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The safeguards and protective measures for property owners during business rescue

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Abstract

It is an undeniable dilemma for a landlord or property owner to find its property in the possession of a company under business rescue. Not only does the tenant often remain in occupation of the leased premises during business rescue, but additionally fails to make ongoing payment of rent. The goals of business rescue must be carefully balanced with the prejudice caused to property owners by virtue of the moratorium during business rescue. The moratorium encroaches on the proprietary rights of third parties, who are unable to recover their property from a company during business rescue. My earlier article — MF Cassim (2017) 29/3 SA Merc LJ 419 — focused on the effect of the moratorium on the property owner. The present article focuses on the protective measures available, and which ought to be available, for property owners whose property is in the possession of a company under business rescue. The safeguards built into the Companies Act 71 of 2008 for property owners are discussed. Guiding principles are proposed for the lifting of the moratorium in business rescue by both the courts and business rescue practitioners, first, for the repossession of property by the property owner, and second, for the recovery of current rent and other compensation by the property owner during business rescue. Whether post-commencement claims for rent have, and should have, a super-priority status as post-commencement finance or as an expense of the administration is also considered.

I Introduction to the safeguards for property owners

The goals of business rescue must be carefully balanced against the prejudice caused to property owners by the moratorium during business

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rescue. It is an undeniable dilemma for a landlord or property owner to find its property in the possession of a company under business rescue. Not only does the tenant often remain in occupation of the leased premises during business rescue, but additionally fails to make ongoing payment of rent. The moratorium on the enforcement of debts and rights against the company, whether proprietary or otherwise, is a cardinal feature of the business rescue regime which gives the company essential breathing space while the business rescue practitioner seeks to steer it towards one of the goals of business rescue. The moratorium encroaches on the proprietary rights of third parties, who are prevented from recovering their property from a company during business rescue, even if they have cancelled the underlying agreement with the company. The purpose of this temporary restriction is to prevent third parties and creditors from disrupting or hampering the chances of saving the company. Without the moratorium, it would simply not be possible to rescue the company. This aspect is fully canvassed in my earlier article on which the current article builds.¹

In a misguided attempt to protect property owners, the courts have regrettably overlooked the fundamental aim of the moratorium and have improperly whittled it away.² The High Courts have held, in effect, that the moratorium will not apply where the lessor or other property owner has cancelled its lease, or other relevant agreement, with the company in business rescue.³ This means that the lessor is free to institute legal proceedings or enforcement action against the company to reclaim the leased property. This approach is not only at odds with the intention of the legislature, but also threatens to undermine the entire business rescue regime.⁴ The moratorium is intended to restrict the property owner from freely vindicating its property from the company during business rescue, regardless of whether the property owner cancelled its agreement with the company before or after the commencement of business rescue. The repossession of land or goods by the property owner would in many cases defeat the very purpose of the rescue endeavour.

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The correct approach for the courts to adopt in protecting property owners from unfair discrimination during business rescue, is to rely on the protective measures already built into the Companies Act 71 of 2008 (the Act). These statutory safeguards empower the court and the business rescue practitioner to lift or relax the moratorium in appropriate cases.

A property owner, such as the lessor of land or movable property, or the owner of goods sold to the company under an instalment-sale transaction (the lessor/property owner), is prevented by the moratorium from reclaiming its property from a company under business rescue and, if this takes place without compensating the property owner, the business rescue effort is effectively driven at the expense of the property owner. This outcome should as far as possible be avoided, but without impeding the aim of business rescue. An intricate balancing act is involved. It is squarely in the hands of the courts to find and preserve a proper balance. Two essential policy factors must be weighed by the court. On the one hand, the aim of business rescue and the cardinal role of the moratorium in achieving this aim must not be compromised. On the other hand, the business rescue endeavour should not be conducted to the prejudice of those who hold proprietary rights, save where this is unavoidable. The legislature has entrusted the courts with the task of fleshing out guiding principles as to when the moratorium may be lifted or relaxed with the sanction of the court under section 133(1)(b) of the Act.

Typically, the lessor has two chief concerns when the lessee initiates business rescue proceedings: first, the recovery of its property from the company under business rescue; and secondly, the enforcement of its right to receive ongoing payment of rent, hire, or other compensation, and ongoing third-party expenses such as water and electricity charges. Paragraph II of this article discusses the safety measures in the Act for the protection of property owners, while Paragraph III suggests general guiding principles for the lifting of the moratorium in business rescue by both the courts and business rescue practitioners. Specific guidelines for the lifting of the moratorium on the repossession of property by property owners are suggested in Paragraph IV, followed by guiding principles for the ongoing payment to property owners during business rescue of current rent or other compensation in Paragraph V. Whether post-commencement claims for rent have, or should have, a super-priority status — whether as post-commencement finance or as an expense of the administration — is considered in Paragraph VI.

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II The protective measures built into the act for property owners

The Act builds in protective measures for property owners. These measures give the court and/or the business rescue practitioner a discretion to lift the moratorium during business rescue where warranted. In practice, this not only assists the property owner to recover its property from the company in business rescue, but also enables it to receive ongoing payment of current rent and other compensation for the company's use of its property during the business rescue endeavour.

(a) Protective measures for the repossession of property

A property owner who wishes to recover its property from a company in business rescue may seek the written consent of the business rescue practitioner to do so. Section 134(1)(c) provides that:

despite any provision of an agreement to the contrary, no person may, irrespective of whether that property is owned by the company,

In withholding consent for the recovery of the property by the lessor or having regard to three criteria: the purposes of business rescue; ⁵ the claimed in respect of it. ⁶ It is essential that this protective measure be developed effectively and that clear guiding principles be laid down for business rescue practitioners in exercising their discretion to grant or withhold consent under section 134(1)(c) and (2). This is the role of the courts. ⁷

Where the business rescue practitioner acts unreasonably in withholding consent under section 134(1)(c), read with subsection (2), for the repossession of property by the property owner (eg, where the asset in question is not needed for the effective rescue of the company), it is submitted that the aggrieved property owner has the right to apply to the court to lift the moratorium. This it may do by applying for judicial leave under section 133(1)(b), to institute legal proceedings against the financially distressed company for the recovery of its property. It is crucial that the property owner be permitted recourse to the courts in such circumstances and that the courts have the power to shield the

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property owner from the prejudice it would otherwise suffer as a result of an unreasonable refusal of consent by the business rescue practitioner.

Section 133(1)(b), therefore, serves as a second safeguard for the property owner seeking to reclaim its property from a company under business rescue. Section 133(1) 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 . . .

In reliance on this protective measure, the aggrieved property owner may bring legal proceedings for the return of its property from the company in business rescue, but only with the permission of the court under section 133(1)(b) (or the written consent of the business rescue practitioner under s 133(1)(a)).

(b) Protective measures for the payment of current rent

The protective measure in section 133(1) assists the property owner not only to recover its property, but also to sue for the payment of rent and other compensation from the company in business rescue in recompense for the company's ongoing use and enjoyment of the property during the business rescue process. In some circumstances the lessor may choose not to cancel its lease agreement with the company under business rescue — for example, due to difficulties in finding suitable new tenants — and may prefer to sue for ongoing payment of rent. In other circumstances where the court has justifiably refused the property owner leave to sue for the recovery of its property on the ground that the continued use of the property by the company is critical to its successful rescue, the property owner would seek to enforce its right to receive ongoing payment of current rent and other charges.

To safeguard property owners who wish to enforce their right to be paid ongoing rent, hire and/or other charges or compensation during business rescue, the Act provides for two protective measures. The property owner is empowered to bring legal proceedings for the continuing payment of rent and other compensation by the company during business rescue, either with the written consent of the business rescue practitioner under section 133(1)(a), or with the leave of the court under section 133(1)(b).

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It is vital that the courts mould these statutory safeguards to operate efficiently and effectively. Coherent guiding principles must be developed for the exercise of the discretion both by future courts and by business rescue practitioners under sections 133(1)(a) and (b) and 134(1)(c), read with subsection (2). Guiding principles are suggested below for the practical application of these protective measures.

III Lifting the moratorium: General guidelines for the courts

(a) Can a creditor seek the leave of the court under section 133(1)(b) without first having sought the consent of the business rescue practitioner under section 133(1)(a)?

In *Chetty v Hart* the Supreme Court of Appeal significantly pronounced that a creditor is permitted to seek the leave of the court to institute or proceed with legal proceedings under section 133(1)(b), either if the business rescue practitioner refuses to give his or her permission in terms of section 133(1)(a), or even without first seeking the permission of the business rescue practitioner under section 133(1)(a). It is submitted, however, that the better approach is for the creditor first to be required to seek the consent of the business rescue practitioner — whether consent for the recovery of its property under section 134(1)(c), or consent to institute legal proceedings under section 133(1)(a). An application to court for leave under section 133(1)(b) should be reserved for cases where the business rescue practitioner has unreasonably refused to give his or her consent. This approach would be less burdensome for the courts and would also save legal costs. By restricting the number of applications for leave before the courts, disruption to business rescue proceedings is reduced. It is preferable that these matters be dealt with directly by the business rescue practitioner, so that once practical guidelines have been developed in our law, applications to court under section 133(1)(b) will eventually be the exception rather than the norm.

(b) General guiding principles for lifting the moratorium

Based on the wording of the provision, it is submitted that the court has a wide and unfettered discretion to lift the moratorium under section

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133(1)(b). The lifting of the moratorium by the courts is therefore not intended by the legislature to be an exceptional remedy only. ⁹

A *Mabote v Van der Merwe* (Mabote), ¹⁰ which recommended certain principles to be applied by the courts in deciding whether to grant or refuse leave under section 133(1)(b). The court stated that its wide discretion to grant leave must be exercised judicially having regard to the purpose and objects of section 133(1)(b), read in the context of the Act as a whole, including the provisions of sections 7(k) and 128(1)(b). ¹¹ Considerations of fairness and convenience are of fundamental importance. ¹² The court declared further that each case must be determined on its own facts. Although there is no closed list of factors, in exercising its discretion under section 133(1)(b), a court will consider factors such as: the effect of the grant or refusal of leave on the applicants' rights, as opposed to other affected persons and relevant stakeholders; the impact of the proposed legal proceedings on the wellbeing of the company and its ability to regain financial viability; ¹³ and whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act. ¹⁴ In exercising its discretion the court must also consider the views of the business rescue practitioner. ¹⁵ The court concluded that it had wide powers to grant leave and to determine the terms on which leave is granted under section 133(1)(b). ¹⁶

While *Mabote v Van der Merwe* is a good start, it is crucial for the courts to formulate a more definite and clearer test to light the way for both future courts and business rescue practitioners in the exercise of their discretion to permit property owners to institute legal proceedings under section 133(1)(a) and (b), coupled with lucid guiding principles. For greater clarity, where a property owner — such as a lessor or a seller in an instalment sale agreement — is faced with the dilemma of finding

its property in the possession of a company in business rescue, while its submitted that the courts should implement the following guiding principle: exercise its proprietary rights.

1. First, where the property is not required for the rescue of the company for 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. Secondly, 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 its 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.

These guidelines are discussed further in Paragraphs IV and V.

IV Guidelines for leave to repossess property

(a) Cases where the repossession of property would not obstruct the purpose of the rescue

It ought to be a clear judicial guideline that the lessor or property owner should be permitted to enforce its right to repossess its property or goods from a company in business rescue where the relevant asset is not needed for the effective rescue of the company, or where the repossession of the asset is unlikely to obstruct the purpose of the rescue endeavour. There is no justifiable basis in these cases for compelling the property owner, against its will, to leave its property in the hands of the company by virtue of the moratorium.

It is significant that a similar approach applies in both English ¹⁷ and Australian law ¹⁸ where the asset in question is not required for the rescue. In such circumstances, it is submitted further that the business

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rescue practitioner should ordinarily be expected to give his or her consent for the recovery of the property in terms of section 134(1)(c), so obviating the need for the property owner to incur the expense and delay involved in approaching the court for leave. Should the business rescue practitioner fail to consent, the court should grant the property owner leave under section 133(1)(b) to start or proceed with legal proceedings to reclaim its property from the company in business rescue. As discussed in Paragraph II above, it is only rational that the court retains the power to permit the property owner to sue for the recovery of its property, so as to avoid prejudice he or she would otherwise suffer at the hands of an unreasonable business rescue practitioner.

An example is *178 Stamford Hill CC v Velvet Star Entertainment CC*, ¹⁹ in which the business rescue practitioners had notified creditors that there was no longer any point in continuing the business rescue proceedings, as there was no prospect of success. ²⁰ Any concern that the success of the business rescue endeavour would be frustrated or jeopardised by legal proceedings by creditors had, therefore, fallen away. The landlord had also already cancelled the lease agreement with the company in business rescue and sought recovery of its premises. This is the typical scenario in which the business rescue practitioner ought simply to consent to the repossession of the premises by the landlord, so avoiding the need to involve the courts in an application for leave to bring ejection proceedings under section 133(1)(b). As the landlord's property was patently not needed for an effective rescue of the company, and the repossession of the property would not have impeded the rescue attempt, the court or the business rescue practitioner would clearly have been justified in permitting the landlord to retake its property from the tenant company. ²¹

(b) Cases where the repossession of property would obstruct the purpose of the rescue: A balancing test

In these cases, the continued operation of the business of the financially distressed company is crucial to the business rescue process, and the

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property in question is essential to the success of the rescue endeavour. Where the property owner (eg, the landlord of business premises, the lessor of equipment or goods, or the seller under an instalment-sale agreement of vehicles or goods) seeks leave to recover its property in circumstances where the repossession of the property would obstruct the purpose of the rescue endeavour, it is submitted that the court should carry out a balancing act in deciding whether or not to permit the repossession of the property. In considering whether to lift the moratorium under section 133(1) by granting the property owner leave to enforce its right to recover the property, the court (or the business rescue practitioner) must balance the interests of the property owner against the interests of all the company's other creditors and other relevant stakeholders. Support for such a balancing act may be derived from section 7(k) of the Act, which explicitly declares that a purpose of the Act is to

provide for the efficient rescue and recovery of financially distressed companies, in a manner that *balances* the rights and interests of *all relevant stakeholders* (emphasis added).

It is consequently submitted that the proper test to be applied by the courts in the exercise of their discretion to grant or refuse leave for the enforcement of proprietary rights, entails a balancing act between, on the one hand, the loss or detriment for the property owner in applying the moratorium, and, on the other hand, the benefit or advantage for the company, its other creditors as a whole, its employees, and other relevant stakeholders, in enforcing the moratorium. In other words, one must weigh up the detriment caused to the property owner who is compelled against its will to leave its property in the possession of the company undergoing business rescue proceedings, against the detriment that would be caused to the company, its other creditors as a whole, its employees and other relevant stakeholders should the property owner be given permission to repossess its property.

This balancing act is neither straightforward nor simple and demands a flexible rather than a rigid approach by the courts. How the balance is struck in practice, will depend on the peculiar facts and circumstances of each case and the competing interests in question. It must also be borne in mind that business rescue has diverse aims, ranging from the survival of the company as a going concern, to securing a more favourable return for creditors and shareholders than would result from immediate

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winding-up. ²² It should also be remembered that business rescue is intended to be temporary and short-lived; the business rescue practitioner must act as quickly and efficiently as reasonably practicable.

From a policy perspective, the aim of the moratorium is to enable the company to effect an 'efficient rescue and recovery' as mandated by section 7(k), bearing in mind that the very purpose of the rescue endeavour may collapse if the property owner repossesses its premises or goods from the company under business rescue. Depriving the company of property essential to its business, could amount to depriving it of the chance to trade out of its financial difficulties. ²³ Creditors or property owners should not necessarily be allowed to repossess assets or premises that are fundamental to the company's business or the business rescue process. On the other hand, the purpose of the statutory power of the court to grant the property owner leave to repossess its property, is to give the court a wide discretion to lift the moratorium in circumstances where its application would be unfair or unjust. It is essential that the balancing process give due and proper weight to the proprietary interests of the property owner. It must be foremost in the mind of the court that if a person with a proprietary interest is denied its property against its will and without any compensation, the business rescue attempt will in effect be run at its expense. This outcome must be avoided if possible.

As a broad general guideline, it is submitted that where the property owner's land or goods are used by the company for the purposes of business rescue in terms of an existing lease or other relevant agreement, resulting in substantial loss or detriment (whether direct or indirect) to the property owner, this ought to provide an adequate basis for allowing the property owner to repossess the property. The balance, however, may yet lie in favour of a refusal of leave if proportionately greater loss or detriment would be caused to the company, its other creditors as a whole, its employees, other relevant stakeholders and other affected persons by the grant of leave to repossess the property. In other words, leave may be granted to the property owner if, on a balancing process between the interests of the property owner and those of the other creditors and stakeholders, it is found that the loss or detriment that would be caused to the property owner by reason of the moratorium, outweighs the loss or detriment that would be caused to the company, its creditors as a whole, its employees and other relevant stakeholders by a

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lifting of the moratorium to allow the repossession of the property by the property owner.

In carrying out the suggested balancing test while applying section 133(1)(b), the courts should take account of all relevant factors when weighing up the losses and benefits of the property owner and those of the company, its other creditors, and stakeholders. A list of important factors, albeit non-exhaustive, is tentatively suggested below. Significant guidance may also be derived from section 134(2) of the Act, which indicates the factors which the legislature intended the business rescue practitioner to have regard to in exercising his or her discretion to consent to the recovery of property by the property owner. Although this subsection gives direction to the business rescue practitioner and not explicitly to the court, it is submitted that paragraphs (a) to (c) of section 134(2) are of equal relevance to the courts. The courts must consequently take account of the following criteria when balancing interests under section 133(1)(b):

- (i) the purposes of business rescue in terms of Chapter 6 of the Act (s 134(2)(a));
- (ii) the circumstances of the company (s 134(2)(b)); and
- (iii) the nature of the property and the rights claimed in respect of it (s 134(2)(c)).

Section 134(2)(c) gives due recognition to the substantial weight and emphasis that must be given to the proprietary interests of the property owner in the balancing process.

In applying the balancing test under section 133(1)(b) several other important factors are relevant. First, when considering the 'circumstances of the company', as required by section 134(2)(b), it is submitted that the courts should also have regard to:

- (iv) the financial position of the company; and
- (v) the company's ability to compensate the property owner, for example, by continuing to pay current rental and other charges as well as any arrear rental and interest. If, for example, the company is able to make ongoing payment of its rental and other charges during the course of business rescue, the court may justifiably refuse the owner permission to repossess the property on the basis that he or she would benefit only marginally, while others would suffer far greater loss.

Secondly, in assessing the 'purposes of business rescue' in terms of section 134(2)(a) read with the 'circumstances of the [particular] company' in terms of section 134(2)(b), the courts ought further to consider, as related factors, the following:

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- (vi) whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act, as suggested in *Mabote v Van der Merwe*; ²⁴
- (vii) the end result sought to be achieved by the rescue of the company. For example, the court could be more inclined to refuse leave where the goal of the business rescue process is the survival of the company as a going concern. The court could refuse leave even where the goal of the rescue endeavour is to sell the company as a going concern, in order to achieve a more advantageous realisation of assets than would be obtained on liquidation. In these circumstances, the loss of possession of the company's business premises would make it difficult to sell the company as a going concern.
- (viii) the proposals of the business rescue practitioner. Where, for example, the business rescue practitioner has specifically undertaken to make rental payments to the property owner during the course of business rescue proceedings, the moratorium on the repossession of property would cause little permanent loss to the property owner and leave to repossess its property may be refused;
- (ix) the prospects of success of the business rescue;
- (x) the length of time business rescue has already been in force, and how long it is expected to continue. ²⁵ Repossession of property by the property owner may not be necessary if, for instance, the moratorium is likely to be very short-lived;
- (xi) the views of the business rescue practitioner, as recommended in *Mabote v Van der Merwe*; ²⁶
- (xii) the effect on the business rescue process if leave is given, and the effect on the property owner if leave is refused. This includes the effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders, and the impact that the proposed legal proceedings would have on the well-being of the company and its ability to regain its financial health, as raised in *Mabote v Van der Merwe*; ²⁷
- (xiii) the likelihood or degree of probability of each of the above factors.

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Thirdly, the outcome of an application for leave under section 133(1) may also be influenced by: ²⁸

- (xiv) the history of the business rescue proceedings; and
- (xv) the conduct of the parties. This enables the court to have regard to considerations such as whether the business rescue practitioner had made misrepresentations to the property owner, or has prolonged the course of the rescue process, or whether the property owner has accepted certain benefits during the rescue process. In *Kythera Court v Le Rendez-Vous Caf, CC*, for example, the company under business rescue appeared to be misusing the business rescue process by remaining on the leased premises and operating its business without making any rental payment or other charges to the landlord, despite the undertaking by the business rescue practitioner to do so. The company, moreover, had refused to give the business rescue practitioner control of its bank accounts, and was simply unwilling to cooperate during the business rescue process, which caused delays. It is submitted that such conduct is a valid factor which the court should consider in deciding whether to grant or refuse leave for the recovery of the property by the property owner. ³⁰

It is notable that the English ³¹ and Australian courts ³² have adopted a comparable balancing approach in deciding whether to relax the moratorium or prohibition on the recovery of property by lessors and hire-purchase sellers during administration. In this regard, many

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analogous factors and principles are taken into account by both the English ³³ and Australian courts. ³⁴

To sum up, the question whether the court should, under section 133(1)(b), grant leave to a property owner to recover its property from a company under business rescue, should be determined by a balancing act between the interests of the property owner and the interests of the company together with its other creditors, its employees, and other stakeholders. In weighing up the respective losses and benefits of the parties, the courts should take account of the open-ended list of factors suggested above. Due and proper weight must be given to the proprietary interests of the property owner so that the courts as far as possible steer clear of undue encroachment on proprietary interests

whereby the property owner is denied its property without the payment of rent or other compensation. To routinely allow this would be to effectively compel the property owner to fund the rescue endeavour of the company. The issue of the ongoing payment of rent and other compensation during the course of business rescue is discussed in greater detail in Paragraph VI. The guiding principles and the test suggested above may also be usefully relied on by business rescue practitioners when acting under either section 134(1)(c) or section 133(1)(a).

V Guidelines for leave to receive rental payments

(a) The refusal of leave to repossess property should be on the basis of payment of rent

In cases where, on the application of the balancing test discussed above, the property owner is refused leave or permission to recover its property from a company under business rescue, it is submitted that this refusal must, as a general rule, be on the basis of the continued payment to the property owner of current rent or other relevant compensation.

It would be a gross and improper violation of proprietary rights if property owners are ordinarily unable to recover their property from distressed companies under business rescue, and are also deprived of

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payment of rent or compensation. The playing field between property owners and companies in business rescue must be levelled. While there may be valid reasons for depriving the landlord, by virtue of the moratorium, from repossessing its rented premises from a company under business rescue, it is important to balance this, where possible, by preventing a situation where companies in business rescue are able to indefinitely occupy rented premises without the payment of any rent — except to the extent that this is unavoidable. To allow this routinely would be effectively to compel the property owner to fund the rescue endeavour of the company. The same principle applies to other property owners whose property is possessed by a company in business rescue, such as the lessee of goods or movable property or the seller in an instalment-sale agreement.

It falls to the courts to find the optimal solution in these circumstances using the tools furnished by the legislature in the Act. First, a power that is potentially very useful is the power of the court to impose 'any terms the court considers suitable' for the grant of leave under section 133(1)(b). Wide powers are thus given to the court to determine the terms on which leave is granted. Accordingly, where the property owner seeks leave under section 133(1)(b) to bring legal proceedings to repossess an asset that is indispensable to the successful rescue of the company, the court, in refusing leave for the return of the property, may require that the business rescue practitioner makes ongoing payment of rent to the property owner. But since section 133(1)(b) on a strict literal interpretation permits the court to impose only terms for the grant of leave but not terms for the refusal of leave, the court may have to use *indirect* means to impose terms on a refusal of leave. This may be accomplished, for instance, by an order that the property owner is granted leave to repossess its property unless the business rescue practitioner undertakes to make ongoing payment of rent for the duration of the rescue process. Secondly, the property owner would be well-advised, when seeking the leave of the court under section 133(1)(b) for the repossession of its property, to seek in the alternative and failing a recovery of its property, the leave of the court to sue for the continued payment of rent or other compensation from the company during the course of the business rescue.

Thus, as a broad general guideline, if judicial leave is refused to the property owner to recover its property under section 133(1)(b), it should ordinarily be countered by an order or a condition that the business rescue practitioner make ongoing payment of current rent or periodic payment of other compensation to the owner of the property

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that it continues to use. This is reasonable and fair, to minimise the detriment suffered by the property owner by its inability to reclaim the property, and would strike a proper balance between the competing interests of the property owner and those of the company together with its other creditors as a whole and other stakeholders. An additional practical benefit of implementing this guideline is that the business rescue practitioner, confronted with the prospect of cancellation of the lease agreement (or other relevant agreement) and with the possibility of subsequent legal proceedings for the return of the property to the property owner, may feel compelled to continue to make payment of rent during the rescue process in order to ward off this risk. Since business rescue is not a barrier to the cancellation of the contract by the property owner, as held in *Cloete Murray v FirstRand Bank Ltd t/a Wesbank*,³⁵ the business rescue practitioner, to avert the cancellation of the agreement, may feel pressurised to honour the company's obligations to pay rent as it falls due.

It is notable that in certain circumstances a court order for payment to the lessor or other property owner should consist of a periodic payment of compensation or damages, rather than payment of rent. This pertains when the lessor, by this stage, has cancelled the lease agreement in order to crystallise or perfect its right to claim the repossession of the property.³⁶ Where the lease has been cancelled but the company in business rescue retains occupation or possession of the property by virtue of the moratorium, the lessor would have a right to damages.³⁷ A court order for payment to the property owner in these cases may require the periodic payment of compensation by the company during business rescue.

The rule rather than the exception thus ought to be that the lessor or property owner should receive ongoing payments of rent or other compensation for the duration of business rescue proceedings. This relates not only to cases where the courts, on the application of the balancing test, find it inappropriate to allow the property owner to take back its property, but also to those cases where the property owner itself prefers not to cancel the lease and reclaim its property, but chooses rather to uphold the lease and sue for its rental.

There can, however, be no absolute entitlement to payment of the property owner during business rescue. The wide discretion of the court

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requires that, where the circumstances call for it, the court may refuse to grant leave to the property owner to sue for payment of rent under section 133(1)(b). In exceptional circumstances, the property owner may be refused leave for both the return of its property and the payment of its rent or other compensation — with the outcome that assets belonging to the property owner are used by the company during the rescue process without the payment of any rent or other charges. Rental payments may not be necessary in some circumstances, for instance, if the moratorium is likely to be short-lived, while in other situations rental payments may not be immediately possible, for instance where the company does not have the liquidity or lacks sufficient unencumbered assets to pay the rent. For the courts inflexibly to order, as a rigid rule, the immediate payment of current rental and/or other charges by companies undergoing business rescue, would be to confer on lessors and property owners an unfair priority over other creditors.

The courts must use a similar balancing test in deciding whether to permit the property owner to enforce its right to payment of current rent under section 133(1)(b), which balances the rights and interests of the property owner with those of the company, its other creditors and stakeholders, using the factors as suggested in Paragraph IV above. The feasibility of an order for ongoing payment of rent or other compensation during business rescue, ultimately depends on the unique circumstances of each case, and, in particular, the financial position of the company in distress.

(b) The time period of respite from the payment of rent must be capped

Where a company in business rescue does not have the financial resources to pay ongoing rent or other compensation for the use of property belonging to a third party, it is submitted that the court should, wherever possible, limit the period for which the company may continue to use the property without reciprocal payment of any rent or compensation. As a broad general guideline, it is suggested that a threshold period of three months without the payment of rent or other compensation, would be a useful guideline for the courts to adopt. This appears to be the most expedient and appropriate guideline for business rescue proceedings envisaged by the legislature,³⁸ as reflected in section 132(3)

of the Act (albeit in practice business rescue proceedings tend to take substantially longer).

To cap the period for which the property owner is not paid for the use of its property during the rescue process, recourse may be had to the extensive powers of the court to stipulate the terms on which leave is granted under section 133(1)(b). In practical terms, this wide discretion could, for example, be used to grant the property owner leave to sue for the payment of rent on condition that the business rescue practitioner has failed to resume rental payments after three months' respite. Alternately, the property owner could be authorised to bring legal proceedings for the return of its property in three months' time unless the payment of rent has by then resumed.

Flexibility may be built in where necessary in meritorious cases. The courts, for example, may grant a shorter or longer period of respite depending on the circumstances, or it may later extend the initial three-month period in deserving cases. It may perhaps be convenient for the court to order that the property owner be refused leave to sue for payment of current rent on condition that the business rescue practitioner includes, in his or her monthly report on the progress of business rescue proceedings under section 132(3), an update on the deferral of rental payments with cogent reasons for the extension of the three-month period.

In both English ³⁹ and United States' law, great stress is laid on the right of the landlord to receive ongoing payment of current rent — albeit via statutory intervention rather than the exercise of judicial discretion. United States' law protects the landlord's right to rental payments by the implementation of statutory rules to thwart the prospects of the debtor in bankruptcy remaining in rented premises indefinitely without paying rental. There are time limits in the US on the postponement of a distressed company's obligations to perform under real estate leases during bankruptcy. Prior to the assumption or rejection of the agreement, the debtor company must generally continue to perform its obligations under real estate leases during bankruptcy. An exception is made, however, whereby obligations under real estate leases arising during the first 60 days post-bankruptcy, may be postponed by court order; but these obligations may ordinarily be postponed only until the

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end of the 60-day period. ⁴⁰ This could be useful for the South African courts, and supports the submission made above.

(c) Suspension of rental payments by the business rescue practitioner under section 136(2)(a)

An important factor, unique to South African law, is whether the business rescue practitioner has exercised his or her power under section 136(2)(a) to suspend the company's obligations under a contract with a property owner to make payment of rent or other compensation. The power of the business rescue practitioner to suspend the company's obligations under contracts is controversial. In its current form, it allows the business rescue process to be conducted to the prejudice of those who have proprietary rights, by depriving them of both possession of their property and their rent and other compensation. Section 136(2)(a) is wide enough to give the business rescue practitioner the discretion to 'cherry-pick' the provisions of the contract which benefit the company while rejecting the burdens. By so doing, the business rescue practitioner could leave the property owner in limbo until the very end of the rescue. The property owner may even end up suffering permanent loss, as it is a mere concurrent creditor and may ultimately receive only part of the amount claimed. When a contract is suspended, section 136(3) of the Act allows the third party to the agreement to assert a claim against the company but only for damages.

Property owners whose rights are subject to suspension under section 136(2)(a) may not even obtain the right to cancel the contract flowing from the company's failure to make payment of rent or other relevant compensation. They are therefore unable to perfect their right to repossess the property. This is because the effect of the suspension is that the company, in declining to make post-commencement payments that fall due *during* the business rescue proceedings, will not be in breach of the agreement and the property owner may have no valid basis on which to cancel the agreement. ⁴¹

It is submitted that, despite the suspension of a lease or instalment-sale agreement by the business rescue practitioner, the lessor, seller, or other relevant property owner should be permitted to apply to the court to lift the suspension, where this is justifiable, by seeking the leave of the

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court under section 133(1)(b) to enforce its right to receive payment of current rent — or even to repossess the property, in cases where cancellation of the agreement remains possible. ⁴² It is in the interests of fairness and equity for the court to come to the assistance of the property owner in circumstances where the business rescue practitioner has exercised his or her power of suspension under section 136(2)(a) to the unfair prejudice of the property owner.

It is further submitted that in deciding whether to lift the moratorium under section 133(1)(b), specifically in circumstances where the business rescue practitioner has suspended the agreement with the property owner, the court should have regard to all relevant considerations in applying the balancing test, including:

- (i) the list of factors suggested in Paragraph IV(b) above;
- (ii) whether the company's obligations under the contract have been suspended entirely, partially, or conditionally;
- (iii) the effect of the suspension on the property owner;
- (iv) the circumstances of the suspension;
- (v) the reasons for the suspension;
- (vi) the effect on the company if the suspension is lifted; and
- (vii) the length of time for which the suspension has been in force and the period for which it is expected to continue.
- (viii) A fundamentally important factor for the court to take cognisance of when conducting the balancing exercise, in the case of a suspension, is whether the business rescue practitioner has suspended an obligation of the distressed company under business rescue while electing to leave the reciprocal obligations of the property owner intact. If the business rescue practitioner, for example, has exercised his or her power of suspension so as indefinitely to preserve the company's right to trade from leased premises or to use hired vehicles for as long as business rescue continues, while suspending the company's concurrent duty to pay rent or other compensation and charges to the property owner for the use of such property, this must be a significant factor in the court's decision whether to lift the moratorium

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under section 133(1), especially in cases where the company has the financial means to make such payment.

- (ix) The courts should impose a time limit on the suspension of the distressed company's obligations under agreements with property owners. A general time limit of three months at the most is suggested in Paragraph V(b) above — albeit in the context of the granting of a period of respite from the payment of rent. This three-month period should also apply to a suspension. In practical terms, it is submitted that the court has the discretion to implement such a time limit either by lifting the moratorium on an agreement that has been suspended for more than three months, or by staying or freezing the grant of leave to the property owner to enforce the agreement for a period of three months. This submission is based on the wide wording of the discretion accorded the court under section 133(1)(b), as discussed above. ⁴³ The South African Act, however, contains no automatic right to rental payments for the lessor, nor does there appear to be any provision for priority in respect of post-commencement payments of rent, as discussed in Paragraph VI below.

VI Priority of unpaid rent: A preferent claim and post-commencement finance?

(a) The legal position in South African law

If a financially distressed company continues to occupy leased property during business rescue, it is a contentious issue whether the property owner does or should have the inevitable right to receive periodic payments of rent and other charges for the duration of the business rescue process. In South African law it seems that there is no automatic right to receive post-commencement payments of rent or other compensation, but it is in each case subject to the discretion of the court under section 133(1)(b).

Under the Act, a claim for unpaid rental and other related charges arising during business rescue is treated as an ordinary unsecured claim. The Act does not appear to regard it as post-commencement finance, nor allow it priority as an expense linked to the business rescue process. In this regard, it does not appear to fall within the business rescue

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practitioner's expenses⁴⁴ and other claims arising out of the costs of the business rescue proceedings in terms of section 135(3). The mere fact that an event which gave rise to a debt for the company occurred during business rescue proceedings, is insufficient to render payment of the debt a cost of the business rescue proceedings — it must reasonably have been intended by the legislature that it should be given a priority status ahead of other debts.

As regards post-commencement finance — this term refers to financing obtained by the company during business rescue proceedings,⁴⁵ ie, additional new finance obtained after the commencement of the rescue process in order to turn the company's business around.⁴⁶ Since the term 'financing' in section 135(2) of the Act is not defined, it is uncertain how widely it should be interpreted.⁴⁷ It could be strictly interpreted to mean financing or loans from lenders such as banks, or it could be more liberally interpreted to include new credit from suppliers of goods and services to the company. Even if it is interpreted in the liberal sense, it is nonetheless arguable that post-commencement claims for rental (that is, rental claims arising during business rescue proceedings) under a pre-existing contract of lease do not amount to post-commencement finance as post-commencement finance requires a new contract specifically concluded during the business rescue proceedings. More importantly, the Act singles out employee claims arising during business rescue and gives such claims a super-priority as post-commencement finance under section 135(1). Had the legislature intended to give a similar super-priority status to rental payments that fall due during business rescue, it would have expressly indicated so in the section. The implication is that rental payments arising during business rescue under pre-existing contracts of lease, do not constitute post-commencement finance.

In South African law, therefore, it appears to have been a deliberate decision by the legislature that there is no automatic right for the lessor to receive post-commencement payments of rent, nor are these claims given any super-priority status. Instead, the post-commencement payment

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of rent falls entirely within the discretion of the court under section 133(1)(b), and is dependent on the peculiar facts of each case.

It is submitted that this is the correct approach for South African law to adopt. To do otherwise in our law would result in inflexibility and rigidity, with attendant hardship for both financially distressed companies in business rescue, as well as other stakeholders with interests in the matter. Whether the owner of property whose land or goods are being used by the company during the temporary period of business rescue, should be paid before other creditors, must depend on the circumstances, which will differ from one case to the next.

(b) The legal position in comparable jurisdictions

The legal position in South African law can be contrasted with English and US law. In English law, the payment of rent to the property owner was previously a matter that fell within the discretion of the court, similar to the current position in South African law. However, the English legal position has been amended by the enactment of r.2.67(1)(a) of the Insolvency Rules. Because of the application of r.2.67(1)(a), post-administration liabilities arising under pre-administration contracts are payable as expenses of the administration. The result is that in English law, the lessor is entitled to payment of rental amounts from the administrator as they fall due during the administration; the payment of rental amounts is no longer a matter within the discretion of the English courts.⁴⁸

The US also has special statutory rules designed for the protection of property owners. A brief discussion of US law is useful insofar as it demonstrates the primacy given to the protection of the landlord in Chapter 11 bankruptcy proceedings. The automatic stay in bankruptcy in the US system is very wide and, as is the case in South African law, also extends to property which the debtor controls but does not own.⁴⁹ Accordingly, the lessor of property to a company in reorganisation proceedings in terms of Chapter 11 of the US Bankruptcy Code, cannot reclaim the leased property. The US bankruptcy court does, however, have a discretion in deciding whether to terminate or lift the stay. One of the most powerful tools available to a Chapter 11 debtor is its ability to decide whether to assume (ie, honour) or reject contracts of lease and other executory contracts under which both parties have extant obligations.⁵⁰

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The Chapter 11 debtor generally has until confirmation of the plan to make its decision on executory contracts, but a specific exception has been created for non-residential lease agreements of real property.⁵¹ This exception strengthens the legal protection of the landlord. In the case of a lease of non-residential real property, until such time as the lease has been assumed or rejected, the debtor is expressly required to continue to perform its obligations to pay the rent post-bankruptcy timeously. Although the bankruptcy court may postpone the performance of the debtor's obligations arising during the first 60 days post-bankruptcy, these may normally be postponed to no longer than the end of this initial 60-day period.⁵² These provisions serve to prevent the Chapter 11 debtor from occupying rented premises indefinitely without paying rent to the landlord.

Furthermore, US law imposes a deadline on the assumption or rejection of non-residential real estate leases. Since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005,⁵³ such leases are deemed to have been rejected unless they are assumed within 120 days after filing for bankruptcy. This is subject to extension by the court to 210 days for good cause, but no longer than this without the consent of the landlord.⁵⁴ Before 2005, debtors enjoyed a virtually unlimited assumption/rejection period in respect of such leases. The result of the amendment is that in the interests of creating certainty for landlords, there are now shorter stays for retailers and other debtors who rely on leased property.

Significantly, once a contract has been assumed, special priority is accorded to the debtor's obligations under the contract, as they become post-petition 'administrative expenses' which must be paid in full and on time.⁵⁵ US legislation therefore specifically provides that post-commencement rental payments under a lease that has been assumed by the debtor, enjoy administrative expense priority.

Lessors of personal property are also protected by US legislation, albeit in a somewhat diluted form. They are to be paid obligations arising after the first 60-day post-bankruptcy period and before assumption or rejection of the contract, unless the court orders otherwise.⁵⁶

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In sharp contrast to English and US legislation, South African legislation does not provide for the treatment of post-commencement rental payments as administrative expenses, nor do they constitute post-commencement finance. The South African legislature has favoured the adoption of a discretionary approach to the payment of post-commencement rent to property owners, in terms of which the courts have room to manoeuvre and flexibly to take cognisance of widely varying circumstances when exercising their power to permit the property owner to sue for rent under section 133(1)(b). The burden of developing applicable legal principles falls to the judiciary. The courts must use the wide discretion bestowed on them by the legislature to level the playing field between the property owner and the company in business rescue, by giving due weight to the interests of property owners and vigilantly thwarting situations where property owners are denied both their property as well as their rent during business rescue, save to the extent that this is strictly unavoidable. However, to confer a super-priority status on post-commencement payments of rent as post-commencement finance or as costs of the business rescue proceedings, would result in rigidity

and an undue elevation of proprietary interests ahead of the interests of all other creditors and stakeholders in the successful rescue of the company. As required by section 7(k) of the Act, the rights and interests of all parties during business rescue must be balanced.

VII Conclusion

The two primary grievances of the owner of property leased, occupied, or possessed by a company under business rescue, are the continued payment of its rent or other compensation, and the recovery of possession of the property. The moratorium in business rescue does not extinguish the company's legal duty to pay rent, but any legal proceedings or enforcement action by the property owner to recover unpaid rent or other compensation from the company are frozen unless the business rescue practitioner or the court consents to lifting the moratorium. This consent simply releases the applicant's rights from the freeze, and gives him or her liberty to enforce such rights.⁵⁷

Although the business rescue practitioner may avoid the company's legal duty to pay ongoing rent during business rescue, the property owner retains the right to cancel the lease agreement, as business rescue is not a bar to cancellation of the agreement on the basis of breach (save

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in circumstances where the business rescue practitioner has suspended the company's obligation to pay post-commencement rent). While cancellation is permissible, the moratorium still restricts the property owner from repossessing its property from the company following the cancellation of the agreement, unless the business rescue practitioner or the court consents.⁵⁸ During business rescue, the company is therefore empowered by the moratorium to continue to use and enjoy premises held on lease, together with equipment, vehicles, or goods held on lease or under instalment-sale transactions.

Although the moratorium triggered by the initiation of business rescue encroaches on the proprietary rights of third parties, it is a cardinal feature of the business rescue regime. It is purposed at providing temporary breathing space while the business rescue practitioner, in his or her role as the new management of the company, seeks to rehabilitate the distressed company and accomplish one of the two aims of business rescue set out in the Act. The property of third parties which is possessed or occupied by the distressed company, may be a key component of the company's business and indispensable to the success of the rescue endeavour.

The legislature has struck a proper balance in the Act between the goals of business rescue and the prejudice caused to property owners. The moratorium is balanced against the safety measures for property owners built into the system. These protective measures give the court and the business rescue practitioner a discretion to lift or terminate the moratorium during business rescue. The practical effect of these safeguards is not only to assist the property owner to recover its property from the company in business rescue, but also to enable it to receive ongoing payment of current rent and other compensation for the company's use of its property during the business rescue endeavour. The property owner who seeks to recover its property from the company in business rescue may do so either with the written consent of the business rescue practitioner under section 134(1)(c), read with subsection (2), or with leave of the court under section 133(1)(b) to institute legal proceedings for the repossession of the property. In similar vein, property owners who seek the continued payment of current rent and other compensation during the rescue process, are empowered to initiate legal proceedings for such payment either with the written consent of the business rescue practitioner under section 133(1)(a), or

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with leave of the court under section 133(1)(b) subject to terms the court considers appropriate.

The protection of property owners during business rescue is, consequently, not an issue of whether an amendment to the Act is necessary. It is rather a question of the proper application of the provisions of the Act by the courts and business rescue practitioners. It is crucial that the statutory safeguards for property owners be carefully developed by the courts to ensure that they operate in an efficient and effective manner. To this end, it is submitted that, in considering whether to grant leave to the property owner to exercise its proprietary rights against a company in business rescue, the courts ought to implement the following guiding principles:

1. First, 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 business rescue practitioner or the court should lift the moratorium and permit the property owner to enforce its right to repossess the property.
2. Secondly, in cases where the repossession of the property would obstruct the purpose of the rescue, whether the court should lift the moratorium and grant leave to the property owner to *repossess its property*, should be determined by means of a balancing test. The balancing test requires the court to weigh up the loss or detriment (whether direct or indirect) that would be caused to the property owner who is compelled to leave its property in the possession of the company, against the loss or detriment that would be caused to the company, its other creditors as a whole, its employees, and other relevant stakeholders should the property owner be granted leave to deprive the company of possession of the property.

Where the moratorium would result in substantial loss or detriment to the property owner, this ought to provide an adequate basis for the grant of leave to the property owner to repossess the property. The balance, however, may lie in favour of a refusal of leave if proportionately greater loss or detriment would be caused to the company and other parties involved, its other creditors as a whole, its employees and other relevant stakeholders by the grant of leave to repossess the property. In other words, leave may be granted to the property owner if the balancing test shows that the loss or detriment that would be caused to the property owner by reason of the moratorium outweighs the loss or detriment that will be caused to the company, its creditors as a whole, its employees and other relevant stakeholders by a lifting of the moratorium to

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allow the recovery of the property by the property owner.

How exactly the balance is struck in practice must depend on the factual circumstances of each case. In weighing up the competing losses and benefits of the parties, the courts should take cognisance of all relevant factors, including but not limited to: (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.

3. Thirdly, in cases where the property owner is refused leave or permission to repossess its property from a company under business rescue, this, as a general rule, must be on the basis of the ongoing payment of current rent or other compensation to the property owner for the use and enjoyment of its property. If property owners are routinely denied repossession of their property without any ongoing payment of rent or other compensation, the business rescue effort will effectively be run at the property owner's expense. This outcome should, insofar as possible, be avoided.

There can, however, be no absolute entitlement to ongoing payment of the property owner during business rescue. The courts must similarly use a balancing test when deciding whether to permit the property owner to enforce its right to receive ongoing payment of current rent or other compensation, taking cognisance of parallel factors to those listed above.

In exceptional and deserving cases where a distressed company is found to be financially incapable of making rental (or other) payments, the period for which the company is given respite from the payment of current rent must be strictly limited by the courts.

As a broad and general guideline, it is suggested that this period be capped at three months.

The courts, similarly, ought to intervene where the business rescue practitioner has exercised his or her power of suspension in terms of section 136(2)(a) to suspend the company's obligations to pay rent or other compensation in a manner that is unjust or inequitable to the property owner. It has been submitted that the court has a residual power to lift the suspension and grant leave to the property owner in terms of section 133(1)(b).

The above guidelines may also be useful to business rescue practitioners. Contrary to the dictum of the Supreme Court of Appeal in *Chetty t/a Nationwide Electrical v Hart and another NNO*,⁶⁰ it is submitted that the property owner or any other creditor, rather than being permitted to go directly to the court to seek leave to commence legal proceedings,⁶¹ must be required first to approach the business rescue practitioner for such permission — whether it be consent for legal proceedings⁶² or consent for the recovery of its property.⁶³ Court applications for leave should be reserved for those cases where the business rescue practitioner has refused to consent. This approach would not only alleviate the burden on the courts, but would also save legal costs and limit the disruption caused to business rescue proceedings by applications for judicial leave. It is far preferable for the business rescue practitioner to deal with these matters so that once practical guidelines have been developed in our law, court applications for leave will ultimately be the exception rather than the norm.

Finally, the South African Act, in stark contrast with English and US legislation, contains no automatic right to post-commencement rental payments for the lessor, nor does it give such post-commencement rental payments any priority as administrative expenses or as post-commencement finance. The South African legislature has instead placed the matter entirely within the discretion of the court, and has given the court not only a wide discretion to grant leave, but also extensive powers to impose any terms it considers appropriate. This is the correct approach for South African law to adopt, as it gives the court the flexibility to take account of widely differing circumstances that may vary from one case to the next. The conferral of a super-priority status on post-commencement payments of rent would not only cause hardship

to financially distressed companies undergoing business rescue together with their other creditors, employees and stakeholders, but would also unduly elevate the interests of the property owner above the interests of the other creditors of the company as a whole.

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1 See MF Cassim 'The effect of the moratorium on property owners during business rescue' (2017) 29/3 SA Merc LJ 419. This article should be read together with the present article.

2 MF Cassim (2017) 29/3 SA Merc LJ 419 para V.

3 See eg *Madodza (Pty) Ltd v Absa Bank Ltd* (38906/2012) 2012 ZAGPPHC 165 (12 August 2012); *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and others* 2016 (6) SA 448 (KZD); *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC); and *Kythera Court v Le Rendez-Vous Caf, CC* 2016 (6) SA 63 (GJ), as discussed in MF Cassim (2017) 29/3 SA Merc LJ para V(a).

4 See further MF Cassim (2017) 29/3 SA Merc LJ para V(b)-(d).

5 These purposes are discussed in MF Cassim (2017) 29/3 SA Merc LJ para V(b).

6 Section 134(2) of the Act.

7 See further Paragraph III below.

8 *Chetty v Hart* 2015 (6) SA 424 (SCA) para 40.

9 See, eg, *Mabote v Van der Merwe* [2016] ZAGPJHC 185 (18 July 2016) para 29 and *Arendse v Van der Merwe* 2016 (6) SA 490 (GJ) para 29. But see also *Redpath Mining South Africa (Pty) Ltd v Marsden* [2013] ZAGPJHC 148 (14 June 2013) paras 70-71.

10 *Mabote v Van der Merwe (Mabote)* [2016] ZAGPJHC 185 (18 July 2016).

11 See MF Cassim (2017) 29/3 SA Merc LJ 419 para V for a discussion of the purpose of the moratorium in s 133(1)(b), the goals of business rescue in terms of s 128(1)(b), and the significance of the stated purpose of the Act as contained in s 7(k).

12 *Mabote* paras 11-13 and 29. See also *Arendse* para 11.

13 See also *Chetty t/a Nationwide Electrical* para 28, where the Supreme Court of Appeal referred to a similar factor for the business rescue practitioner to consider in the exercise of his or her discretion to grant consent under s 133(1)(a).

14 *Mabote* para 28; see also *Arendse* para 28.

15 *Mabote* para 40.

16 *Mabote* paras 11, 28 and 29.

17 *Mackay v Kaupthing Singer* [2013] EDWHC 2533 (Ch); *Re Atlantic Computer Systems Plc* [1992] Ch 505.

18 *Re Java 452 Pty Ltd (admin apptd) v Stout* (1999) 32 ACSR 507; *Canberra International Airport Pty Ltd v Ansett Australia Ltd* [2002] FCA 329.

19 *178 Stamford Hill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015).

20 *178 Stamford Hill CC* para 29.

21 The court in *178 Stamford Hill*, however, did not decide whether its leave was required in the first place, but simply stated that if leave were required, it was of the view that this was a case where the court should grant leave (*178 Stamford Hill CC* paras 30-31). See further M F Cassim op cit note 1 para V on the fundamentally important issue of whether the leave of the court is required to bring ejection proceedings from leased property in circumstances where the landlord has cancelled the agreement of lease.

22 See further MF Cassim (2017) 29/3 SA Merc LJ para V, which discusses the purposes of business rescue in terms of s 128(1)(b)(iii) and the purpose of the moratorium.

23 MF Cassim (2017) 29/3 SA Merc LJ para V.

24 *Mabote* para 28. See Paragraph III(b) above.

25 See, eg, *Re Java 452 Pty Ltd (admin apptd) v Stout* (1999) 32 ACSR 507; *Canberra International Airport Pty Ltd v Ansett Australia Ltd* [2002] FCA 329; *Debis Financial Services (Australia) Pty Ltd v Allied Bellambi Collieries Pty Ltd* [1999] NSWSC 936; *Re Atlantic Computer Systems Plc* [1992] Ch 505.

26 *Mabote* para 40.

27 *Mabote* para 28.

28 See, eg, *Canberra International Airport Pty Ltd v Ansett Australia Ltd* [2002] FCA 329; *Re Atlantic Computer Systems Plc* [1992] Ch 505.

29 *Kythera Court v Le Rendez-Vous Caf, (Kythera Court)* CC 2016 (6) SA 63 (GJ).

30 The court in *Kythera Court* instead ruled that the moratorium did not operate at all where the lease agreement had been cancelled, and that the property could be recovered by its owner without the need first to seek the leave of the court under s 133(1)(b). It is submitted with respect that this is not the correct approach for the courts to adopt. For a discussion of whether the moratorium on the repossession of property applies where the property owner has cancelled the agreement with the company in business rescue, see MF Cassim (2017) 29/3 SA Merc LJ para V.

31 See *Mackay v Kaupthing Singer* [2013] EDWHC 2533 (Ch); *Re Atlantic Computer Systems Plc* [1992] Ch 505; *Innovate Logistics Limited (in administration) v Sunberry Properties Limited* [2008] EWCA Civ 1261.

32 See *Canberra International Airport Pty Ltd v Ansett Australia Ltd* [2002] FCA 329; *Re Java 452 Pty Ltd (admin apptd) v Stout* (1999) 32 ACSR 507.

33 See *Bristol Airport Plc v Powdrill* [1990] Ch 744; *Re Atlantic Computer Systems Plc* [1992] Ch 505.

34 See *Hamilton v National Australia Bank* (1996) 14 ACLC 1202; *Canberra International Airport Pty Ltd v Ansett Australia Ltd* (2002) 20 ACLC 1133 (FCA); *Re Java 452 Pty Ltd (admin apptd) v Stout* (1999) 32 ACSR 507; *Re Ansett Australia Limited (administrators appointed); Intrepid Aviation Partners VII LC v Ansett Australia Limited (administrators appointed)* (2001) 39 ACSR 255.

35 *Cloete Murray v First Rand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA). See further MF Cassim (2017) 29/3 SA Merc LJ para III.

36 See MF Cassim (2017) 29/3 SA Merc LJ paras III, V(b) and V(d).

37 MF Cassim (2017) 29/3 SA Merc LJ paras III, V(b) and V(d).

38 FHI Cassim 'Business Rescue and Compromises' in FHI Cassim et al, *Contemporary Company Law* 2ed (Juta 2012) 887.

39 See Paragraph VI for a more comprehensive discussion of the lessor's right to rental payments during administration in English law and during bankruptcy proceedings in US law.

40 Chapter 11 of the US Bankruptcy Code, Bankruptcy Reform Act 1978 11 USC, s 365(d)(3). See further Paragraph VI below.

41 See further MF Cassim (2017) 29/3 SA Merc LJ para IV, for a more comprehensive discussion of suspension under s 136(2)(a), including a discussion of relevant judicial authority.

42 As submitted in MF Cassim (2017) 29/3 SA Merc LJ para IV, the power of suspension applies only to contractual obligations of the company that would

become due *during* the business rescue proceedings. Thus where the company, at some stage *before* the commencement of business rescue, had failed to honour its obligations to pay rent to the property owner, the property owner retains the right during business rescue to *cancel* the agreement — notwithstanding the suspension of the agreement by the business rescue practitioner.

43 See Paragraph V(a) above.

44 Regulation 128(3) of the Companies Regulations (GN R351 GG 34239 of 26 April 2011) states that the expenses of the business rescue practitioner means the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out his or her functions and facilitate the conduct of the company's business rescue proceedings.

45 Section 135(2) of the Act.

46 FHI Cassim 'Business Rescue and Compromises' in FHI Cassim et al, *Contemporary Company Law* 2ed (Juta 2012) 882.

47 FHI Cassim 'Business Rescue and Compromises' in FHI Cassim et al, *Contemporary Company Law* 2ed (Juta 2012) 883.

48 See *Re Game Station Ltd* [2014] EWCA Civ 180; *Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration)* [2009] EWHC 3389 (Ch).

49 US Bankruptcy Code 11 USC, s 362.

50 USBC s 365(a).

51 USBC s 365(d).

52 Section 365(d)(3). See Paragraph VI(b) above.

53 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub L No 109–8, 119 Stat 23 (2005).

54 BAPCP Act s 365(d)(4).

55 BAPCP Act s 503(b)(1)(A).

56 BAPCP Act s 365(d).

57 See further MF Cassim (2017) 29/3 SA Merc LJ 417.

58 See further MF Cassim (2017) 29/3 SA Merc LJ 417.

59 Or the consent of the business rescue practitioner under s 133(1)(a).

60 *Chetty t/a Nationwide Electrical v Hart and another NNO* 2015 (6) SA 424 (SCA).

61 Section 133(1)(b).

62 Section 133(1)(a).

63 Section 134(1)(c).