

## **Interpretation of s 133(1) of the Companies Act 71 of 2008 – the principle of *moratorium* re-defined under business rescue**

*Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA)

By Romeo Tsusi

The enactment of the Companies Act 71 of 2008 (the Act) brought about s 7, envisaging the purpose and application of the Act, *inter alia*, subs k 'provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders, and introduces business rescue proceedings for financially distressed companies.

The Act entrenched these provisions under ch 6 of the Act – ss 128 to 156. Section 128(1)(b) defines business rescue as 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

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

### **Section 133(1) of the Act – temporary moratorium**

For the purposes of this article, focus will be on s 128(1)(b)(ii) of the Act – the temporary moratorium on the rights of claimants against the company or in respect of property in its possession during business rescue proceedings.

The temporary moratorium against a company under business rescue is effective on commencement of business rescue proceedings. There is an automatic and general moratorium (or stay) on legal proceedings or executions against the company, its property, assets and on the exercise of the rights of creditors of the company (FHI Cassim (managing ed) *Contemporary Company Law* 2ed (Cape Town: Juta 2012) at 878).

The Supreme Court of Appeal (SCA) in the recent judgment of *Cloete Murry* at para 14, Fourie AJA held that 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 a company to restructure its affairs and that, it was aptly described moratorium is a cornerstone of all business rescue procedures.

The temporary moratorium referred to above in terms of s 128(1)(b)(ii) has been enacted by means of s 133(1). Section 133(1)(a) – (b) under the heading '[g]eneral moratorium on legal proceedings against company' provides that – '[d]uring 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, 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; ... .'

### **Interpretation of s 133(1) as held in the *Cloete Murry* matter**

The appeal was heard by Fourie AJA (Navsa ADP, Ponnann and Zondi JJA and Schoeman AJA concurring) dealing with the interpretation of s 133(1), whether once business rescue proceedings under the Act have commenced, the creditor of a company under business rescue can unilaterally cancel an extant instalment sale agreement (agreement) that it had concluded with the company prior to the company being placed under business rescue. FirstRand Bank Ltd t/a Wesbank (Wesbank) entered into an agreement with Skyline Crane Hire (Pty) Ltd (Skyline) in terms of which Wesbank sold and delivered movable goods to Skyline, Wesbank retaining ownership in the goods until the purchase price had been paid in full.

Skyline was placed under business rescue, and had already been in arrears in respect of the monthly instalments payable to Wesbank under the agreement. Wesbank, subsequently dispatched a letter of cancellation of the agreement to Skyline due to failure to pay the monthly instalments, and advised it would repossess the goods; it would value and sell same; and credit the proceeds to the relevant accounts and to claim damages. The business rescue practitioner appointed in terms of the Act to oversee the proceedings consented to the repossession and selling of the goods.

The business rescue, by order of court was discontinued and Skyline was placed in liquidation. The liquidators challenged Wesbank's cancellation of the agreement and alleged that it was contrary to the provision of s 133(1), and of no force or effect. The application was dismissed in the court *a quo* (Gauteng Local Division, Pretoria, Jordaan J sitting as court of first instance).

The SCA was faced with the issue of determining the proper meaning of s 133(1), particularly the correct interpretation of the term '... no legal proceeding, including enforcement action, against a company [under business rescue] may be commenced.'

Therefore, the cancellation of the agreement by Wesbank was alleged to be interpreted to constitute an 'enforcement action' as meant in s 133(1) by the liquidators and thus the absence of the written consent by the business practitioner or leave of the court in terms of subs (1)(a) and (b) meant that the cancellation was of no force or effect. In contrast, Wesbank submitted that the cancellation did not constitute 'enforcement action' as envisaged by the section, thus no consent or leave by the court was required to cancel the agreement.

Fourie AJA, held that an interpretation of s 133(1) called for, the crisp issue being whether the cancellation of the agreement constituted 'enforcement action' as meant in s 133(1) of the Act?

The Act places a moratorium on 'legal proceedings' and 'enforcement action', which definition of the said terms is not contained in the Act.

### **'Legal proceeding'**

It was held at para 31 that this term is well-known in South Africa legal parlance and usually bears the meaning of a lawsuit or 'hofsak', in the Afrikaans translation. Therefore cancellation of an agreement does not constitute a legal proceeding in terms of s 133(1).

### **'Enforcement action'**

Fourie AJA at para 32 accepted that in our legal parlance, 'enforce' or 'enforcement', usually refers to the enforcement of obligations. Evaluating the context of s 133(1), reference is made to 'no legal proceeding, including enforcement action' as such, inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding' was held to indicate that:

- 'enforcement action' is considered to be a species of 'legal proceeding'; or,
- at least, is meant to have its origin in the legal proceedings.

This conclusion was further held to be strengthened by the wording of s 133(1), which ‘provides that no legal proceeding, including enforcement action, “may be commenced or proceeded with *in any forum*” (my emphasis). A “forum” is normally defined as a court or tribunal (see the *Concise Oxford Dictionary 12 ed* (2011)) and its employment in s 133(1) conveys the notion that “enforcement action” relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment’.

Therefore, Fourie AJA held at para 33 that the concepts of ‘enforcement’ and ‘cancellation’ are traditionally regarded as mutually exclusive. ‘Cancellation’ connotes the termination of obligations between parties to an agreement and cannot be interpreted to mean enforcement action as envisaged under s 133(1), as such the correct interpretation of s 133(1) was held to contextually be understood to refer to enforcement action by way of legal proceedings.

## **Conclusion**

Therefore, a creditor of a company under business rescue proceedings may cancel a contract if such company is in breach of the agreement, this cannot, according to s 133(1) be regarded as an enforcement action falling under the notion of moratorium. The court concluded that ch 6 of the Act provides for safeguard provisions to prevent the disastrous result foreshadowed by the liquidators (ss 136(2); 154(2) of the Act).

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