MORATORIUM IN BUSINESS RESCUE SCHEME 
AND THE PROTECTION OF COMPANY’S CREDITORS

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Abstract

The concept of business rescue has been acknowledged as one of the innovative paths towed by the South African Companies Act 71 of 2008. The primary purpose of business rescue, as set down by the law, is to facilitate the rehabilitation of a company that is in financial distress. Attaining that purpose could, however, come at a price to the company's creditors. The law imposes a temporary restriction on legal proceedings, enforcement actions and the property rights of creditors. Unless the written consent of the business rescue practitioner or the leave of the court is first sought and obtained, the creditors cannot have any recourse against the company. The paper argues that the statutory moratorium could constitute an affront on the constitutional right of property, and further contends that while the business rescue practitioner whose governance role naturally supplants that of the board, would not ordinarily grant such consent, the courts are seemingly more neutrally disposed for recourse by the creditors who seek to exercise their rights against the company. In weighing the competing interests, greater consideration should be accorded to the creditors, the protection of whose interests are generally more compelling whenever the company is in financial distress.

Keywords: Moratorium, Business Rescue, Creditors, Business Rescue Practitioner, Statute, Courts

1. INTRODUCTION

The business rescue scheme is arguably one of the distinctive features of the South African Companies Act 71 of 2008. The scheme which supplants the concept of judicial management under the old statutory regime, follows one of the stated purposes of the Act; 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. The courts have continued to lend judicial support to the stated legislative purpose through the interpretation and application of the relevant provisions in Chapter 6 of the Act, emphasising the significance of business rescue to the socio-economic development of the nation.

It is axiomatic that realizing the goals of business rescue will always come at a cost to the creditors of the company. Binns-Ward J alluded to this in Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd where he stated that the mere institution of business rescue proceedings materially affects the rights of third parties to enforce their rights against the subject company. The affected ‘third parties’ were specifically identified by Traverso DJP in Gormley v West City Precinct Properties (Pty) Ltd as the creditors who should have the strongest right to consultation regarding the development of business rescue plan as they have the greatest financial interest in the outcome of the business rescue. In AG Petzetakis v Petzetakis Coetzee AJ observed that the creditors are affected in that business rescue proceedings temporarily protects the company concerned from legal

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1 Companies Act 61 of 1973, s 427.
2 Section 7(h) CA 2008.
3 See Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd 2012 (2) SA 378 (WCC) para 14 where Binns-Ward J observed that it is clear that the legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that it is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible.
4 It is axiomatic that realizing the goals of business rescue will always come at a cost to the creditors of the company. Binns-Ward J alluded to this in Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd where he stated that the mere institution of business rescue proceedings materially affects the rights of third parties to enforce their rights against the subject company. The affected ‘third parties’ were specifically identified by Traverso DJP in Gormley v West City Precinct Properties (Pty) Ltd as the creditors who should have the strongest right to consultation regarding the development of business rescue plan as they have the greatest financial interest in the outcome of the business rescue. In AG Petzetakis v Petzetakis Coetzee AJ observed that the creditors are affected in that business rescue proceedings temporarily protects the company concerned from legal
proceedings by its creditors for the recovery of legitimate claims. This temporary restriction on the creditors from recourse against the company is statutorily instituted by the Act as moratorium which is sustained throughout the duration of the business rescue proceedings. The suspension which the law places on the creditors in the exercise of their rights while business rescue subsists and the protections afforded to the creditors in the circumstances are the focus of this discourse.

2. MORATORIUM ON CREDITORS’ RIGHTS

There are two broad types of moratorium placed by the Act on the exercise of the creditors’ rights against the company under business rescue. These could be discerned from section 128(1)(ii) 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 its possession.” It could be asked, for curiosity sake, why temporary moratorium, when the word ‘moratorium’ itself, in its ordinary English expression, implies temporary restriction? If the word ‘temporarily’ does add any value at all to that provision, it can only be as an illustration of how brief the moratorium on the rights of creditors are expected to endure and to keep at the barest minimum the adverse impact of such restriction on the exercise of the rights of the affected company’s creditors. Section 132(3) indicates that the business rescue proceedings should generally not exceed three months. Though the court has power, upon the application of the business rescue practitioner, to extend that period, 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 contractual obligations.

The judicially recognized essence of the moratorium is simply to provide the company the required breathing space or the necessary period of respite to restructure its affairs in such a way as would allow it to resume operation on the basis of profitability. The company ought not, as observed by James J in *Re David Lloyd & Co*,12 because it has become insolvent or decided to restructure its affairs, be placed in a better position than the creditors of the company. In *Gormley v West City Precinct Properties (Pty) Ltd*13 Traverso DJP warned that the moratorium provisions could be subjected to abuse by the company insiders seeking to use those provisions to frustrate creditors’ rights and to stave off liquidation for ulterior motives. This note of caution is a reason for a close scrutiny by the courts of any applications by the company seeking judicial indulgence in matters of business rescue. It is trite that the interests of the creditors intrude whenever the company is in financial distress.14 Although the duties of company directors are primarily owed to the company,15 it is, however, normal for a company as a going concern to incur debts in the course of carrying on its business. Where this occurs, the interests of the creditors would become material factors which the company should have in contemplation while conducting its affairs. The focus of the company is legally expected to shift from profit making to addressing the concerns of the creditors who have interests in recovering debts owed to them by the company.16 This realization should inform the judicial approach to the two broad sides of the statutory moratorium on the exercise of the creditors’ rights envisaged under section 128(1)(ii) which could conveniently be classified as moratorium on legal proceedings and moratorium on proprietary rights.

3. MORATORIUM ON LEGAL PROCEEDINGS

The right of the company’s creditors to institute legal proceedings against the company under business rescue is specifically restricted by section 133 of the Act. Section 133(1) provides as follows:

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

(a) with the written consent of the practitioner;17

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12 (1877) 6 CD 339 at 344.
The inherent question from this judicial opinion on the intention of the legislature lies on whether a moratorium could indeed operate in that context without some level of interference, not necessarily the alteration, of some existing legal rights? Moratorium by its nature cannot operate in a vacuum. Legal proceedings and enforcement actions are, by their nature, necessarily ancillary (if not expressly stated) parts of contractual rights and obligations of parties to an existing agreement. Putting a wedge on legal proceedings emanating from a contractual obligation does invariably interfere with the existing contractual right. The application in context of section 133(1), galvanized by the legislative intention of allowing some breathing space to a company in financial distress to return to status of profitability, would not unreasonably entail casting the scope of that provision as wide as possible to include every conduct of the creditor, based on existing contract with the company, that could materially affect the realization of the purpose of that provision. This would strip the creditors of all vestiges of protection in all contractual relationships with the company during the subsistence of the moratorium except to the extent specifically allowed by that provision. However, the Supreme Court’s decision in Murray suggests that the court could still view the provision through the lens of the creditor. In that case, the exercise by the creditor of the right of repossession of goods, after the cancellation of the contract, with the consent of the business rescue practitioner, though not in writing as required by the statute, was upheld by the court. The court held that the absence of written consent does not vitiate the consent. In a later decision of the Supreme Court in Chatty v Hart the court had stated the essence of the requirement of the business rescue practitioner’s consent as being 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, either by settling it or continuing with the litigation. In particular, to assessing how the claim will impact on the well-being of the company and its ability to regain its financial health. Thus, the statutory moratorium is judicially recognized as a defence in personam, a personal privilege or benefit in favour of the company. Being a personal benefit, the company can, through its appointed representative, apply it in a manner that it deems most appropriate to it, and could even waive the benefit.

The Supreme Court of Appeal in Murray also gave judicial expression to the operative phrases in section 133(1) such as ‘legal proceedings’, ‘enforcement action’ and ‘forum’ as used in that provision. Fourie AJA observed:

In the context of s 133(1) of the Act, it is significant that reference is made to ‘no legal proceeding, including enforcement action’…

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… A ‘forum’ is normally defined as a court or tribunal… 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.

This decision by the Supreme Court has implicitly overruled the High Court position in Madodza (Pty) Ltd v ABA Bank Ltd where Tolmey J held that the cancellation of the vehicle finance agreement effected pursuant to a court order granted prior to the commencement of the business rescue proceedings could be enforced during the subsistence of the rescue proceedings to enable the respondent recover possession of the vehicles.

Although the Supreme Court in Murray had interpreted ‘enforcement action’ as emanating from the generic phrase ‘legal proceeding’, thus, suggesting the occurrence of chain of events within the operative course of the statutory moratorium to bar the exercise of the creditor’s right, the framing of section 133(1) which uses a comma to separate ‘legal proceeding’ from ‘enforcement action’ suggests that both operative phrases could also be read disjunctively. In other words, the provision implies that no ‘legal proceedings’ or ‘enforcement
action’ may be commenced or proceeded with while the company is under business rescue. Reading it in such a manner entails that even when court action is already commenced and judgment entered before the commencement of business rescue, the enforcement of the order of court cannot be proceeded with while business rescue is in place.

The Supreme Court in *Murray* understandably did not dwell much on the meaning of the phrase ‘legal proceeding’ as that was not in issue. However, in a later decision by the same court *Cachalia JA*, while interpreting section 133(1), stated 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. The language employed in s 133(1) itself suggests that a broader interpretation commends itself.” The broad approach seems indeed to be the preferred approach in pursuing the legislative intention. The English courts have adopted a similar approach in interpreting a similar provision under the UK Insolvency Act of 1986. Section 11(3)(d) of the Insolvency Act provides as follows:

(3) During the period for which an administration order is in force -
(d) no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid.

While construing this provision in *Environent Agency v Administrator of Rhondda Waste Disposal Ltd*, Scott Baker JJ, in a unanimous decision of the Court of Appeal, said:

It seems to me that they have a plain and clear meaning. The words: ‘no other proceedings and no execution or other legal process may be commenced or continued... against the company or its property’ cover on their face all judicial and quasi-judicial proceedings. There is no qualification to “other proceedings”. The sections do not say “no other civil proceedings”; nor is there any reference to excluding any particular category of proceedings...The words used are entirely apt... to include all judicial proceedings.

In *Winson v Special Railway Administrators of Railtrack Plc* Wolff CJ aligning with the decision of Sir Nicolas Brown-Wilkinson VC in *Powdrill*, observed that it is sufficient to note that section 11(3)(d) applies to a wide category of legal or quasi-legal proceedings. None the less the other proceedings have to be “against” the company or its property. Similarly, in *Air Ecosse Ltd and Others v Civil Aviation Authority* Lord McDonald emphasised his conviction that the restrictions in section 11(3) are directed against the activities of the creditors of the company which might otherwise be available to them in order to secure or recover their debts. This, incidentally, is the position adopted by the South African courts. In *Chetty v Hart* Cachalia JA had emphasised towards the end of the judgment that by mentioning that the moratorium envisaged by section 133(1) only suspends legal proceedings against a company under business rescue and not by the company. In that context, the law has certainly placed the company under business rescue in a more advantageous position than the creditors. This should be of essence when the courts are considering applications for leave to stay a creditor to institute legal action against the company during the subsistence of the moratorium. Some level of fairness ought to be adopted in weighing the contending interests of the creditors against the company always bearing in mind that the interest of the creditors deserves stronger protection when the company is in financial distress.

4. Moratorium on Proprietary Rights

The exercise of right by a creditor over property owned by the creditor but in the possession of the company under business rescue is suspended by the Act. Section 134(1)(c) provides the scope of the restriction imposed on the creditors' proprietary right as follows:

(1) Subject to subsections (2) and (3), during a company's business rescue proceedings-
(c) 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 strikes directly on the private agreement between the creditor and the company. 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. The full import of this provision could not be explored by the Supreme Court in *Murray* as the facts revealed that the cancellation of the agreement and repossessing of the goods by the creditor were indeed done with the consent of the business rescue practitioner. The only contested issue that invoked the examination of section 134(1)(c) borders merely on the nature of the consent which the provision requires to be in writing. The Supreme Court finding that the requirement of consent is merely directory and not peremptory is in tandem with the exercise of private right. The company cannot be heard to say: ‘I did not consent in writing as required of me by the law. I only consented orally’. The company cannot rely on its own fault as a defence to the exercise of the creditor’s right. In

27 The court merely indicated that the term ‘legal proceeding’ is well-known in South African legal parlance and usually bears the meaning of a lawsuit or ‘hofsaak’. The court cited *Van Zyl v Ewaldt Trust (Edens) Bpk*. 1963 (3) SA 394 (T) at 399C-D and *Lister Garment Corporation (Pty) Ltd v Wallace NO*. 1992 (2) SA 722 (D) at 723G-H in support thereof.

28 *Chetty v Hart* [1990] 2 BCC 492 at 494.

29 *Winsor v Special Railway Administrators of Railtrack Plc* [2002] 4 All SA 401 para 35.

30 *Empire Airways Ltd v D A Platt*. 1987 BCC 117 at 120; 1987 CPD 249 at 252B-C.

31 *Chetty v Hart* [1990] 2 BCC 492 at 494.

32 *Winsor v Special Railway Administrators of Railtrack Plc* [2002] 4 All SA 401 para 35.

33 *Empire Airways Ltd v D A Platt*. 1987 BCC 117 at 120; 1987 CPD 249 at 252B-C.

34 *Winsor v Special Railway Administrators of Railtrack Plc* [2002] 4 All SA 401 para 35.
Chetty v Hart\textsuperscript{36} the Supreme Court emphasised that the essence of the requirement for consent to be sought from the practitioner and given in writing is to promote legal certainty and avoid future disputes. Non-compliance with the written requirement does not therefore have a vitiating effect on the consent as given.

Beyond the issue of consent is the need to explore in context the specific meanings of the operative words in that provision which are ‘ownership’ and ‘possession’ of property. Where the company is the owner of the property which the creditor seeks to seize in the exercise of a contractual or legal right, the law is fairly settled. The creditor cannot exercise the right over such property without the written consent of the business rescue practitioner while business rescue proceedings are subsisting. Where the company merely asserts the right of possession over the property, especially where the property is in actual possession of a third party, there will always be the question as to whether the property is indeed in the possession of the company? What does being in possession entail? In Towers and Co Ltd v Gray\textsuperscript{37} Lord Parker CJ observed that the term ‘possession’ is always giving rise to trouble. His Lordship buttressed this assertion by referring to the statement of Earl Jowitt in United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England\textsuperscript{38} that “[t]he person having the right to immediate possession is, however, frequently referred to in English law as being the ‘possessor’ - in truth the English law has never worked out a completely logical and exhaustive definition of ‘possession’.\textsuperscript{39}” His Lordship expressed his stand on this unsettled term leaning in favour of contextual approach where he said:

For my part I approach this case on the basis that the meaning of ‘possession’ depends upon the context in which it is used ... In some contexts, no doubt, a bailment for reward subject to a lien, and perhaps some period of notice has to be given before the goods can be removed, could be of such a nature that the only possession that there could be said to be would be possession in the bailee. In other cases it may well be that the nature of the bailment is such that the owner of the goods who has parted with the physical possession of them can truly be said still to be in possession.

The Constitutional Court had in FNB v The Commissioner for the South Africa Revenue Services\textsuperscript{40} held that the possession of a movable requires both physical control (\textit{detentio}) and the necessary state of mind (\textit{animus}). When used in a statute the context will determine what state of mind is required for possession in terms of such statute.\textsuperscript{41} The UK Court of Appeal in All Capital Markets Plc & Anor v Atlantic Computer Systems Plc & Ors\textsuperscript{42} preferred a purposive approach to the interpretation of ‘possession’ in a similar provision in section 113(3)(c) of the UK Insolvency Act of 1986.\textsuperscript{43} Nicholls LJ stated that:

The paragraph is dealing with goods which, as between the company and its supplier, are in the possession of the company... Those goods are to be protected from repossession unless there is either consent or leave. It is imperative whether they remain on the company’s premises, or are entrusted by the company to others for repair, or are sub-let by the company as part of its trade to others.

The provision of section 134(1)(c) is amenable to a similar line of construction taking into consideration the legislative intention and purpose of that provision as the guiding approach. The provision refers to ‘lawful possession’ and not ‘actual possession’. This would ordinarily include actual and constructive possession so long as the company can legitimately lay a claim on the property while under business rescue.

Can this provision be impugned as an expropriation of property contrary to the constitutional demands? Section 25(1)(2)(4) of the 1996 Constitution provides \textit{inter alia}:

25. Property–

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application–

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(4) For the purposes of this section –

(a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

(b) property is not limited to land.

It is judicially settled that the above provision affords protection to the holding of property.\textsuperscript{44} The protection applies to both natural and juristic persons, and could have grave consequences if the entitlement is denied.\textsuperscript{45} The protected property as indicated in section 25(4)(b) is not limited to land, it extends to the right of ownership of corporeal movables.\textsuperscript{46} The relationship between deprivation and expropriation in the context of the provision was explored in FNB’s case. Ackermann J explained that “any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or 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 and expropriation in the context of th...
right to or in the property concerned... If the deprivation amounts to an expropriation, then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b)."  

Section 134(1)(c) certainly bears some element of interference with the exercise of the creditor’s right of property. Such interference could, however, be justified as being in terms of the law of expropriation and that it is not arbitrary. Thus, there is no issue on compliance with section 25(1) of the Constitution. A similar conclusion cannot, however, be attained in relation to section 25(2). The contention here is that the provision of section 134(1)(c) of the Companies Act amounts to an expropriation of property to the extent that the creditors are denied of rights (albeit temporarily) over their property in possession of the company under business rescue. The purpose of the expropriation is convincingly settled as being in the public interest or for public purpose. The requirement of section 25(2)(a) of the Constitution is thus satisfied to that extent. But not so with section 25(2)(b) which demands that compensation should be paid to the owners of the expropriated property. In AIB Capital Markets Plc & Anor v Atlantic Computer Systems Plc Ors a similar provision in section 111(3) of the UK Insolvency Act of 1986 was described by the Court of Appeal as having an expropriating effect to the extent that it precludes the owners of land or goods from exercising their proprietary rights while the company is under administration. The court was, however, persuaded that, among others, the right granted to the creditors to apply to the court for leave, in the absence of agreement by the administrator, to exercise their rights over such property, provides sufficient safety value for the creditors. Although similar safe guards are incorporated in sections 134(1) (c) and 133(1) of the Companies Act, 46 they are arguably insufficient to supplant the mandatory constitutional requirement for compensation for expropriation of property. It would seem that the only acceptable ground upon which the creditors could be denied compensation is when the business rescue is initiated by the creditors as they could under section 131 of the Act. In such an instance, they would be deemed to have accepted the consequences that are statutorily attendant to such proceedings including the expropriation of their proprietary rights.

5. PROTECTION OF THE CREDITORS’ RIGHTS

The safety valves which the law has built into the provisions of sections 133(1) and 134(1) (c) for the protection of the proprietary rights of creditors are the right to seek the written consent of the business rescue practitioner or the leave of the court to exercise their rights. The English court’s interpretation of similar provisions in section 11(3) (c) (d) suggests that the creditor can approach the court only after the administrator has failed to grant his consent. The South African courts seem to tow a different approach in that respect. In Chetty v Hart 51 for instance Cachalia JA emphasised that section 133(1) (a) is not a shield behind which a company not needing the protection may take refuse to fend off legitimate claims in that:

s 133(1)(b), which is to be read disjunctively with s 133(1)(a) because of the use of the word ‘or’ in exceptions (a) to (e), permits a creditor to seek the court’s imprimatur to initiate or continue legal proceedings against the company in the event of a practitioner’s refusal to give consent, or directly, even without the permission of the practitioner having been sought. So s 133(1)(a) is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue.

There are good reasons to suggest that the judicial position in South Africa would afford greater protection to the creditors than the English counterpart. Admittedly, there are a number of safe guards in the statute such as section 138(1)(e)(f) aimed at ensuring some level of independence in the discharge of the responsibilities of the business rescue practitioner to the company in the course of the business rescue proceedings. Section 139(2)(e) similarly declares that the practitioner could be removed for lack of independence. The same is true of section 140(3) (a) which provide that the practitioner is an officer of the court. The bottom line, however, remains that the practitioner, in assuming the position of running the company’s affairs during business rescue, supplants the board and discharges his functions as an agent of the company. He also receives remuneration from the company. These considerations would expectedly compel the practitioner to place the interest of the company above other interests including those of the creditors. The desire to justify the reason for his appointment could becloud his sense of judgment in addressing requests from individual creditors in matters of concern to the creditors. The courts are seemingly in a better position to guarantee fair treatment to the creditors in matters of concern to the creditors, though the stakes could be higher in terms of time and expense.

Where the creditor decides to seek the consent of the practitioner first, the practitioner is expected to decide on the request responsibly and expeditiously. The power of the practitioner to grant or decline consent must not be used as a bargaining counter in a negotiation to the advantage of one creditor or disadvantage of the other. As an officer

51 See AIB’s case above note 49 para 36 where the court held that built into section 11(3) itself is provision for an application to the court for leave, in the absence of agreement by the administrator. (2015) 4 All SA 401 para 40. Emphasis added. The Supreme Court reiterated that position in para 45 of the same judgment. The section provides that; (1) A person may be appointed as the business rescue practitioner of a company in existence or in 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. (2) The court may appoint any person who has a relationship contemplated in paragraph (d). Note that para (d) refers to para (c) as para (d) does not deal with the issues of relationship. See s 140(1)(a).

References:
46 Ibid para 49(2)(c).
47 Ackermann J in FNB ibid pp 68-69 para (i) while construing the word ‘arbitrary’ stated that a deprivation of property is ‘arbitrary’ as meant by section 25 when the “law” referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.
48 See s 128(1)(b)(i) which provides the purpose of business rescue as being to develop and implement 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 or in 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.
49 See s 299(2) of the Companies Act, 2008.
50 See Chetty v Hart (2015) 4 All SA 401 para 45 where the court observed that the exercise of a creditor’s rights is therefore suspended during the moratorium, but this is balanced by the other protections afforded it in the section itself.
of the court, the practitioner should endeavour to decide as close as the court would have done in similar circumstances. 56 Where the creditor approaches the court for leave, the considerations for the exercise of the judicial discretion, as stated by the court in AIB, include the consequences which the grant or refusal of leave would have, the financial position of the company, the period for which the administration (business rescue) order is expected to remain in force, the end result sought to be achieved, and the prospects of that result being achieved, 57 while always bearing in mind that the power of the purpose to give leave is to enable the court to relax the prohibition where it would be inequitable for the prohibition to apply. 58 These considerations require the weighing of the competing interests with preference given to the creditors who will bear the greater risk upon failure of the business rescue proceedings. 59

Beyond the need for the exercise of the judicial discretion in favour of the creditors, lies the legal consequence of legal proceedings commenced by the creditor to vindicate his proprietary right without first obtaining the consent of the practitioner or leave of the court. Neither section 133(1) nor section 134(1)(c) embodies any legal consequence for non-compliance. The approach by the English courts, in interpreting similar provisions under the English law, is that the effect of the provisions is not to render a nullity proceedings brought without the consent of the administrator or the leave of court but that such proceedings are liable to be stayed. 60 This position which emanated from the decision of Lord Coulson in Carr v British International Helicopters Ltd, 61 was followed by Underhill J in Unite the Union v Sayers Confectioners Ltd 62 where the Judge held that he could see no reason why the decision in Carr would not apply equally in that case. Although not bound by that decision, the Judge admitted that he had no reason not to follow it.

The initial South African court’s approach to the application of those provisions is to decline jurisdiction where leave was not obtained prior to the commencement of an action. This was implicit in the decision of Kgomo J in Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies 63 where the Judge held that once a business rescue plan is adopted, no legal proceedings can be instituted against the respondent except with prior authorisation by the court. “It will be incongruous or incomprehensible, if not also illogical for the applicant to have embarked on these proceedings well knowing that they are not permitted and can only be instituted after a court had granted leave.”

This line of reasoning was not followed by the Supreme Court in the more recent decisions. In Chetty v Hart 64 the Supreme Court held that section 133(1)(a) constitutes a mere procedural bar to the initiation or continuation of legal proceedings. The court emphasised that the object of the provision is to prevent the practitioner from being inundated with legal proceedings without sufficient time within which to consider whether or not the company should resist them and to prevent the company that is financially distressed from being dragged through litigation while it tries to recover from its financial woes. Its effect is to stay legal proceedings except in those circumstances mentioned in section 133(1)(a) to (c) Section 133(1) post a shield behind which a company not needing the protection may take refuge to fend off legitimate claims. Thus, the non-compliance with that provision does not nullify the proceedings. Similarly, in Murray NO and Another v Firststrand Bank Ltd 65 the court held that the requirement of written consent of the practitioner in section 134(1)(c) is merely directory and not peremptory, and the fact that the statute did not provide any sanction for non-compliance is an indication that the failure to meet the requirement of written consent would not constitute an action taken under that provision a nullity.

The language of section 133(1) lends credence to the Supreme Court position. The provision commences with “During business rescue proceedings”, thus indicating that its operation is only for a specific period. Then the active part: “no legal proceedings … may be commenced or proceeded with in any forum”. 66 The word ‘may’ is generally directory unless a different intention is indicated. The words ‘commenced’ and ‘proceeded’ refer to, not only fresh actions, but also pending matters. If the provision is read as implying that every action commenced under that provision is a nullity, the same will apply to all proceedings pending in any forum prior to the commencement of the Act. This would be absurd. The legislature did not set out to deprive creditors of their rights of recourse to the court. The intention of the legislation, as severally emphasised by the courts 67, is merely to grant a period of respite to the company under business rescue from litigation by the creditors. This line of reasoning is re-enforced by section 133(3) which provides that “[i]f any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company’s business rescue proceedings.” 68 The word ‘must’ in that provision contrasts sharply with the word ‘may’ in section 133(1). This suggests that the creditors will not be unduly subjected to prejudice in the exercise of their rights of action on account of the subsistence of business rescue proceedings. 69 Suspending or staying of proceedings is certainly more sensible and businesslike than any suggestion that such proceedings without the consent or leave of court by the creditor is not permitted. This accords with the spirit and object of the Act which the courts are instructively enjoined to pursue under section 158. 70

56 See AIB above note 51 paras 34 & 35.
57 Ibid para 30.
58 Ibid paras 6-7.
64 Emphasis added.
66 Emphasis added.
67 See Panama Properties (Pty) Ltd and Another v Neel NO and Others 2015 (3) SA 63 (SCA) para 26 where the Supreme Court held that a sensible meaning is to be preferred to one that leads to sensible or businesslike results or undermines the apparent purpose of the document.
68 Section 158(b) provides that when determining a matter brought before it in terms of this Act, or making an order contemplated in this Act, the court: (i) must promote the spirit, purpose and objects of this Act; and (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must promote the meaning that best promotes the spirit and purpose of this Act, and
The creditors, the exercise of whose rights is already abridged by the statutory moratorium, should not be subjected to any further avoidable hardship by being shut out entirely from the judicial process while the moratorium subsists.

6. CONCLUSION

The importance of the company to the socio-economic development of the nation is seemingly the key motivating factor for the statutory scheme on business rescue. The quest to salvage a company in financial distress, however, comes at a cost to the creditors whose right of recourse to the court to vindicate their contractual and proprietary rights are suspended during the subsistence of the business rescue proceedings. The need to minimize the adverse impact of the business rescue on the creditors whose rights are placed in abeyance, demands that the proceedings be conducted expeditiously with the attendant obligation on the courts to guard against using that statutory scheme by unconscionable company directors as a subterfuge to fend their own nests by preventing the creditors from enforcing their legitimate rights against the company or the company’s assets. The realization that the protection of the interests of the creditors is of paramount consideration whenever the company is in financial distress should inform judicial attitude in applying the provisions on moratorium on the rights of the creditors while the company is undergoing business rescue.

The purposive approach employed by the Supreme Court of Appeal in Murray in interpreting section 133(1) of the Act as aimed at granting the company in financial distress a breathing space by putting a wedge on the creditors’ right of legal proceedings and enforcement action may not be faulty in context. But the same cannot be said of the suggestion that that provision does not interfere with the contractual rights of the creditors. The fact that the creditors cannot enforce their rights as they could ordinarily have done under the contract constitutes an interference with the creditors’ contractual right. This is inherent in the Supreme Court of Appeal’s decision in Chetty where the Court held that the section 133(1) only suspends legal proceedings ‘against’ a company under business rescue and not ‘by’ the company. The implication of that decision is that the company is unable to rescue itself accorded greater statutory indulgence than the creditors.

The suspension on legal proceedings seemingly strengthens the moratorium on the creditors’ proprietary right in section 134(1)(c) of the Act. It is arguable that the interference with the creditors’ proprietary right under section 134(1)(c) amounts to expropriation of property with the attendant constitutional implications. Though the nature of the expropriation is as such as would satisfy the requirements of public purpose and public interest as demanded by section 25(2)(a) of the Constitution, the absence of any provision for compensation as required by section 25(2)(b) exposes section 134(1)(c) to constitutional challenge.

The approach by the Supreme Court of Appeal in Chetty on the creditors’ exercise of options provided in section 133(1)(a)(b) to either seek the consent of the business rescue practitioner or the leave of the court to exercise their legal rights seems more amenable to the plight of the creditors than the UK court’s approach which insists that the creditor should first explore the prospect of obtaining the administrator’s consent prior to recourse to the judicial discretion. The propensity is always higher that the practitioner who supplants the board in the conduct of the affairs of the company, receives remuneration from the company, and would ordinarily want to showcase his business acumen, would most likely prefer the interest of the company to that of the individual creditors. The courts are thus more neutrally placed to weigh the contending interests on a fair balance, and should give greater consideration to the interests of the creditors who stand to lose more in the event of the failure of the practitioner to rescue the company in financial distress.

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