of the Act.

⁸ [2021] ZASCA 43 31.

⁹ *Timasani supra* par 29.

because such deposit did not belong to the company, and nor was it in its lawful possession.¹⁰ The court remarked, obiter, that “[c]ommon sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent recovery of property not belonging to it or unlawfully in its possession.”¹¹ Thus, property “belonging to the company” does not include property belonging to the company unlawfully.¹² Unlawfulness in this context includes civil and criminal unlawfulness.¹³ The company may not invoke the moratorium in respect of property that it does not lawfully possess.

3 MORATORIUM ON PROPERTY OWNERS

3.1 Cancellation of agreements

The interpretation of the phrase “legal proceedings and enforcement action thereof” in section 133(1) affects contracts that have been entered into by the company and property owners. The UNCITRAL guidelines provide:

“In reorganisation, where the objective of the proceedings is to enable the debtor to survive and continue its affairs to the extent possible, the continuation of contracts that are beneficial or essential to the debtor’s business and contribute value to the estate may be crucial to the success of the proceedings. These may include contracts for the supply of essential goods and services or contracts concerning the use of property crucial to the continued operation of the business, including property owned by third parties. Similarly, the prospects of success may be enhanced by allowing the insolvency representative to reject burdensome contracts, such as those contracts where the cost of performance is higher than the benefits to be received or, in the case, for example, of an unexpired lease, the contract rate exceeds the market rate.”¹⁴

This raises the question of how contracts with third parties have been dealt with by the courts in relation to the property owned by those third parties.

When a company commences business rescue proceedings, it is likely to have existing contracts requiring performance – that is, executory contracts where one or all of the obligations remain unfulfilled.¹⁵ However, business rescue – specifically the moratorium – has an effect on those executory contracts. Although the moratorium gives a company breathing space to restructure its affairs, it has far-reaching consequences for other property owners, once the company has embarked on business rescue. Property owners may not bring legal proceedings or exercise any right in respect of any property in the lawful possession of the company, irrespective of

¹⁰ *Timasani supra* par 35.

¹¹ *Timasani supra* par 31.

¹² *Southern Value Consortium v Tresso Trading supra* 29–30.

¹³ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD) 37.

¹⁴ United Nations Commission on International Trade Law (UNCITRAL) “Legislative Guide on Insolvency Law Part 2” (2005) 121 par 122 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (accessed 2020-12-07).

¹⁵ Lawrenson “Lease Agreements and Business Rescue: In Need of Rescue” 2018 3 *Tydskrif vir die Suid-Afrikaanse Reg* 657.

whether it is owned by the company (except to the extent that the practitioner consents or with leave of the court).¹⁶ It has been argued that this constitutes injustice for a property owner whose claims are stayed while the company enjoys the use of the property.¹⁷ However, although executory contracts are stayed during business rescue, they are not automatically cancelled or terminated. Consequently, section 136(2)(a) gives the practitioner powers to cancel, entirely, partially or conditionally, obligations of the company arising from agreements “to which the company was a party at the commencement of the business rescue proceedings; and would otherwise become due during those proceedings”.¹⁸ Levenstein argues that the purpose of section 136(2)(a) is to identify which contracts are detrimental or prejudicial to the continued viability of the company in business rescue,¹⁹ with the result that section 136(2) does have an effect on property owners. In terms of both section 133(1) and section 136(2)(a), once the company commences business rescue, property owners are faced with several consequences, including:

- a stay on the enforcement of action or legal proceedings where the company has failed to pay rent and any incidental expenses in relation to lease agreements or instalments in relation to credit agreements; and
- the partial, whole or conditional suspension of the company's obligations arising out of executory contracts.

As a result of the competing legal interests and rights, a contest often ensues between company and property owner.

Furthermore, owing to the importance of executory contracts in the commercial world, legal certainty on how the moratorium affects property owners has been tested by the courts. The courts have been called upon to test the balance between the goals of the moratorium against the prejudice caused by the moratorium on property owners. The SCA has held that the moratorium does not prevent a property owner from cancelling an agreement with a company under business rescue.²⁰ The court was tasked with determining whether, once business rescue proceedings have commenced, the creditor of a company under business rescue could unilaterally cancel a contract it had concluded with the company prior to the company being placed under business rescue. Fourie AJA (Navsa ADP, Ponnán JA, Zondi JA and Schoeman AJA concurring) held:

¹⁶ S 133(1)(a), read with s 134(1)(c). Since the Act uses the words “any property”, both owners of both movable and immovable property are affected by the moratorium.

¹⁷ Cassim “The Effect of the Moratorium on Property Owners During Business Rescue” 2017 29(3) *South African Mercantile Law Journal* 422.

¹⁸ S 136(2) provides: “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.”

¹⁹ Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria) 2016 470.

²⁰ *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra*.

“In the context of s 133(1) of the Act it is significant that reference is made to ‘no legal proceeding, including enforcement action *in any forum*’. (My emphasis.) The inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceeding’ seems to me to indicate that ‘enforcement action’ is considered to be a species of ‘legal proceeding’ or, at least, is meant to have its origin in legal proceedings. The concepts ‘enforcement’ and ‘cancellation’ are traditionally regarded as mutually exclusive. The term ‘cancellation’ connotes the termination of obligations between parties to an agreement. However, the liquidators contended for a wider meaning to be attributed to the expression ‘enforcement action’, to include the cancellation of an agreement. In so doing I believe that they are doing violence to the wording of s 133(1) of the Act. Cancellation is a unilateral act of a party to an agreement and, save for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form of forum ... It therefore seems to me that, linguistically, the phrase ‘enforcement action’ in s 133(1) is unable to bear the meaning of the cancellation of an agreement, as contended for by the liquidators. Contextually it must be understood to refer to enforcement by way of legal proceedings.”²¹

Several commentators and courts have agreed with this judgment and accepted that a moratorium does not affect the cancellation of an executory agreement.²² However, the court did not dwell on whether the property owner may repossess such property after the cancellation of an agreement. Consequently, the question remains whether property owners are given special power to disregard a moratorium and repossess their property when they have cancelled an agreement with a company under business rescue. The courts appear to have eased application of the moratorium when dealing with owners’ repossession of property,²³ leaning towards favouring property owners rather than the company in business rescue. Academics such as Cassim have criticised this as misconstruing the moratorium.²⁴

3 2 Moratorium on movable property

Some judgments in KwaZulu-Natal and Gauteng have upheld the right of property owners to repossess movable property after the cancellation of an

²¹ *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra* par 32 and 33.

²² Cassim 2017 *South African Mercantile Law Journal* 423–424; Weyers “Cancellation or Suspension of Agreements During Business Rescue” 2015 15(4) *Without Prejudice* 17; *Southern Value Consortium v Tresso supra*; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa supra*.

²³ See for e.g., *Madodza (Pty) Ltd v Absa Bank Ltd* [2012] ZAGPPHC 165, *Southern Value Consortium v Tresso Trading supra*; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa supra*; *Kythera Court v Le Rendez-Vous Café CC* 2016 (6) SA 63 (GJ).

²⁴ Cassim 2017 *South African Mercantile Law Journal* 432 and 437. In her arguments (at 433), Cassim argues that “[b]y freezing the rights of property owners to bring enforcement actions or legal claims to repossess their property from the company, the moratorium prevents property owners from disturbing the company’s possession of the property, interfering in the rescue process, and upsetting the chances of saving the company. The wide application of the moratorium to include hired and leased property, and other property possessed but not owned by the company, thus allows the company to continue in business by restricting creditors from depriving the company of property that is key to its business. Without it, the entire business rescue regime would fall apart. If property owners were freely permitted to divest the company of goods or assets used and enjoyed by it, it would impair the business rescue practitioner’s capacity to manage the company and to use those assets in the conduct of the company’s business with a view to achieving the goal of the rescue.”

agreement. In both judgments discussed below, companies had failed to make payments as required in their agreements with the banks. In both cases, the banks had obtained, prior to the companies being placed in business rescue, court orders for the return of motor vehicles in the possession of the companies.

In *Madodza (Pty) Ltd v Absa Bank Ltd*,²⁵ the company brought an urgent application to prevent the sheriff from removing several vehicles from its possession until such time as the business rescue proceedings came to an end. The company argued that it should be allowed to restructure its affairs in a way to allow it to continue operating, and the business rescue proceedings would fail if the vehicles were returned.²⁶ The bank, however, contended that the vehicles did not form part of the assets of the company, nor was the company in lawful possession of the vehicles. The bank argued that the agreement had been cancelled prior to the commencement of business rescue. The court ruled in favour of the bank and found that the company was not in lawful possession of the vehicles and, therefore the applicant was not entitled to rely on section 133(1);²⁷ it held further that the agreements were cancelled, and the company had been ordered to return the vehicles prior to commencing business rescue proceedings.²⁸ Consequently, the company had failed to prove that it was in lawful possession of the vehicles.

The court in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* agreed with the *ratio* in *Madodza* that the company could not rely on section 133(1) because it was not in lawful possession of the vehicle in question.²⁹ Interestingly, the court acknowledged that the execution or enforcement of an order made prior to the commencement of business rescue would amount to "enforcement action" as per section 133(1) of the Act.³⁰ However, from the moment the agreement was cancelled, the company lost lawful possession of the vehicle.³¹

²⁵ *Supra*. This case was decided before the judgment of the SCA in *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra*.

²⁶ *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 11.

²⁷ *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 18.

²⁸ *Madodza (Pty) Ltd v Absa Bank Ltd supra* par 17.

²⁹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 51.

³⁰ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 13.

³¹ *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd supra* par 27. In reaching the decision, Olsen J held: "It seems to me that there are two possible meanings to be ascribed to the word "lawfully" in s 133(1) of the Act. The first is wider than the second. The first, being the one adopted in *Madodza*, regards the affected company's possession of property as unlawful, and therefore not protected by s 133(1) of the Act, whenever the company lacks the so-called *jus possidendi*, which Professor Silberberg described as 'a right which justifies a person's claim to have a thing in his possession'. 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. On this approach the requirement of s 133(1) is that the company's possession should be lawful when judged from any perspective; or if not that, then lawful when judged from the perspective of any claim by a third party to possession of the property. The second possibility involves a distinction not unknown to our law between *iusta* and *iniusta* possession. Professor Silberberg considered this distinction to be one between just and unjust possession. The learned authors of his work (Badenhorst, Pienaar and Mostert,

A common thread in both these cases was that the company's use of vehicles was key to their business and important for the success of business rescue proceedings. However, the courts rejected this argument and focused on the meaning of "lawful possession" of the property. It is submitted that the court should have considered critically the use of vehicles as a key component in rescuing these companies. While the vehicles would have decreased in value with use,³² the courts should have realised that repossession of such vehicles negatively affected the purpose of business rescue; focusing on the meaning of "lawful possession" made life more difficult for the companies in their quest for business rescue. The courts appear to have favoured property owners by allowing them to cancel the agreements³³ and to bypass the moratorium, frustrating the intention of a moratorium. Cassim's argument that, by favouring a wider literal meaning of the phrase "lawful possession", the courts have undermined the purpose of the legislation,³⁴ is supported. However, the rights of property owners should be considered carefully. In considering these rights and the purpose of a moratorium, it is necessary to look at the surrounding circumstances. There may be circumstances where property that is not critical to the "lawful owner" may threaten the goal of business rescue if repossessed.³⁵ There may be circumstances in which it is vital for the company to retain possession of the property to continue its commercial services. In such circumstances, the moratorium should apply, despite the property owner seeking to recover it. In judicial management cases, the courts have emphasised that the circumstances are important in order to determine whether the moratorium is to be upheld.³⁶

2006) render the same distinction in English as one between lawful and unlawful possession. In both cases the examples of unjust or unlawful possession immediately dealt with are possession acquired by force or stealth (secretly). The learned authors add as a further example of unlawful possession that which is exercised 'on sufferance as against the opponent'. They accordingly equate the concept of lawful (or just) possession with possession *nec vi, nec clam, nec precario*, as those terms were used in s 2 of the repealed Prescription Act 18 of 1943."

³² A bank may therefore argue that if it repossesses the vehicle, it can get a better return rather than to wait for even just one day while the vehicle is in the possession and used by the company.

³³ It appears that as long as the agreement was cancelled prior to commencing business rescue, the property owners have a "special" power to repossess their property.

³⁴ Cassim 2017 *South African Mercantile Law Journal* 439.

³⁵ Depending on the type of business, vehicles may not always be as critical as they were in *Madodza* and *JVJ Logistics*.

³⁶ See *Unitrans Botswana (Pty) Ltd v North-West Transport Investment (Pty) Ltd* [2005] ZANWHC 1. Although this case did not concern property in the company's possession, it concerned the issue of moratorium and surrounding circumstances. Landsman J at 15 held that the absence of a complaint that the judicial management of the company would be prejudiced financially by the claim weighed the heaviest. In both *Madodza* and *JVJ Logistics* the companies complained that the taking of vehicles would prejudice the success of business rescue. Furthermore, in *Samuel Osborn (SA) Ltd v United Stone Crushing Co (Pty) Ltd (Under Judicial Management)* 1938 WLD 229 235, the court took the view that the discretion of the court should not be exercised so as to wreck the prospects of the successful issue of the judicial manager's administration, unless it was clear that this administration was doomed to failure.

3 3 Moratorium on immovable property

While a moratorium bars the enforcement of action and legal proceedings against a company in business rescue, judgments in the KwaZulu-Natal, Western Cape and Gauteng courts have implications for the moratorium that affect property owners in lease agreements. In some of the judgments, cancellations were made prior to a company commencing business rescue,³⁷ while in others cancellation was post-commencement.³⁸ In *178 Stamfordhill CC v Velvet Star Entertainment CC*,³⁹ which originated in KwaZulu-Natal, the property owner brought an urgent application for a declarator that the lease had been cancelled, and sought the eviction of the respondent from the property. The case was founded primarily on section 136(2) of the Act, since the respondent argued that the business rescue practitioners had suspended the agreement.⁴⁰ The respondent argued that the court's legal proceedings could not be brought in relation to possession of the property without the leave of the court, and that the court should not grant an order for eviction.⁴¹ However, the court held that while section 136(2) had an effect on rental claims that were due after the commencement of business rescue, this did not apply to rental claims that had been due prior to the commencement of business rescue; therefore the property owner was entitled to cancel the contract,⁴² and the respondent was ordered to remove its movables from the applicant's premises.⁴³

Although the court did not rely on the fact that the business rescue proceedings were likely to fail, it is submitted that this factor should play an important role in such disputes. This was a case of abuse of business rescue and of the moratorium against the property owner; the property was no longer needed for effective rescue, and repossession of such property was not going to affect business rescue proceedings negatively.

However, in *Kythera Court v Le Rendez-Vous Café CC*⁴⁴ (originating in the Gauteng High Court, per Boruchowitz J), the applicant sought the urgent eviction of the respondent on the grounds that the lease agreement had been cancelled. Although the case was more about the interpretation of section 133(1), the court nevertheless touched on the interpretation of section 136(2) as follows:

"The section provides that the business practitioner may – despite any provision of an agreement to the contrary – entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a

³⁷ *Southern Value Consortium v Tress Trading supra*.

³⁸ *178 Stamfordhill CC v Velvet Star Entertainment CC* [2015] ZAKZDHC 34; *Kythera Court v Le Rendez-Vous Café CC supra*.

³⁹ *Supra*.

⁴⁰ See *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 11, where the court accepted that although the letter suspending the agreement did not form part of the court papers, it appeared that a letter had been sent to the property owner.

⁴¹ *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 21.

⁴² *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 25 and 27.

⁴³ *178 Stamfordhill CC v Velvet Star Entertainment CC supra* par 37.

⁴⁴ *Supra*.

party at the commencement of the business rescue proceedings. By invoking this section, the business practitioner may prevent a landlord from cancelling a lease and from instituting eviction proceedings.”⁴⁵

Significantly, the court accepted that the respondent did not invoke section 136(2) and therefore the “respondent’s obligation to pay monthly rentals and municipal utilities had not been suspended prior to applicant’s cancellation.”⁴⁶ If section 136(2) had been invoked by the respondent, the applicant might have been prevented from cancelling the lease agreement.⁴⁷ Cassim has criticised this interpretation, arguing that a section 136(2) suspension applies only to post-commencement obligations.⁴⁸ The argument by Cassim, therefore, supports the *ratio* in *178 Stamfordhill CC*.

The court went further to deal with the application of section 133(1) to lease agreements. Citing the case of *Cloete Murray NO v Firstrand Bank Ltd t/a Wesbank*, the court held that the agreement had been validly cancelled.⁴⁹ The court went on to deal with the issue of eviction. In this regard, Boruchowitz J held:

“It is trite law that on the termination of a lease (whether by cancellation or the effluxion of time) it is the duty of the lessee to vacate the property subject only to the lessee’s right to compensation for improvements. The failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier.”⁵⁰

The court viewed the phrase in section 133(1) “in relation to any property belonging to the company, or lawfully in its possession” as inapplicable to legal proceedings or enforcement action in relation to property belonging to persons or entities other than the company in business rescue, or in relation to property that is unlawfully possessed by the company.⁵¹ The court held further that “vindictory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible.”⁵² Accordingly, the court found that leave to eject the company from premises – once the agreement had been validly cancelled – was not necessary,⁵³ and the order of eviction was granted.⁵⁴

In the Western Cape case of *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* (per Blignault J),⁵⁵ the issue of the moratorium and lease agreements arose. Unlike in the *178 Stamfordhill CC* and *Kythera Court* cases, the lease agreement was cancelled prior to the

⁴⁵ *Kythera Court v Le Rendez-Vous Café CC supra* par 15.

⁴⁶ *Kythera Court v Le Rendez-Vous Café CC supra* par 31.

⁴⁷ *Ibid.*

⁴⁸ Cassim 2017 *South African Mercantile Law Journal* 427.

⁴⁹ In *Kythera Court v Le Rendez-Vous Café CC supra* par 13, the court held that “cancelling the agreement does not constitute enforcement action as contemplated in s 133(1) and that it is permissible for an agreement to be cancelled during business rescue proceedings.”

⁵⁰ *Kythera Court v Le Rendez-Vous Café CC supra* par 14.

⁵¹ *Kythera Court v Le Rendez-Vous Café CC supra* par 9.

⁵² *Ibid.*

⁵³ *Kythera Court v Le Rendez-Vous Café CC supra* par 16.

⁵⁴ *Kythera Court v Le Rendez-Vous Café CC supra* par 41.

⁵⁵ *Supra.*

commencement of business rescue proceedings. As in *178 Stamfordhill CC* and *Kythera Court*, the company fell into arrears with the payment of rent and other additional charges, including operating costs, utilities consumption and municipal charges. After commencing business rescue proceedings, the company opposed an application for eviction on the grounds that sections 133(1) and 134(1)(c) precluded the property owner from pursuing such claims. Interpreting both sections, the court found in favour of the property owner, holding that the company was not in lawful possession of the property. Bignault J held:

“The applicant claims to be the lawful owner of the property. The business practitioners did not refute this claim. It follows that the property never belonged to respondent. Following the cancellation of the lease agreement respondent was, furthermore, no longer in lawful possession of the property. The business practitioners can therefore not rely on the provisions of s 133(1) of the Companies Act as a defence to applicant's claim. Similar reasoning applies to the interpretation of s 134(1)(c) of the Companies Act. The key concept is the lawful possession of the company. After the cancellation of the lease agreement respondent was no longer in lawful possession of the property.”⁵⁶

The court added that it could not have been the legislature's intention that the company in business rescue would restructure its affairs by using assets to which it has no lawful claim.⁵⁷

4 FURTHER COMMENTARIES

On the issue of property belonging to the company or in its lawful possession, the SCA in *Timasani* has created precedent on when a company in business rescue is protected by the moratorium. Significantly, the judgment's interpretation of “property belonging to the company or in its lawful possession” reinforces the purposive interpretation of section 133 that the moratorium cannot sensibly be construed to provide a defence to the institution of legal proceedings in instances where the company under business rescue unlawfully possesses the property in dispute. Therefore, in the context of property, it has been clarified that the moratorium protection can only possibly apply to property that is owned by or in the lawful possession of the company in business rescue. Such moratorium protection cannot prevent the recovery of property not belonging to the company or which is unlawfully in its possession. Therefore, a third party is allowed to institute legal proceedings in relation to property in dispute if that property does not belong to the company or is not in its lawful possession. However, this leads to another interesting issue – the importance of that property for business rescue proceedings – that is, the issue of the commercial importance of the property in dispute when the company is in business rescue. This also touches on the cancellation of agreements.

In relation to the cancellation of agreements – and the interpretation of section 133(1) – the cases discussed above have leaned towards protecting

⁵⁶ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd supra* par 31 and 32.

⁵⁷ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd supra* par 35.

property owners once an agreement has been cancelled, irrespective of whether the contract had been cancelled prior to or after commencement of business rescue proceedings. Such protection of property owners has been the subject of academic criticism for failing properly to consider the purpose of the moratorium for business rescue, especially in regard to eviction or repossession of property once an agreement has been cancelled. Cassim argues: “[I]n a misguided attempt to protect property owners, the courts have regrettably overlooked the fundamental aim of the moratorium.”⁵⁸ Lawrenson argues that it was a practical question of how a company under business rescue could survive if the property owner cancelled the agreement in question, depriving the company of the property in its possession.⁵⁹

The criticisms carry weight, subject to reservations in cases of potential abuse of the process. The courts have indeed appeared to favour owners, giving little weight to the moratorium. The decisions in *Madodza* and *JVJ Logistics* disregarded the important role of vehicles in rescuing the companies. Refusing repossession would have helped the companies to conduct efficient⁶⁰ rescue proceedings. As mentioned above, the case of *178 Stamfordhill CC* constituted an exception to this proposition because the business rescue had palpably failed, and refusal of repossession would have been unfair to the owner. The court should look at the circumstances when interpreting section 133(1), including the protection of property owners. If repossession serves to obstruct the business rescue, it should be refused. This requires the courts to balance the interests of the company under business rescue and those of the property owner. The moratorium is intended to allow the company under business rescue to remain in possession of property vital for its continued commercial activities.⁶¹ Considering that the property owner may argue that the moratorium infringes property rights to their detriment (that is, loss of rent), Cassim concedes that the time period of the moratorium must be capped, and the court should limit

⁵⁸ Cassim “The safeguards and protective measures for property owners during business rescue” 2018 30 1 *South African Mercantile Law Journal* 40. See also the same author in Cassim 2017 *South African Mercantile Law Journal* 437 when she cites a judgment to stress the point that the courts have misconstrued the moratorium’s purpose.

⁵⁹ Lawrenson 2018 *Tydskrif vir die Suid-Afrikaanse Reg* 661.

⁶⁰ The word efficient is used deliberately in face of the argument that the companies could have raised further loans to buy new vehicles. However, raising new loans might take time that the company does not have.

⁶¹ Cassim 2018 *South African Mercantile Law Journal* 57. At 51, Cassim gives sound guidelines for circumstances where the courts are considering whether to grant a property owner leave to exercise their rights. According to Cassim, the court should consider the following factors:

1. Where the property is not required for the rescue of the company, or where the repossession of the property would not obstruct the purpose of the rescue, the court or the business rescue practitioner should lift the moratorium and permit the property owner to enforce its right to reclaim the property.
2. Where the repossession of the property would obstruct the purpose of the rescue, a balancing test must be undertaken by the courts (or the business rescue practitioner) in deciding whether or not to lift the moratorium and to permit the repossession of the property by the owner.
3. Thirdly, where the property owner is refused permission to repossess their property, this, as a general rule, must be on the basis of the continued payment of current rent (or other relevant compensation) to the property owner.

the time (to about three months) in which the company is allowed to use the property without paying rent or compensation.⁶² While this is a sound guideline and is supported in principle, the threshold should be determined by the court in the given circumstances. Three months may be too long or too short, depending on the circumstances. The court's discretion would therefore necessarily ensure that neither the company nor the property owner could abuse this guideline.

In the *Cloete Murray* case, the court held:

"the effect of s 136(2) of the Act is that a contract concluded prior to the commencement of business rescue proceedings is not suspended or cancelled by virtue of the business rescue but that the practitioner may suspend, or apply to court to cancel, any obligation of the company under the contract."⁶³

Cassim submits that when there has been suspension of lease agreements or instalment-sale agreements in terms of section 136(2)(a), the property owner should be permitted to apply to the court to lift the suspension and seek leave of the court to enforce the right to receive payment or repossession of property if this is justifiable.⁶⁴ Wyers asserts that, if section 136(2) has been invoked prior to the cancellation of an agreement, the creditor needs a business rescue practitioner or leave of the court to enforce cancellation of the agreement.⁶⁵ However commentators differ on whether such cancellation has an effect on obligations incurred prior to commencement of business rescue. Cassim argues that suspension applies only to post-commencement obligations,⁶⁶ whereas Weyers is of the view that section 136 applies even to pre-commencement obligations.⁶⁷ The issue of the cancellation of executory agreements in business rescue is not a clear-cut issue.

Citing the UNCITRAL Model Law and the 2007 Companies Bill, Lawrenson adds a further argument that:

"a provision similar to section 139(1)(a) of the 2007 Companies Bill be inserted into the Act, prohibiting a landlord from cancelling an executory lease

⁶² Cassim (2018 *South African Mercantile Law Journal* 68) lists a number of factors that the court should look at when weighing the loss and benefits of the property owner and those of the company. These include: "(i) the purposes of business rescue; (ii) the company's circumstances; (iii) the nature of the property and the rights claimed in respect of it; (iv) the financial position of the company; (v) the company's ability to pay ongoing and arrear compensation to the property owner; (vi) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings; (vii) the goal or end result sought by the rescue of the company; (viii) the proposals of the business rescue practitioner; (ix) the prospects of success of the business rescue endeavour; (x) the length of time for which business rescue has already been in force and the expected period for which it is to continue; (xi) the views of the business rescue practitioner; (xii) the effect on the business rescue process if leave is given and the effect on the property owner if leave is refused; (xiii) the likelihood or degree of probability of each of the above factors; (xiv) the history of the business rescue proceedings; and (xv) the conduct of the parties."

⁶³ *Cloete Murray NO v FirstRand Bank Limited t/a Wesbank supra* 15.

⁶⁴ Cassim 2018 *South African Mercantile Law Journal* 59.

⁶⁵ Weyers 2015 *Without Prejudice* 17.

⁶⁶ Cassim 2017 *South African Mercantile Law Journal* 447.

⁶⁷ Weyers 2015 *Without Prejudice* 17.

agreement; [and] that a business rescue practitioner should be granted the option of continuing with, or cancelling an executory contract without having to obtain a court order – in line with international best practice.”⁶⁸

The reasons for suspending the contract in its entirety, partially or with a condition, may include onerous obligations in the form of excessive interest for credit agreements or high rentals. Since time is of the essence for business rescue, it may be argued that suspending a contract for those reasons without going to court may save time and legal costs. However, it is submitted that the role of the court may be necessary in certain circumstances. For example, there may be an obligation in terms of which a third party continuously performs a specific task for which the company pays, and the question that arises is whether the company's obligation may be cancelled or suspended while the third party is still obligated. This calls into question the wider issue of contractual liability in which the third party may argue that its obligation ceases when the company stops paying. Such disputes call for the guidance of the courts; in fact, the involvement of the courts may play a major role in resolving the issue.

5 CONCLUSION

This article has dealt with the consequences of business rescue – and particularly of the moratorium as a defence mechanism raised by a company in business rescue. What has become clear is that a moratorium can be used by a financially distressed company to enjoy a breathing space while it is in the business rescue process. However, on the interpretation of the moratorium defence raised by the company in business rescue, it is clear that competing legal and commercial interests, including the rights of both company and property owners, come into play when a company has commenced business rescue proceedings. The article has interpreted the meaning of “property belonging to the company or in its lawful possession” and what it entails in instances where there is a dispute between the company and the third-party owner of the property. Furthermore, the article has looked at the cancellation of agreements between the company and third parties, and the difficulties after such cancellation. In doing so, the article has commented on instances where agreements are cancelled by the business rescue practitioner on behalf of the company, as well as where agreements are cancelled by property owners.

⁶⁸ Lawrenson 2018 *Tydskrif vir die Suid-Afrikaanse Reg* 662 and 669.