THE POWERS OF BUSINESS RESCUE PRACTITIONERS IN RESPECT OF EXECUTORY CONTRACTS

by

Cobus Nieuwoudt

13005538

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Delcaration

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Summary

With the coming into operation of the new Companies Act of 2008, business rescue replaced judicial management to remedy the somewhat flawed restructuring process in place at the time. The business rescue practitioner is the key role player in business rescue proceedings and is responsible for facilitating the rehabilitation of the company. In the course of fulfilling his functions, the business rescue practitioner will be faced with various legal issues and challenges, including the treatment of executory contracts.

Unlike general insolvency proceedings, the rights of creditors and the role of the business rescue practitioner are still somewhat uncertain when it comes to executory contracts, which may be attributed to the fact that the courts are required to play an active role in interpreting the provisions of the Companies Act, specifically sections 133, 134 and 136. With executory contracts, the courts are often tasked with determining whether the cancellation of an agreement by a creditor constitutes legal proceedings or enforcement action and whether this has consequences for the lawfulness of the company's possession of property subject to the agreement. Decisions in this regard could infringe upon the moratorium that the company in business rescue is entitled to and negatively affect the powers of the business rescue practitioner. Statutory amendments and judicial precedent have attempted clarifying issues regarding the powers of the business rescue practitioner in respect of executory contracts and the upholding of these contracts. However, the suspension power of the business rescue practitioner and the current moratorium provision remain contentious areas of law.

In this dissertation, I investigate the powers of the business rescue practitioner with the aim of seeking a resolution to the conflicts between the powers of business rescue practitioners and the rights and obligations of creditors. Furthermore, this dissertation will investigate whether the powers of the business rescue practitioner are affected by a breach of contract that occurred before and/or during business rescue proceedings and what affect such a breach will have on the business rescue as a whole. To this end, I will also investigate the differences between the South African Companies Act, the USA Bankruptcy Code and the Australian Corporations Act to draw conclusions and make recommendations regarding the best way forward for the

South African approach to the treatment of executory contracts during business rescue by the business rescue practitioner.

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Chapter 1
Introduction

1.1 Background

When business rescue comes to mind, without having any prior knowledge about it, it might be natural to think that it involves some form of procedure that will save a company. This rescue effort would be orchestrated by a person who is willing to make crucial decisions in the face of adversity. This person is tasked with displaying acts of bravery, persistence and ingenuity to device a means to save the victim, much like a hero would. According to this analogy, the business rescue practitioner (BRP) is the hero, while the company is the victim in need of saving.

According to Greek mythology, one of the greatest heroes of all time was Achilles. Achilles fought in the Trojan War, leading the Greeks into battle, defeating the Trojan army, and ultimately conquering Troy. The combat skills of Achilles were unmatched, as one by one he defeated anyone who opposed him. He was also a master tactician, both on and off the battlefield. His skillset saved the lives of thousands of Greek soldiers whose lives would otherwise have been expended. However, Achilles, who seemed nearly invulnerable, had one fatal weakness, his infamous Achilles heel. Tragically, an arrow to the heel was all it took to defeat this Greek hero.

The relevance of this analogy is that every hero has a weakness. As the hero, the BRP must step in and find a way to save the distressed company, giving it a second chance at life, and saving the “lives” (or rather, livelihoods) of hundreds or even thousands of employees. However, the BRP also has an Achilles heel: the current statutory provisions regulating his powers as well as the general moratorium have in many cases proven to be the downfall of the BRP, specifically when it comes to executory contracts. As argued in this dissertation, the objectives of business rescue cannot be achieved, and the BRP cannot serve his function as a hero, as it were, if amendments are not made to empower the BRP adequately and assist him in saving the distressed company.

Business rescue is a relatively new concept in South Africa and potentially provides a distressed company with what one could call a second chance at conducting business on a solvent basis. Business rescue is regulated by Chapter 6 of

the Companies Act of 2008. As seen in many other countries, the call for corporate rescue procedures was a global phenomenon. Some developed countries, such as the United States of America (USA or US), have answered this call by providing reorganisation as a corporate rescue procedure to companies. Soon to follow suit were other developed countries, such as Australia and the United Kingdom, who would similarly provide their companies with an alternative to winding-up. Developing countries, such as South Africa and China, later followed to introduce their own corporate rescue mechanisms as well.

No country will be able to duplicate the exact corporate rescue regime of another country due to the legal intricacies of each country within its own legal sphere and, therefore, every corporate rescue regime should be tailor made for that specific country. It is inevitable that each rescue regime will have its weaknesses and strengths and will require constant legislative or judicial intervention to refine and perfect the proceedings. South Africa is no stranger to statutory amendments and judicial intervention, but as seen throughout this dissertation, these interventions have not necessarily clarified the issues regarding executory contracts in full.

Before the introduction of business rescue, judicial management and compromises were the only corporate rescue procedures available to a company in South Africa. Of the two, judicial management resembled business rescue the closest. However, judicial management did not quite reach its expectations and was more of a last resort rather than a useful alternative to general insolvency proceedings. Indeed, it was almost impossible to be placed under judicial management due its high threshold of requiring a reasonable probability of success. Judicial management was an idealistic corporate rescue regime that could hardly be utilised and was ultimately coined as a “spectacular” and “abject” failure.[1]

However, a modernised system of regulation was needed to accommodate and protect companies who experienced hardship.[2] The South African Government noted that an attempt had to be made to change judicial management and offer a better form

[1] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 7. See also *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 9.

[2] The Department of Trade and Industry *Policy paper: South African company law for the 21st century: Guidelines for corporate law reform* (GN 1183 in GG26493 of 23 June 2004) para 4.6.2.

of business rescue.[3] Therefore, the position under the new Companies Act of 2008[4] is meant to be a more company-friendly approach to insolvency.[5]

With the inception of business rescue in the hope of addressing the shortcomings of judicial management, the BRP has also been formally introduced. The BRP is tasked with taking full management control of the company, investigating its financial affairs and developing a business rescue plan. The BRP plays a pivotal role in business rescue and is equipped with both specific and general powers to do so. The main focus of this dissertation is the powers and duties of the BRP with respect to executory contracts. An executory contract (or an uncompleted contract) is a contract in which one or both of the parties to the contract have an outstanding obligation at the moment when the company enters a formal insolvency proceeding. Typical executory contracts include instalment sale agreements, lease agreements and employment contracts. The treatment of executory contracts is a significant issue in the current business rescue sphere and urgently requires clarification. Executory contracts play an important role in a company commencing with business rescue, as they remain in force and the BRP is responsible for dealing with them. The BRP is tasked with either suspending the obligations in terms of these executory contracts or applying to court to have these contracts cancelled. However, the suspension power of the BRP raises certain questions, not least of which because such suspension power is not evident in most foreign jurisdictions, which makes it difficult to compare and find possible solutions.

There is a need to investigate the statutory provisions and judicial precedent in relation to powers of the BRP when it comes to dealing with executory contracts. A particularly thorny question is whether the moratorium, as currently formulated and interpreted, adequately assists the BRP to properly serve his function of returning the company to operating on a solvent basis and whether one can learn any lessons from foreign jurisdictions to further enhance the South African law on business rescue.

[3] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 501.
[4] Ch 6 of the Companies Act 71 of 2008.
[5] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 41.

1.2 Problem statement

One of the matters that any insolvency proceeding must cover is rules on how existing executory contracts should be dealt with. Almost all companies that enter insolvency proceedings will have one or more executory contract that will require urgent treatment by its insolvency practitioner. Are these contracts automatically cancelled, should they continue as normal or should the insolvency practitioner be granted certain unique powers regarding such contracts? The research problem of this dissertation revolves around executory contracts in the context of the business rescue procedure in South Africa, particularly the powers of BRPs when it comes to such contracts.

When a BRP is appointed to office, he needs to know in terms of which contracts he can suspend the obligations or when he can apply to court to have these executory contracts cancelled. The problem, as illustrated in this dissertation, is that BRPs often attempt to suspend obligations in terms of executory contracts under circumstances where a breach of contract occurred before business rescue proceedings commenced or BRPs attempt to retrospectively suspend obligations after an executory contract has been validly cancelled. What should happen in these circumstances? Is the company and its BRP at fault or is the judicial precedent and current statutory provisions unclear in this regard? Furthermore, is this lack of clarity on how to treat executory contracts attributable to the unclear statutory provisions or are there other underlying factors that need to be considered? Other than the inadequate use of the suspension power of the BRP, the company in business rescue and its BRP often continue to occupy immovable property and/or use movable assets in terms of contracts that have been validly cancelled. Do they continue such possession with the hope that the moratorium will provide them with adequate protection, or does the moratorium only create a false sense of security? Furthermore, this continued possession and occupation are usually coupled with continued non-performance by the company and its BRP before and during business rescue. What should happen in these circumstances? Can the BRP and company continue remaining in possession without honouring their contractual obligations, such as paying rent, or should the property be forfeited or repossessed by the counterparty?

Statutory amendments and judicial precedent have attempted to clarify these issues pertaining to the powers of BRPs and the moratorium in the context of upholding executory contracts, but to no significant effect.

1.3 Research questions

In view of the above research statement, the discussion will consider the following research question throughout the analysis:

- What are the statutory powers of the BRP in South Africa, specifically when it comes to executory contracts of the company placed in business rescue?
- What uncertainties and problems are there regarding the abovementioned powers and what possible solutions have been put forward?
- Can the BRP suspend obligations in terms of a contract that became due before the commencement of business rescue proceedings, or will he only be empowered to suspend obligations that have become due during business rescue proceedings?
- Will the counterparty be bound by such suspension?
- Can the counterparty elect to cancel a contract where the obligations under such a contract have been suspended or does it have to honour its obligations while not receiving any counter performance?
- What will happen in terms of a suspended obligation of an executory contract if the counterparty already performed?
- Do the abovementioned powers of the BRP conflict with the rights and obligations of creditors and, if so, how can these issues be resolved?
- Does the moratorium provide adequate protection, allowing the BRP to exercise his functions properly by investigating the affairs of a company and allowing it to return to operating on a solvent basis by utilising assets in the possession of the company?
- Will the cancellation of an executory contract by a counterparty effect the lawful possession of property subject to that contract? Will the moratorium bar such cancellation?
- If cancellation by the counterparty is indeed possible, can the counterparty enforce its property rights? Will the moratorium bar such enforcement?
- How does selected foreign jurisdictions, such as the USA and Australia, deal with balancing the powers of the BRP with the rights of creditors, and which lessons can be learnt for purposes of improving the South African approach to executory contracts?

1.4 Hypotheses

The investigation conducted in this dissertation is based on the following hypotheses:

- The BRP has certain important express and implied powers when it comes to executory contracts of the company placed in business rescue. However, despite statutory amendments, there remains significant uncertainties regarding these powers that need clarification.
- The BRP can only suspend obligations in terms of executory contracts that have become due during business rescue proceedings.
- The counterparty to an executory contract that has suspended obligations will have to abide by such suspension and cannot cancel such a contract.
- There are certain conflicts between the powers of BRPs and the rights and obligations of creditors – not only in general, but specifically when it comes to executory contracts.
- As currently interpreted and applied, the moratorium does not adequately assist the BRP in saving a company.
- The moratorium will bar cancellation and prohibit the enforcement of property rights by a creditor, as these constitute legal proceedings and enforcement action respectively, as provided for in the Act.
- The USA and Australia deal differently with the powers of a BRP than South Africa and, therefore, a comparative study could provide insights for the possible way forward in South Africa.

1.5 Methodology

For purposes of this dissertation, I will critically discuss and analyse the relevant statutory provisions giving rise to the powers of a BRP. To enable this, a thorough review of literature, legislation and case law regarding the South African position pertaining to executory contracts in business rescue will be conducted.

A comparative study will also be done to reflect on the different approaches adopted in selected other jurisdictions, specifically the USA and Australia, to draw lessons for South Africa in this regard.

This dissertation will only consider the current legal position up until 30 June 2021.

1.6 Overview of chapters

Chapter 2 will focus on the current operation of business rescue in South Africa. I will give a brief overview of the start of the proceedings up until the termination thereof. In this regard, business rescue proceedings can commence in either of two ways, namely voluntarily or under compulsion. The commencement of business rescue is subject to the prerequisites that the company should be in financial distress and that a reasonable prospect to rescue the company should exist. The similarities and differences between the various requirements for the commencement of judicial management as compared to business rescue will also be summarised. In addition, I will discuss the primary and alternative objectives of business rescue.

In Chapter 3, I will investigate the general and specific powers of a BRP during business rescue proceedings, namely what the BRP can and cannot do when he is in office. Furthermore, the powers and duties of the BRP with respect to executory contracts will be discussed, with an emphasis on issues such as the BRP's power to suspend or cancel contracts. I will give various examples of executory contracts and current issues pertaining to executory contracts and discuss judicial precedent in determining how the BRP is supposed to treat these contracts.

Chapter 4 will focus on the conflicts that arise during business rescue in the context of executory contracts. These conflicts arise when the BRP and company in business rescue rely on the moratorium to afford it protection against counterparties cancelling contracts and exercising their property rights. However, the moratorium as a safeguard often does not provide the BRP with the adequate breathing space to deal with executory contracts, with the result that counterparties are often allowed to cancel their agreements and repossess their property through enforcement proceedings. I will discuss key concepts such "stay on legal proceedings", "enforcement action" and "lawful possession". Furthermore, I will discuss the current approach by the courts when they are faced with the provisions pertaining to the moratorium.

In Chapter 5, I will conduct a comparative study, where the legislative provisions and judicial precedence of each country will be discussed. This chapter will consider questions such as whether the manner in which the USA and Australia treat corporate rescue differ fundamentally from that of South Africa. Furthermore, I will investigate how the USA and Australia deal with executory contracts and the lessons that South Africa can learn from these jurisdictions.

In Chapter 6, I will draw conclusions regarding the adequacy of the current South African approach regarding executory contracts and make recommendations on how to improve the current state of affairs.

Chapter 2

Overview of the business rescue procedure

2.1 Introduction

Business rescue should provide a company with a much-needed breathing space to restructure its financial affairs.[1] Business rescue aims to rescue financially distressed companies in a manner that balances the interests of all the relevant stakeholders.[2] Therefore, not only the interests of the company in need of rescue are considered but also the interests of employees and creditors.

During the normal course of business, a company seeks to maximise shareholder wealth.[3] In business rescue proceedings, the purpose is focused, in turn, on allowing the company the necessary breathing space to become financially rehabilitated as per the Act.[4] Becoming solvent and profitable once again is the goal of a company under business rescue, which is in-line with achieving shareholder wealth. In contrast, during liquidation or general insolvency proceedings, the focus shifts from making a profit to the recovery of debts by the creditors.[5]

Liquidation will be the final nail in the coffin of a company and will have some serious consequences. For example, employees will no longer have a means of income until they find alternative employment, while suppliers and customers could also experience financial difficulty as a result of a company being liquidated. Therefore, liquidation proceedings should generally be avoided, if at all possible, to protect the socio-economic interests served by that company.[6] Notoriously, South Africa had a liquidation prone culture that business rescue seeks to reverse.[7] Business rescue is similar to liquidation in many respects. However, a BRP is appointed instead

[1] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 3.
[2] S 7(k) of the Companies Act 71 of 2008.
[3] MF Cassim "South African Airways makes an emergency landing into business rescue: Some burning issues" (2020) 137 *SALJ* 201-214 211.
[4] S 7(k) of the Companies Act 71 of 2008.
[5] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 60.
[6] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 14.
[7] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 9.

of a liquidator, and the process involves not only the creditors but also other affected persons.[8]

In the paragraphs that follow in this chapter, I will give an overview of business rescue, from the point of its commencement until its termination. I will discuss how the interpretation of the new Companies Act should be in favour of business rescue. I will discuss some important similarities between business rescue and judicial management as well some key differences. Most significantly is the threshold requirement of a reasonable probability that has changed to a reasonable prospect to allow more companies to make use of business rescue as a corporate rescue procedure.

In addition, the chapter will identify the primary and alternative objectives of business rescue. Furthermore, I will discuss key concepts such as a company being "financially distressed" and a "reasonable prospect" of rescue, both of which are critical to the commencement and continuation of business rescue proceedings. Therefore, this chapter lays the foundation for the discussion to follow in subsequent chapters regarding the powers of BRPs when it comes to executory contracts.

2.2 A brief history

Before the inception of business rescue, the only corporate rescue measures available to a company in South Africa were judicial management and compromises.[9] The concept of judicial management was introduced in the 1926 Companies Act and were later retained in the 1973 Companies Act. Judicial management was supposed to be a means to combat the socio-economic problems created by liquidation,[10] such as subjecting a company to liquidation where it, in fact, had the possibility of being saved. However, judicial management was flawed in many respects and was regarded in general as a failure.[11] Judicial management had a high threshold requirement that was all but unattainable, while the procedure itself was described as ineffective and

[8] *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening*) 2011 (5) SA 422 (GNP) para 19.
[9] Ss 427 and 311 of Companies Act 61 of 1973.
[10] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 14.
[11] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 9.

criticised for infringing on the rights of creditors.[12] Therefore, this ineffective corporate rescue regime had to be replaced with a more modern business rescue procedure in an attempt to remedy this flawed restructuring mechanism and ultimately to avoid the harmful consequences of liquidation if there was a possibility of saving the company.

The other alternative to liquidation as mentioned above was a compromise between the company, its members and the creditors.[13] Compromises were characterised as a "speedy remedy", but its major shortcoming as a corporate rescue mechanism was its failure to provide a moratorium, which in turn left the company vulnerable to legal proceedings.[14] Of the two alternatives to liquidation, judicial management offered some saving capability, even thought this was of little avail.

Traditionally, when a company was unable to pay its debt, a creditor of the failing company had a right *ex debito justitiae* to liquidate the company,[15] which indicates that South Africa followed a creditor-friendly or liquidation-prone culture. The court would only place a company in judicial management as an "extraordinary procedure" as an alternative to liquidation if the court deemed it appropriate.[16] However, the perspective of courts changed with the commencement of the business rescue regime under the new Act, where it is nowadays regularly stressed that judicial consideration should be given in favour of business rescue, to aid and assist the failing company. In other words, the courts had to make a mental shift away from the fact that creditors had an *ex debito justitiae* right to liquidate a company or to be paid in full.[17] This is due to the fact that business rescue attempts to balance the interests of all relevant stakeholders, which was not the case with judicial management.[18]

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[12] EP Joubert "Reasonable possibility versus reasonable prospect: Did business rescue succeed in creating a better test than judicial management" (2013) 76 *THRHR* 550-563 551.
[13] Section 311 of the Companies Act 61 of 1973.
[14] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 8.
[15] *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd (under curatorship, intervening)* 2001 (2) SA 727 (C) para 42, where the court applied the dictum of *Silverman v Doornhoek Mines Ltd* 1935 TPD 349 353.
[16] *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd (under curatorship, intervening)* 2001 (2) SA 727 (C) para 42, where the court applied the dictum of *Silverman v Doornhoek Mines Ltd* 1935 TPD 349 353
[17] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 22.
[18] Section 7(k) of the Companies Act 71 of 2008. See also *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 9.

The court in *Le Roux*[19] also described the judicial management system as a system that had barely worked since 1926.[20] Since a judicial management order was only granted in exceptional circumstances,[21] an attempt to rescue a company through judicial management was hardly ever attempted and, consequently, it did not have a high success rate.[22] On the other hand, the current business rescue proceedings is evidence of an attempt to transform corporate insolvency law, with the ideal that more companies in financial distress will be assisted through restructuring and that the interests of all affected persons will be considered.

2.3 Interpretation of the statute in favour of business rescue

Achieving the primary or alternative objective of business rescue by allowing the company to either return to operate on a solvent basis or offering a better return to creditors and shareholders than liquidation would have provided, is often hindered by some of the vague and/or unclear provisions in Chapter 6 of the Companies Act.[23] Indeed, these unclear provisions sometimes allow for the exploitation of inconsistencies and technical arguments put forward that inevitably prevent the purpose and objectives of business rescue from being fulfilled.[24]

Where such unclear provisions allow for a dispute in court, the court is tasked to consider and provide a sensible interpretation of the disputed provisions at hand.[25] The interpretation of legislation involves attributing meaning to the words contained therein.[26] These principles of construction involve firstly that effect should be given to the meaning of every word and every section in as far as possible to the extent that the provision is not without practical effect, and secondly, to reconcile as far as possible the provisions of a statute that are in conflict.[27]

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[19] *Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd (under curatorship, intervening)* 2001 (2) SA 727 (C).
[20] Para 60.
[21] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 10.
[22] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 501. See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 7.
[23] *Diener NO v Minister of Justice and Others 2018* (2) SA 399 (SCA) para 18.
[24] *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) para 1.
[25] Para 27.
[26] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[27] *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) para 27.

Section 7(k) of the Companies Act is important when it comes to business rescue. It explicitly states that the purpose of the Act is to provide for the efficient rescue and recovery of companies facing financial distress, by balancing the interests and rights of all relevant stakeholders.[28] The Companies Act should therefore be interpreted and applied to achieve and give effect to the aforementioned purpose.[29] Where an inconsistency arises between a provision in the Companies Act and a provision of any other national legislation, both provisions should be applied concurrently to the extent that one does not contravene the other.[30] If the provisions cannot be applied concurrently, the provision in the Companies Act will prevail unless the conflicting provision is from national legislation explicitly listed in terms of section 5(4).[31] Lastly, a court tasked with the interpretation of the Act is allowed to consider foreign law.[32]

The business needs to be rehabilitated and all relevant stakeholders should be benefited when the BRP develops a business rescue plan.[33] This is why the procedure is called "business rescue" and not "company rescue".[34] The focus is not only on ensuring that creditors can receive payment of their claims (as is the case in insolvency law), but even more so to protect a broader set of interests, including those of shareholders and employees.[35] An affected person is a person who has an interest in the company, no matter what their quantifiable monetary contribution or claim is and, consequently, their interests should be protected. Competing interests might be problematic, especially when a creditor wants the business to be liquidated while another affected person wants the company to commence with business rescue proceedings in order to ensure the continuation of the company.[36]

As mentioned above, when a BRP develops a business rescue plan, it should be to the benefit of all affected persons. Even though it is necessary for the plan to benefit

[28] S 7(k) of the Companies Act 71 of 2008.
[29] S 5(1).
[30] S 5(4)(a).
[31] S 5(4)(b)(i)-(ii).
[32] S 5(2).
[33] S 7(k).
[34] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 12; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).
[35] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 12; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).
[36] B Wassman "Business rescue-getting it right" (2014) January *De Rebus* 36-38 36.

all affected persons, it is often practically impossible to do so.[37] In the process of balancing the rights of all affected persons, there inevitably will have to be winners and losers. The precision and expertise lie within the formulation of a business rescue plan that will negate the most losses while offering a favourable return to the affected persons at stake. When the interests of all stakeholders are weighed, the company will become aware of those stakeholders who will advance business rescue and those who will hinder the objectives of business rescue.[38] Unfortunately, business rescue in practice often tend to focus primarily on the interests of creditors as the main category of affected persons, which is in line with the "Creditors bargain theory" on which insolvency law is based.[39] However, it is important to guard against the temptation to overemphasise the interests of creditors, since the Companies Act clearly expects the business rescue procedure to maintain a balance between the interests of all stakeholders. This balance should, moreover, also be kept in mind when interpreting and applying the provisions dealing with the powers of BRPs, including with regard to executory contracts.

2.4 Financially distressed

In order to qualify for business rescue, the company has to be financially distressed, meaning that it is reasonably unlikely that the company will be able to pay all of its debts in the ensuing six months, or alternatively when it appears likely that the company will become insolvent in the ensuing six months.[40] If a company is facing financial difficulty but not to the degree as envisaged in the Companies Act, the threshold of being financially distressed will not be met and the provisions of Chapter 6 will not apply.[41] Business rescue proceedings should be reserved for those companies that are capable to being rescued and those that could potentially trade on a solvent basis. These proceedings are not meant for the "terminally" or "chronically" ill companies.[42] It is also clear from the provisions of the Companies Act that business

[37] O Mokoena "The philosophy of business rescue law" (2019) 5 *JCCL&P* 1-41 6.
[38] 6.
[39] 7.
[40] S 128(1)(f)(i)-(ii) of the Companies Act 71 of 2008.
[41] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para 11.
[42] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 12.

rescue proceedings do not only apply to companies, but are also available for close corporations.[43] This is somewhat controversial, as the rescue proceedings for closed corporations apparently were adequate before the enactment of the 2008 Companies Act, and thus legislative intervention probably was not needed.[44]

The starting point for business rescue is to allow a company that is financially distressed to initiate proceedings that will start its rehabilitation.[45] This rehabilitation process entails the temporary supervision of the company, its management and its business affairs.[46] The company will also enjoy a temporary moratorium to prevent creditors and other counterparties from exercising their rights to repossess property in the lawful possession of the business.[47] Lastly, a restructuring plan in terms of the assets and liabilities of the business must be developed and implemented to rescue the business and to return it to a solvent status.[48]

The business rescue plan should maximise the likelihood that the company can continue with its normal day-to-day operations during and after business rescue proceedings.[49] The emphasis rests on the word "likelihood",[50] because even though a well-founded plan should be implemented, no plan can guarantee success.[51] The ultimate goal of rehabilitating the business is to allow a company to return to its solvent status or provide for a better return for its creditors or shareholders than what would have ensued if the company had to be liquidated.[52] The objectives and goals of the business rescue plan should be carefully weighed against the interests of creditors as well as the potential prejudice it might cause.[53] A business rescue application cannot serve as a means of deliberately obstructing a creditor from enforcing contractual or property rights by the company electing to enjoy the benefits of business rescue

[43] Item 6 of Sch 3 to the Companies Act of 2008.
[44] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 503. See also s 72 of the Close Corporations Act 69 of 1984.
[45] S 128(1)(b) of the Companies Act 71 of 2008.
[46] S 128(1)(b)(i).
[47] S 128(1)(b)(ii).
[48] S 128(1)(b)(iii).
[49] S 128(1)(b)(iii). See also *Absa Bank Limited v Caine NO and Another, In Re; Absa Bank Limited v Caine NO and Another* (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014) para 40.
[50] S 128(1)(b)(iii).
[51] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 2.
[52] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 501-512.
[53] MF Cassim "The safeguards and protective measures for property owners during business rescue" (2018) *SA Merc LJ* 40-70 41.

proceedings, while simultaneously not intending to resolve its financial issues speedily.[54]

As mentioned already, the primary objective of business rescue is the formulation of the business rescue plan that will assure that the company can return to and continue its normal business operations on a solvent basis.[55] The alternative objective, which is also evident in section 128 of the Act,[56] is that a plan can also be formulated to provide the creditors or shareholders with a better result than what would have ensued if an order were made for immediate liquidation.[57] In both instances, before business rescue can commence, there should be a cogent evidential foundation for a reasonable prospect that the company will be able to achieve either objective.[58] A reasonable prospect of rescue includes the situation where business rescue would only lead to a better dividend for creditors.[59] Whether or not this is what the legislature intended, a business rescue plan can be sufficient even if it does not have the aim of genuinely saving the company rather only protecting the creditors' or shareholders' interests.[60]

2.5 Commencing with business rescue

Business rescue proceedings can be initiated in two ways. The first is through the company passing a resolution to place the company in business rescue in circumstances where the company is financially distressed and where there would be a reasonable prospect to rescue the company.[61] This is referred to as "voluntary business rescue". It is clear from the wording of section 129 that two requirements need to be met before a resolution can be passed to initiate business rescue proceedings. The two requirements for passing a resolution might seem onerous but it is actually to the benefit of the company. Instead of reaching a point of factual insolvency (where the company's liabilities exceed its assets), the business can decide

[54] *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) para 20.
[55] S 128(1)(b)(iii) of the Companies Act 71 of 2008.
[56] S 128(1)(b)(iii).
[57] *Absa Bank Limited v Caine NO and Another, In Re; Absa Bank Limited v Caine NO and Another* (3813/2013, 3915/2013) [2014] ZAFSHC 46 (2 April 2014) para 40.
[58] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 17.
[59] *Collard v Jatara Connect (Pty) Ltd and Others* 2017 (2) SA 45 (WCC) para 7.
[60] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 11.
[61] S 129(1)(a) and (b) of the Companies Act 71 of 2008.

to go into business rescue at the point where it has reached commercial insolvency (the point where the company realises it will not be able to pay its debts in the near future).[62] It is important to distinguish between these two points of insolvency, as commercial insolvency still allows a company a window within which to rescue the business, whereas factual insolvency will in most instances probably lead to the winding-up of the company, since it might be too late to save the business.

The resolution by the board may only be initiated if no liquidation proceedings has been instituted against or by the company seeking to enter business rescue.[63] The business rescue proceedings also cannot come into effect until the resolution has been filed with the Companies and Intellectual Property Commission (CIPC).[64] Within five business days of the resolution being adopted and filed, the company should publish a notice of the resolution and its effective date, together with supporting affidavits, to all affected persons, and appoint a BRP who satisfies the requirements of section 138.[65] The appointment of the BRP and notice that should be published to all affected persons can be postponed by way of an application to the CIPC.[66] If an application is made to extend the time period within which to appoint a BRP, the time period is granted to finalise the registration of the proposed BRP. The extension does not serve as a blanket provision to appoint any BRP or to substitute one BRP for another.[67]

A failure to adhere to the prescribed time periods in section 129(3) and (4) will result in the adopted resolution being null and void, and the company will have failed to commence with business rescue proceedings.[68] Non-compliance will also result in the company being unable to file for a resolution to commence with business rescue proceedings for a period of three months after the lapse of the initial null and ineffective resolution.[69] In *Advanced Business Technologies and Engineering Company v Aeronautique et Technologies*,[70] Fabricius J stressed that the wording of section 129

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[62] B Wassman "Business rescue-getting it right" (2014) January *De Rebus* 36-38 37.
[63] S 129(2)(a) of the Companies Act of 2008.
[64] S 129(2)(b).
[65] S 129(3)(a) and (b).
[66] S 129(3) of the Companies Act 71 of 2008.
[67] *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees SAS and Others (GNP)* (Unreported Case No 72522/2011) para 22.
[68] S 129(5)(a) of the Companies Act 71 of 2008.
[69] S 129(5)(b).
[70] *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees SAS and Others (GNP)* (Unreported Case No 72522/2011).

should be interpreted narrowly so as not to render the provision meaningless and subverted.[71] Therefore, condonation for non-compliance with the prescribed time periods will not be allowed and mere substantial compliance will never be sufficient, since strict adherence is necessary.[72]

The second way of placing a business under supervision and business rescue proceedings is where an affected person applies to court.[73] This is referred to as "compulsory business rescue". Such an affected person includes a shareholder or creditor of the company; any registered trade union that represents employees of the company; and employees or their representatives who are not represented by a trade union.[74]

The applicant needs to notify all affected persons and serve a copy of the notification on the company and the CIPC.[75] A notification to affected persons can be made by sending an email, posting an announcement on the Securities Exchange News Service or publishing a notice in the Business Day Newspaper.[76] Physically delivering a copy of the business rescue application to all affected persons will often be financially impractical and unfeasible.[77] The affected persons have the right to participate in the hearing of the application.[78] Hence, affected persons should be notified of a business rescue application to enable them to properly exercise their right to participate in the business rescue application hearing.[79] Where such a right is an automatic right to participate in the hearing,[80] such a party, whether intervening or not, does not have to apply for leave to the court.[81] Leave may, however, be required when such leave forms part of the court procedure, in the instance where an intervening party intends on filing founding or supporting affidavits.[82]

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[71] Para 25.
[72] Paras 27-28.
[73] S 131(1) of the Companies Act 71 of 2008.
[74] S 128(1)(a)(i)-(iii).
[75] S 131(2)(a) and (b).
[76] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Project Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) para 17.
[77] Para 16.
[78] S 131(3) of the Companies Act 71 of 2008.
[79] *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para 15.
[80] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 4.
[81] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Project Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) para 21.
[82] *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para 30.

After the application has been heard, the court can exercise its discretion by making an order that will place the company under supervision and commence with business rescue proceedings.[83] A draft restructuring plan accompanied by substantial support and evidence of its likelihood of success will improve the prospects of an application.[84] In fact, without a restructuring plan, there is no application for business rescue, since the plan is foundational and essential to business rescue.[85]

Factors that the court will consider when deciding whether to grant the order that will place the company in business rescue are: whether it believes the company is financially distressed; whether the company has defaulted on some of its payment obligations, particularly in relation to executory contracts; and whether granting an order placing the business under supervision and commencing with business rescue proceedings would otherwise be just and equitable.[86] Any of the abovementioned grounds will be sufficient for a business rescue application to be granted. However, each of these grounds have to be accompanied by the ultimate requirement, namely that there should be a reasonable prospect of rescuing the company.[87] The court will perform a balancing exercise to determine whether the information presented by the respective applicant (affected person(s)) is enough to satisfy the court that a reasonable prospect exists, given the position of the affected person in relation to the company.[88]

If the court is not satisfied that the company is deserving of business rescue and that there will not be a reasonable prospect for the company to return to operate on a solvent basis or provide a better return for its creditors, the court can dismiss the application in its entirety and/or grant any other necessary orders, including an order to place the company under liquidation.[89] The same applies to liquidation proceedings, where a court can order the company to enter business rescue proceeding rather than

[83] S 131(4)(a) of the Companies Act 71 of 2008.
[84] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 13.
[85] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para 13.
[86] S 131(4)(a)(i)-(iii) of the Companies Act 71 of 2008.
[87] S 131(4)(a).
[88] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 17.
[89] S 131(4)(b) of the Companies Act 71 of 2008.

liquidation proceedings,[90] where such an order will suspend the liquidation proceedings.[91]

In terms of its power to grant a postponement,[92] a court can allow the applicant time to produce and corroborate sufficient evidence supporting a business rescue application. An affected party is not automatically entitled to a postponement, but rather to an order made in the interest of justice by a court in its discretion, where such an application is sought with good cause and within a reasonable time period.[93] The interests of justice is not limited to the parties involved in the application, but consideration should also be given to the public interest.[94] The applicant seeking an order for postponement should give reasons for the application, show the parties who will be prejudiced by a postponement order and indicate whether the application is opposed. Furthermore, the application should be made timeously.[95]

2.6 The requirement of a reasonable prospect

Under the 1973 Companies Act,[96] the court could grant an order to place a company under judicial management after it was showed that the company is unable to pay its current outstanding debt or that it is improbable that the company will meet its future debt payment obligations; the company has not become or prevented from becoming a successful going concern; and if the company is placed under judicial management there will be a *reasonable probability* that the company will be able to pay its current and future debts.[97]

The key difference between the similar provisions of the old regime and the new regime lies in the fundamental change from the term “reasonable probability” to the term “reasonable prospect”. Proving a reasonable prospect of rescue is much less onerous than proving a reasonable probability. Consequently, judicial management

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[90] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 32. See also S 131(7) of the Companies Act 71 of 2008.
[91] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 1.
[92] S 131(4)(b) of the Companies Act of 71 of 2008.
[93] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 7.
[94] *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) para 11.
[95] Para 10.
[96] Companies Act 61 of 1973.
[97] S 427 of the Companies Act 61 of 1973.

under the old Act was only granted in exceptional circumstances and the creditors were *prima facie* entitled to (and typically were granted) liquidation orders.[98] The old Act was ineffective in its rescue opportunity and was known to be a cumbersome procedure[99] that usually led to liquidation, whereas the new regime favours business rescue and ultimately strives to prevent liquidation.[100] Judicial management failed *inter alia* because the threshold of providing evidence of a reasonable probability of rescuing a company was too high.[101]

It could also be deduced from the wording of section 131 of the new Companies Act that a reasonable prospect means that "something less is required than that the recovery should be a reasonable probability".[102] Reasonable prospect cannot have such a high threshold as reasonably probability had with judicial management under the old Act.[103] Indeed, something less than a reasonable probability should be sufficient, where a possibility of rescue should exist and this possibility should be objectively reasonable.[104] In other words, it will be sufficient to show a reasonable prospect of saving the company (the primary objective) or of providing the creditors with a better return than they would have received if an immediate liquidation order was granted (the alternative objective).[105] Business rescue was introduced to help businesses in financial distress and to help a company avoid liquidation. Therefore, the provisions should be interpreted leniently, supporting the fact that business rescue is promoted instead of liquidation.[106]

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[98] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 21.
[99] Para 20.
[100] Para 21.
[101] Paras 20-22. See *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) paras 9-11. See also the commentary on section 131(4) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) *LexisNexis Looseleaf Edition* 492.
[102] *Oakdene Square Properties (Pty) and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 18; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA). See *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 21.
[103] *Oakdene Square Properties (Pty) and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 18. See also A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 506.
[104] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 12.
[105] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) para 23.
[106] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 21.

Before a court grants a business rescue, it must scrutinise the business rescue application to ensure that a genuine attempt was made by the applicant to demonstrate evidence of the likelihood of financial recovery.[107] In terms of the new regime, the threshold test for granting a business rescue application is indeed lower.[108] Nonetheless, concrete and objectively ascertainable facts and details should be disclosed to the court to sketch a scenario in which a successful financial restructuring and rehabilitation is indeed possible and viable.[109] Therefore, the applicant should clearly outline a cogent foundation for the rescue plan that will indicate the feasibility and viability of rescue.[110] This cogent foundation should emphasise the existence of the crucial requirement of a reasonable prospect of success.[111]

In the endeavour to persuade the court that evidence exists that will constitute a reasonable prospect and not mere speculation, the applicant should show the necessary and likely costs the company will have to undertake for business operations to continue as normal during business rescue and after its success; the available or liquid cash resources that the company has at its disposal to support daily business operations; the necessary credit facilities that the company relies on; and the availability of any other resource that the company has at its disposal.[112] In *Prospect Investments*, Van der Merwe J disagreed with the *Southern Palace Investments* judgment in part,[113] by stating that requiring a detailed factual foundation as a basis for showing a reasonable prospect sets the threshold too high. Instead, he reiterated that merely something less than a probability of rescue should be proved.[114] The authors of *Henochsberg* warn that if the level of proof is set too high, the stringent requirements would render the goal of showing a reasonable prospect unattainable

[107] Para 3.
[108] Para 22.
[109] Para 25.
[110] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 17.
[111] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) paras 13-15.
[112] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 24.
[113] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 11.
[114] Para 12.

and lead to business rescue becoming ineffectual as was the case under judicial management.[115]

Stipulating a mere amount of money that the business needs to obtain to rescue the business will not suffice; instead, a plan to obtain the monetary means should be formulated and illustrated.[116] The exact benchmark test for the existence of a reasonable prospect is still unclear and will be determined on a case by case basis. What can be said, however, is that the prospect of rescue should be objectively assessed and that the possibility of rescue should be demonstrated in the application for business rescue.[117]

2.7 Protection during business rescue proceedings

The two main tools to provide protection for a company under business rescue are the general moratorium on legal proceedings against the company[118] and the protection of property interests.[119] The moratorium is where most of the legal issues arise, as a creditor is not entitled to take any legal steps, including enforcement action, against the company.[120] However, the creditor in this situation does have remedies available to him to overcome this barrier, ensuring the adequate protection and recovery of his property.[121] These remedies are sometimes contradictory to the provisions set out by the legislature, as they often involve enforcement action that should have been barred by the moratorium. The moratorium is discussed in greater detail in Chapter 4 below.

2.8 Approval of business rescue plan

In order for a business rescue plan as proposed by the BRP to be approved, it has to be supported by a special majority of holders of creditors' voting rights, and the votes in favour of the proposed plan have to include a majority of the independent creditors'

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[115] See the commentary on section 131(4) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) *LexisNexis Looseleaf Edition* 492.
[116] *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 26.
[117] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 12. See also B Wassman "Business rescue-getting it right" (2014) January *De Rebus* 36-38 37.
[118] S 133 of the Companies Act 71 of 2008.
[119] S 134.
[120] S 133(1).
[121] MF Cassim "The safeguards and protective measures for property owners during business rescue" (2018) *SA Merc LJ* 40-70 41.

voting interests that voted.[122] Where shareholders' rights would also be adversely affected by the proposed business plan, their approval is required in addition to the creditors' approval.[123] Creditors' voting rights equate to the value of the debt owed to them by the company.[124] Therefore, where a creditor holds a large debt, it will allow him to reject a business rescue plan because he can use his voting rights to frustrate the restructuring.[125]

Where a large creditor is called upon to approve a business rescue plan despite having no intention to approve it, the whole procedure of the BRP to obtain approval might prove to be pointless.[126] Unless the creditors are unreasonable or *male fide* in rejecting the proposed rescue plan, they are entitled not to be prejudiced by the conditions of the plan.[127] However, in instances where a BRP attempted to obtain the approval of the creditors but they rejected it, the vote can be set aside by way of a court order.[128] Furthermore, if the BRP believes that the vote against the business rescue plan was arbitrary or inappropriate, he can also obtain a court order to set the vote aside.[129]

Once the business rescue plan has been adopted, it will be binding on all creditors and security holders of the company regardless of whether they were present at the meeting where they had to vote or if they voted against the business rescue plan.[130]

2.9 Termination

Business rescue proceedings do not continue indefinitely and will eventually have to come to an end. It is reasonable to expect that business rescue proceedings should only last for two to three months, whereafter the company should no longer enjoy

[122] S 152(2)(a)-(b) of the Companies Act 71 of 2008.
[123] S 152(3)(c)(i)-(ii). See also J Swanepoel & C Gopal "An inappropriate business rescue mess" (2013) July *Without Prejudice* 16-17 16.
[124] S 145(4) of the Companies Act 71 of 2008.
[125] Y Kleitman "When creditors reject business rescue" (2014) September *Without Prejudice* 6-7 6.
[126] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para 22.
[127] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) paras 37-38.
[128] S 153(7) of the Companies Act 71 of 2008.
[129] S 153(1)(b)(i)(*bb)*.
[130] S 152(4)(a)-(b).

protection.[131] Therefore, it can be terminated in various ways. Firstly, the business rescue proceedings will end when a court sets aside the resolution or court order that initiated the business rescue proceedings,[132] or where the court has converted the business rescue proceedings to liquidation proceedings.[133] Secondly, business rescue proceedings will be terminated when the BRP files a notice of termination with the CIPC.[134] Lastly, if a business rescue plan has been proposed and rejected and no affected person has acted in terms of section 153 to extend the proceedings,[135] or where a business rescue plan has been adopted and the BRP has accordingly filed a notice of substantial implementation of such business rescue plan,[136] it will also amount to the termination of business rescue proceedings.

If the business rescue proceedings have not ended within three months after its commencement, it can be further extended by the court on application by the BRP. However, the BRP must then compile monthly reports and distribute them to all affected persons to inform them of the financial progress the company has made until the moment business rescue has been terminated.[137] If the BRP failed to apply for an extension, the business rescue proceedings will be terminated.[138]

The term of office of the BRP will come to an end when the business rescue plan has been rejected, and any decision made by the BRP following such rejection will be deemed null and void.[139] A BRP will also forfeit his powers when he has been removed or replaced in terms of section 139 of the Act.[140] If the BRP has abused his powers during his time in office, he can be removed from office.[141] The BRP can also be removed when he is no longer competent to perform the duties of a BRP, when he is unable to exercise the degree of care and performance that is expected of a BRP,

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[131] *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd and Others (Marley Pipe Systems (Pty) Ltd and Another Intervening)* 2012 (5) SA 515 (GSJ) 516.
[132] S 132(2)(a)(i).
[133] S 132(2)(a)(ii).
[134] S 132(2)(b).
[135] S 132(2)(c)(i).
[136] S 132(2)(c)(ii).
[137] S 132(3)(a)-(b).
[138] *South African Bank of Athens Ltd v Zennies FreshFruit CC and a related matter* (2018) 2 All SA 276 (WCC) 278.
[139] B van Niekerk & H Smit "When does the business rescue practitioner become functus officio" (2016) March *De Rebus* 34-35 34. See also *Landosec (Pty) Ltd t/a Lasertech v McLaren* (2231/2015) [2015] ECP.
[140] S 139 of the Companies Act 71 of 2008.
[141] *Klopper NO and Others v Ragavan and Others* (12897/2018) [2018] ZAGPJHC 462 (13 April 2018) para 17.

when he no longer possesses the necessary qualifications, when a conflict of interest is evident or where the BRP has been rendered incapacitated.[142]

2.10 Conclusion

Business rescue has proven to be an improvement of its predecessor, judicial management. The threshold requirements of entry have been relaxed, allowing more companies to use business rescue as a corporate rescue avenue. By allowing more companies to use business rescue, not only does the number of companies being rescued increase but it also contributes to the development of business rescue law. Each business rescue case is unique, and the current statutory provisions and judicial precedence might reveal certain shortcomings when it comes to complex cases. However, this should not be seen as an obstacle, but rather an opportunity to contribute and shape business rescue law to cater for complex rescue cases and addressing the shortcoming of the past.

Business rescue is definitely an improvement of judicial management in that it not only caters for the creditors of the company, but considers the interests of all relevant stakeholders. If the requirements of “financial distressed” and “reasonable prospect” are met, there is no reason why a company should not consider business rescue as a corporate rescue regime. If followed correctly, business rescue can provide a deserving company a chance at rescue that it would never have had under liquidation.

The next chapter will consider the powers of the BRP in greater detail – not only in general, but specifically as it relates to executory contracts.

[142] S 139(2)(a)-(f) of the Companies Act 71 of 2008.

Chapter 3

The powers of business rescue practitioners in respect of executory contracts

3.1 Introduction

The BRP is one of the key role players when it comes to saving a company. It can be surmised that if it were not for the BRP, business rescue in its entirety would not be possible. Given that the existence of the company is at stake, it is undeniable that the BRP has to fulfil his duties and obligations adequately.

Therefore, to properly serve his function and fulfil his role, the powers and duties of the BRP should be clearly defined in Companies Act. The BRP should know what exactly is expected of him during business rescue and how he should approach every aspect of his duties, including the treatment of executory contracts. In my view, which is supported by the comparative study in Chapter 5 below, the powers and duties of the BRP are currently not adequately addressed in the Companies Act, because there are only a limited number of provisions that pertain to the duties and powers of the BRP. Therefore, in this chapter, with the use of legislation and judicial precedent, I will discuss what exactly is expected of the BRP during the normal course of business rescue and more specifically when duties under executory contracts arise.

The introduction of the new business rescue regime has not fundamentally changed the role of the BRP, as compared to its judicial management predecessor.[1] The primary function of both the BRP and the judicial manager was to take over management and control of the business. However, the BRP under the new regime must also draft, adopt and implement a business rescue plan, which a judicial manager was not required to do.[2]

[1] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 54.
[2] 54.

3.2 Powers and duties of the judicial manager as a predecessor to the business rescue practitioner

The duties of the provisional and final judicial managers were similar to those of the BRP. The provisional judicial manager took control of the management of the company and was tasked with recovering and taking into possession all the assets of the company.[3] The provisional judicial manager also had to lodge a copy of his appointment letter with the Registrar of Companies (the predecessor of the CIPC) within the prescribed period.[4]

The provisional judicial manager was tasked with preparing and presenting a report that had to include: a description of the general state of affairs of the company; a statement of reasons why the company is unable to pay its outstanding debts or why it will be unable to meet its current or future obligations or why the company has not operated successfully or why it has been prevented from being a successful concern; a statement of the assets and liabilities of the company; a complete list of creditors, including the respective nature and amount of each claim against the company; particulars of the source(s) that the company will or could utilise to ensure that the business returns to the normal day to day operations of a successful concern; and the considered opinion of the provisional judicial manager whether or not there is a prospect for the company to become a successful concern and disclosure of the facts or circumstances that need to be removed and that could prevent the company from becoming a successful concern once more.[5]

The provisional judicial management order bestowed upon the provisional judicial manager the power to raise money without the authority of the shareholders, subject to the rights of creditors, in any manner that the court deemed necessary.[6] Prior to granting a final judicial management order, the report of the provisional judicial manager was considered.[7] The report by the provisional judicial manager was of cardinal importance in determining whether a reasonable probability of rescue existed and whether or not the creditors would approve of a restructuring plan.[8]

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[3] S 430(a) of the Companies Act 61 of 1973.
[4] S 430(b).
[5] S 430(c)(i)-(iv).
[6] S 428(2)(c).
[7] A Loubser "Judicial management as a business rescue procedure in South African corporate law" (2004) 16 *SA Merc LJ* 137-163 157-158.
[8] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 57.

The provisional judicial manager had to compile and present the report within sixty days, before the court could grant a final management order.[9] It was therefore critical that the provisional judicial manager worked closely and expeditiously with the company in obtaining all the essential information. Any shortcomings of essential information would have hampered the Court, Master and judicial manager from exercising their statutory functions and would not have served the interests of creditors who had to issue an important approval opinion before a final management order could be granted.[10]

The duties of the final judicial manger did not differ fundamentally from the provisional judicial manager. The final judicial manager was tasked to: take over and assume management from the provisional judicial manager; conduct such management, subject to the orders of the Court, in a manner that he deems economical and most promotive of the interests of the creditors and members of the company; comply with any directions given by the Court in the final judicial management order; lodge a copy of the final judicial management order, a copy of his appointment letter or, in the event of a cancellation, a copy of the cancellation order with the Registrar of Companies; keep accounting records; prepare annual financial statements and interim reports; conduct annual general meetings and meetings of the members of the company; conduct creditor meetings and file the respective documents submitted in these meetings; examine the affairs and transactions of the company before the final judicial management order was granted and report any misconduct or transgression of a director or officer of the company and report whether such a person could be held personally liable; and submit a notice of cancellation of the final judicial management order if at any time the final judicial manager believes there no longer is a reasonable probability of rescue.[11]

3.3 Qualifications and appointment of a business rescue practitioner

For a BRP to be appointed under the new regime, he has to possess certain qualifications and be a member of an accredited association. The appointment of the

[9] S 432 of the Companies Act 61 of 1973.
[10] *Ladybrand Hotel (Pty) Ltd v Segal and Another* 1975 (2) SA 357 (O) 361.
[11] S 433(a)-(l) of the Companies Act 61 of 1973.

BRP is subject to certain legislative provisions.[12] The BRP enters a fiduciary relationship with the company in business rescue and owes a substantial duty of care to the company.[13] Therefore, it is paramount that only the best qualified practitioners should be considered for appointment.[14]

A BRP can only be appointed if he meets the requirements of section 138 of the Companies Act.[15] Such appointment is subject to the CIPC issuing the BRP a licence to practice as such.[16] The BRP has to be a member in good standing of a legal, accounting or business management association that is accredited by the CIPC.[17] Such an association serves a broad public purpose of allowing public trust to be placed in BRPs.[18] An association will only be accredited by the CIPC for as long as the association is able to discipline its members, revoke their licences and ensure that their members and applicants possess the necessary qualifications and experience.[19] The most important factors that the CIPC values in an association are the powers to monitor and discipline its members.[20]

A BRP should apply for a licence for each business rescue project on which he is to work.[21] After the appointment of the BRP, the company under business rescue should also complete and file the successful appointment of the BRP.[22] A registration certificate that is issued by the CIPC after the BRP has been appointed is not proof of appointment by the CIPC, but rather to certify that the BRP is qualified and equipped to perform the business rescue.[23]

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[12] S 129(3)(b) and S 131(5) of the Companies Act 71 of 2008.
[13] *Samons v Turnaround Management Association Southern Africa NPC and Another* 2019 (2) SA 596 (GJ) para 18.
[14] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet* Akademies 54-82 70.
[15] S 138(1)(a)-(f) of the Companies Act 71 of 2008.
[16] S 138(1)(b).
[17] S 138(1)(a).
[18] *Samons v Turnaround Management Association Southern Africa NPC and Another 2019* (2) SA 596 (GJ) para 19.
[19] Regulation 126(1)(a) of the Companies Act 71 of 2008.
[20] *Samons v Turnaround Management Association Southern Africa NPC and Another* 2019 (2) SA 596 (GJ) para 19.
[21] CIPC form CoR 126.1. See also *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees SAS and Others (GNP)* (Unreported Case No 72522/2011) para 8.
[22] CIPC form CoR 123.2. See also *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees SAS and Others (GNP)* (Unreported Case No 72522/2011) para 6.
[23] Para 15.

After adopting and filing the resolution to commence with business rescue proceedings, the company should publish a notice within five business days to notify all affected persons of the resolution.[24] In addition, within two business days after publishing such notice, the company should publish the notice of the appointment of the BRP and issue a copy of this notice to all affected persons within five business days.[25] It could sometimes be problematic to adhere to all the various prescribed timeframes, as non-adherence to these provisions will lead to the proceedings being void *ab initio* and lapsing automatically, leaving the company without an avenue to rehabilitate.

3.4 The powers and duties of the business rescue practitioner

3.4.1 General powers and duties

In order for the BRP to rescue a company, he has to be bestowed with certain powers and duties. The Companies Act provides the BRP with general powers as well as specific powers.[26] These powers and duties allow the BRP to facilitate the process of rehabilitating a company and achieve the goal of a successful rescue.[27]

The first general power is that the BRP should be able to take full management control of the company in substitution for its board and pre-existing management.[28] This means that the BRP will have the freedom to adopt any management, oversight and control functions that he deems fit to carry out his duties.[29] By being able to take full management control, it is clear that the legislature wants the BRP to play a pivotal role in rehabilitating the company and be more than a mere nominal figurehead within the company.[30] By taking over full management control of the company, the BRP is put on par with a director of the company. Therefore, the BRP is tasked with the ordinary duties of care, skill and diligence when acting in his position, similar to the

[24] S 129(3) of the Companies Act 71 of 2008.
[25] S 129(3) and (4).
[26] Ss 140 and 141 provide for the general powers and duties of the BRP whereas s 136, pertaining to cancellation and suspension of contracts by the BRP, are examples of specific powers bestowed upon the BRP.
[27] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 14.
[28] S 140(1)(a) of the Companies Act 71 of 2008.
[29] *Klopper NO and Others v Ragavan and Others* (12897/2018) [2018] ZAGPJHC 462 (13 April 2018) para 17.
[30] *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC) para 68.

director of a company.[31] However, the remaining directors will continue to exercise their functions, except for full management control, subject to the authority of the BRP.[32] Having full management control includes that the BRP should have unrestricted access to the premises of the company as well as its administrative offices.[33] The BRP should also be able to "set up shop" at the company in order to successfully carry out his duties.[34]

The second general power is the ability of the BRP to delegate any power or function to any previous member of the board or pre-existing management.[35] He can also remove any member that was part of the board or pre-existing management.[36] The directors of the company continue to exercise their functions, but these functions should be subject to the authority of the BRP.[37] The latter is also entitled to appoint a person to a management position within the company to fill a vacancy.[38] However, the maxim of *delegatus non potest delegare* will ensure that the BRP is only able to make delegations, appointments and removals that he is authorised to do expressly or by necessary implication.[39] If a director or member of the pre-existing management has been delegated a power by the BRP, but acts contrary to such delegation or without the express instruction of the BRP, his conduct will be void.[40]

The period for which the BRP is a substitute for the management should be brief, given that rescuing the company urgently is of utmost importance.[41] The scope of the BRP in his managerial role should be limited, since the BRP cannot replace management entirely or relieve them of their managerial duties.[42] The BRP cannot

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[31] S 140(3)(b) of the Companies Act 71 of 2008. See also *Sibanye Gold Ltd t/a Sibanye-Stillwater and Others v Sevigraph 42 CC; Rand Uranium (Pty) Ltd v Sevigraph 42 CC; Sibanye Gold Ltd t/a Sibanye-Stillwater v Sevigraph 42 CC* (28249/2019; 28248/2019; 28247/2019) [2020] ZAGPJHC 384 (22 October 2020) para 27; L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 59.
[32] S 137(2)(a) of the Companies Act 71 of 2008. See also *Klopper NO and Others v Ragavan and Others* (12897/2018) [2018] ZAGPJHC 462 (13 April 2018) 462 para 14.
[33] See the commentary on section 140(1)(a) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(52).
[34] *Klopper NO and Others v Ragavan and Others* (12897/2018) [2018] ZAGPJHC 462 (13 April 2018) para 17.
[35] S 140(1)(b) of the Companies Act 71 of 2008.
[36] S 140(1)(c)(i).
[37] *Ex parte Nell and Others NNO* 2014 (6) 545 (GP) para 30.
[38] S 140(1)(c)(ii) of the Companies Act 71 of 2008.
[39] *Murgatroyd v Van Den Heever and Others NNO* 2015 (2) SA 514 (GJ) para 16.
[40] *Booysen v Jonkheer Boerewynmakery (Pty) Ltd and Another* 2017 (4) SA 51 (WCC) para 68.
[41] *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP) fn 15.
[42] Fn 15.

conduct the entire rescue of the company by himself. In fact, the nature of the role implies that the BRP can appoint and rely on other professionals such as accountants, valuators, lawyers and advisors to assist him in rescuing the company.[43]

Furthermore, the BRP is also tasked with acting as an officer of the court, where it is expected that the BRP should act in good faith, where even his motivation to earn fees should never dissuade him from acting otherwise.[44] The duty of good faith entails acting with trust, confidence and loyalty to the benefit and interest of all the stakeholders of the company, meaning that BRPs are held to a high standard of ethical and professional conduct.[45]

3.4.2 Duty to investigate the financial affairs of the company

Upon appointment, the BRP has to investigate the company's affairs, business, property and financial situation.[46] This should be done as soon as possible after the BRP has been appointed.[47] This duty entails investigating whether profits can be maximised to allow the company to continue to operate on a solvent basis or if a better return can be achieved than would have ensued if the company entered into immediate liquidation and whether or not the company is truly in financial distress.[48] The purpose of the duty to investigate the financial affairs of the company is to ensure that only companies that are in financial distress are able to utilise business rescue proceedings.[49]

The BRP should apply an open mind and conduct a thorough investigation to determine if a reasonable prospect exists for rescuing the company and whether the company is truly financially distressed.[50] The BRP, after investigating the financial affairs of the company,[51] ultimately should be able to show the court and all affected

[43] *Murgatroyd v Van Den Heever and Others NNO* 2015 (2) SA 514 (GJ) para 17.
[44] *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP) para 26.
[45] Para 26. See also *African Banking Corporation of Botswana Ltd v Kariba Manufacturers (Pty) Ltd and Others* 2015 (5) SA 192 (SCA) paras 37-38.
[46] S 141(1) of the Companies Act 71 of 2008.
[47] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* 2013 (1) SA 542 (FB) para 13.
[48] *Ex parte Nell and Others NNO* 2014 (6) SA 545 (GP) para 33.
[49] See the commentary on section 141 in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(58).
[50] *Griessel and Another v Lizemore and Others* 2016 (6) SA 236 (GJ) para 124.
[51] S 141(1) of the Companies Act 71 of 2008.

persons that he possesses the capabilities to undertake the rescue of the company and that such rescue is viable.[52]

3.4.3 Duty to develop a business rescue plan

The duty of the BRP to adopt and implement a business rescue plan is one of the most significant improvements in the transition from judicial management to business rescue.[53] The judicial manager simply had to conduct the restructuring process in such a manner until the company achieved the status of once again being a successful concern and, therefore, no provision was made for drafting, adopting and implementing a business rescue plan.[54] Conversely, according to the new Companies Act, the BRP is responsible for developing a business rescue plan and implementing such plan for the duration of the business rescue proceedings.[55] The development of such a plan after consultation with creditors, management and affected persons is considered the main duty of a BRP.[56]

3.4.4 Other duties

The BRP should work effectively to ensure the expeditious rescue of the company.[57] Furthermore, the Act provides that the BRP should take the necessary steps to rectify matters involving voidable transactions or non-compliance by directors that occurred before the company entered into business rescue if evidence of such conduct exists.[58] The Act also provides that the BRP should take necessary steps in rectifying, reporting and investigating matters of fraud, reckless trading or any contravention of the Act, including the recovery of misappropriated assets.[59] A failure to report matters of

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[52] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 17.
[53] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 60.
[54] 60.
[55] S 140(1)(d)(i)-(ii). See also *Arqomanzi Proprietary Limited v Vantage Goldfields (Pty) Limited and others* [2019] JOL 46430 (MM) para 110.
[56] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 1)" 2010 *TSAR* 501-514 502.
[57] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10. See also *Klopper NO and Others v Ragavan and Others* (12897/2018) [2018] ZAGPJHC 462 (13 April 2018) para 16.
[58] S 141(2)(c)(i) of the Companies Act 71 of 2008.
[59] S 141(2)(c)(ii)(aa) and (bb).

reckless trading, fraud or criminal conduct is indicative of a BRP being unfit and improper for the required role.[60]

The BRP will require access to the financial statements of the company in order for him to exercise his function and duties.[61] Directors who are unwilling to provide financial records of the company to the BRP are delaying the business rescue procedure and preventing the BRP from exercising his statutory investigation.[62] The BRP will then be able to exercise his power under section 142 against such a director to compel compliance by the director in assisting the BRP by providing him with the necessary documents.[63]

Another duty of the BRP is assisting the company with post-commencement finance.[64] The company in business rescue will likely require financing not only to maintain the current operations of the company, but also to ensure that the company returns to a successful concern.[65] When executing his duties, especially when it comes to the sale of assets, the BRP should act in good faith, maintaining objectivity and impartiality.[66]

The judicial manager was unable to dispose of any of the assets of the company in judicial management without the leave of the court.[67] The provision on prohibiting the sale of assets in the 1973 Act was enacted to prevent the judicial manager from wasting or unnecessarily disposing any of the assets of the company.[68] Conversely, the BRP is able to dispose of assets without the consent of the court or a creditor, such as the instance prescribed in section 134(3) of the 2008 Act.

Although the BRP has many duties, the company who appointed the BRP also has various duties, but most important of all is the duty to cooperate sufficiently with the BRP throughout the business rescue proceedings. A failure to cooperate will likely lead to business rescue proceedings being converted into liquidation proceedings by

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[60] *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP) para 30.
[61] S 142 of the Companies Act 71 of 2008.
[62] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 49; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA).
[63] *Cross-med Health Centre (Pty) Ltd and Others v Crossmed Mthatha Private Hospital (Pty) Ltd and Another* (357/2018) [2018] ZAECGHC 24 (29 March 2018) para 41.
[64] S 135 of the Companies Act 71 of 2008.
[65] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 62.
[66] *Gupta v Knoop NO and Others* 2020 (4) SA 218 (GP) para 27.
[67] S 434(1) of the Companies Act 61 of 1973.
[68] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 58.

way of a court order.[69] Through the adequate use of his special and general powers, the BRP can put up a fighting chance at rescuing a company in distress, provided that the company gives its full cooperation.

3.5 Powers and duties in terms of executory contracts

3.5.1 Introduction: What is an executory contract?

The focus of this dissertation is the powers of the BRP when duties under executory contracts arise. An executory contract is a contract in which one or both of the parties to the contract have an outstanding obligation.[70] This can include one or even all the obligations under the contract.[71] It is therefore a contract in terms of which unfulfilled obligation remains due.[72] The concept of an executory contract in practice is reserved for contracts where the debtor (usually the company entering into business rescue) has an outstanding obligation that is not terminated by insolvency or business rescue proceedings while the creditor has reciprocal obligations that it may or may not have performed.[73] An agreement therefore does not automatically terminate when a business enters into business rescue proceedings.

A company in business rescue is likely to find itself in a position where either the company or a counterparty has not performed a contractual obligation in at least one (but probably more) of its contracts.[74] Hence, dealing with executory contracts is important for any company commencing with business rescue. Most commonly, executory contracts will include contracts of lease, instalment sale agreements and employment contracts that were in force when the company commenced with business rescue proceedings. Although executory contracts can include many other types of contracts as well, this chapter focuses on these three examples, as problems surrounding them often appear in practice and case law.

Unlike in general insolvency proceedings, the rights of creditors and the role of the BRP are still somewhat uncertain when it comes to executory contracts, which

[69] *Firstrand Bank Limited v Wolmarans NO and Others* (404/2019) [2020] ZANCHC 16 (26 March 2020) paras 20,23.
[70] *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 (1) SA 463 (W) 471.
[71] *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) para 6.
[72] J Forder "Insolvency of the hire-purchase seller: Concursus creditorium, ownership and possession" (1986) 103 *SALJ* 83-102 89. See also C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 37.
[73] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 657.
[74] 657.

may be attributed to the fact that the court has to play an active role in interpreting the relevant provisions (such as sections 136, 133 and 134) of the Act.[75] The rights of creditors and the role of the liquidator in general insolvency proceedings have been well established through precedent, statutory provisions and common law principles, but we have yet to reach the same point of development in business rescue law.[76]

3.5.2 Overview of suspension and cancellation powers of the business rescue practitioner

3.5.2.1 General

The current legal position is that executory contracts remain in force during business rescue, meaning that outstanding obligations that still need to be performed by both the company in rescue and the counterparty will remain due. However, this is subject to the powers of the BRP, who can unilaterally suspend obligations arising from an agreement or cancel a contract by way of a court application.[77] Furthermore, the cancellation of a contract will also depend on the contractual provisions, whereby the commencement of business rescue may be an act that will allow the counterparty to cancel such a contract. Cancellation by the BRP is not a problem in the current South African business rescue regime, but the concern rather lies with the cancellation by the counterparty and the suspension power of the BRP.

When business rescue cases first came before the courts, the courts struggled with the exact meaning of the suspension power of the BRP, as there were no similar legislative provisions that preceded this power in either liquidation or sequestration proceedings. Furthermore, there was no judicial precedent that could be used to interpret this suspension power other than what a liquidator or trustee would have been able to do in similar circumstances.[78] In *Oakdene Square Properties (Pty) Ltd*,[79] Claasen J held that the suspension power of the BRP would allow a BRP to "cherry-

[75] 658.
[76] 658.
[77] Ss 136(2)(a)(i)-(ii) and 136(2)(b) of the Companies Act 71 of 2008. See also C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 44.
[78] See for example *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 27.
[79] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 49. The *Oakdene* High Court judgment went on appeal in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA), but the judgment was not overruled.

pick" which obligations he wanted to honour and which obligations he wanted to suspend in terms of an agreement. This "cherry-picking" principle is still evident, as the BRP can ultimately decide which obligations he will suspend in terms of an agreement and which not. Logically, a BRP may want to suspend those obligations that a company will not be able to perform immediately or those obligations under contracts that are not critical to the success of the rescue.

The wording of section 136(2)(a) of the Companies Act bestows on the BRP the power to suspend, either entirely, partially or conditionally, any obligation for the duration of the business rescue proceedings where the company is a party to an agreement before or during business rescue.[80] The word "any" seems broad, but it simply refers to those contracts that the company had entered into with a creditor or debtor that create reciprocal obligations.[81] This power of suspension should be applied with a proactive approach, as obligations in terms of contracts are not automatically suspended by the section 133 general moratorium when the company enters into business rescue proceedings.[82]

There is also no prescribed time period in which the BRP should suspend an agreement, but it has been recommended that the BRP should suspend agreements before they become due.[83] To avoid unnecessary litigation, the BRP should suspend an obligation as soon as he is appointed to office, because if the creditor has cancelled the agreement before the BRP suspends the obligations in terms of that agreement, it will result in the suspension achieving no purpose, as the suspension power of the BRP cannot be utilised with retrospective effect.[84]

The suspension of agreements allows a company to extricate itself from obligations that will prevent or are preventing it from returning to being a successful going concern.[85] As a result, the BRP must apply his discretion and manually suspend an agreement. Typically, in practice a BRP will deliver a notice of suspension to the

[80] S 136(2)(a) of the Companies Act 71 of 2008. See also *South African Property Owners Association v Minister of Trade and Industry and Others* 2018 (2) SA 523 (GP) para 19.
[81] *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) para 37.
[82] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 658.
[83] 658.
[84] *Homez Trailers And Bodies (Pty) v Standard Bank of South Africa Ltd* (35201/2013) [2013] ZAGPPHC 465 (27 September 2013) para 25.
[85] See the commentary on section 136(2) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(29).

counterparty, which will clearly state the obligation(s) that the BRP is suspending.[86] One of the problems is that if the suspension power is invoked too late, the creditor will be allowed to cancel the contract or withhold performance based on the general common law principles of reciprocity.

3.5.2.2 Suspension and cancellation power of the business rescue practitioner previously

Before it was amended, section 136(2) of the Act was problematic, as the BRP had a wide discretionary power to cancel or suspend obligations under executory contracts unilaterally.[87] Indeed, it is arguable that the original version of section 136(2) would have been more detrimental to creditors than if the company entered into immediate liquidation proceedings or be placed under supervision via judicial management.[88] The power to unilaterally cancel or suspend contracts entirely, partially or conditionally had a "draconian effect",[89] which resulted in the subsequent amendment of this power by section 87(b) of the Companies Amendment Act 3 of 2011. The position now is that a BRP may only unilaterally suspend obligations in terms agreements entirely, partially or conditionally; there is no longer a unilateral power by the BRP to cancel obligations in terms of agreements entirely, partially or conditionally.

Under the common law, during general insolvency proceedings, a party to an executory contract can elect to continue to perform his obligations or choose to repudiate the contract.[90] For example, in terms of a executory lease agreement of a company in liquidation, the liquidator inherited the contract of lease in its entirety and the *concursus creditorum* did not suspend any of the obligations and the liquidator had

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[86] A Elliot "Cancelation or suspension during business rescue" May (2015) *Hogan Lovells Published Works* 1-3 2, available at http://hoganlovells.com/en/publications/cancellation-or-suspension-of-agreements-during-business-rescue (accessed on 26 April 2021).

[87] L Jacobs "Ondersoek na die bevoeghede en aanspreeklikheid van die ondernemingsreddingspraktisyn as maatskappydokter" (2013) 10 *LitNet Akademies* 54-82 60-61. See also C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 42-43; P Soloman & J Boltar "Section 136(2) of the Companies Act 2008 – potentially drastic consequences: company law" (2009) September *Without Prejudice* 26-29 27.

[88] P Soloman & J Boltar "Section 136(2) of the Companies Act 2008 – potentially drastic consequences: company law" (2009) September *Without Prejudice* 26-29 26.

[89] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 24.

[90] *Smith and Another v Parton NO* 1980 (3) SA 724 (D) 729. See also C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 42; Z Mabe "Insolvency of a purchaser in terms of an instalment sale agreement – *Sekgothe v Wesbank Limited*" (2018) 81 *THRHR* 682-690 682.

to perform the existing and past unfulfilled obligations in terms of the lease.[91] Contrary to this, the previous cancellation and suspension power of the BRP allowed him to unilaterally suspend or cancel obligations arising from executory contracts in part, rather than assuming or cancelling the contract as a whole when compared to the power of a liquidator or trustee.[92] If section 136(2)(a) was not amended, the BRP of his own accord would have been able elect to abide by the provisions he liked and cancel the ones he did not.[93]

3.5.2.3 Current power to suspend obligations in terms of contracts

Before exercising his power to suspend in terms of an executory contract, the BRP should consider the effect it would have on all affected parties.[94] Business rescue is not aimed solely at achieving the aims of a certain group of stakeholders, but rather the company as a whole. The power of the BRP to suspend an obligation is limited to obligations under agreements where the parties have been part of the agreement before the commencement of business rescue proceedings and such obligation would become due during the proceedings.[95] An obligation that has become due before the company entered into business rescue proceedings cannot be suspended by the BRP.[96] This is due to the fact that the BRP cannot invoke his suspension power where the company no longer has a valid and lawful claim in terms of a contract.[97] Where a company in business rescue and the BRP elect not to perform in terms of its contractual obligations, without invoking the right to suspend, such as remaining in occupation of a leased premises without paying rent, this will amount to a misuse of business rescue proceedings.[98]

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[91] *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) para 10. See also *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 27.
[92] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 42.
[93] A Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (Part 2)" 2010 *TSAR* 689-701 690. See also R Bradstreet "The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy" (2010) 22 *SA Merc LJ* 195-213 209-210.
[94] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 41.
[95] S 136(2)(a)(i)-(ii) of the Companies Act 71 of 2008.
[96] *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) para 74.
[97] *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 25,30.
[98] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) para 38.

Even though the BRP can suspend obligations in terms of contracts, he cannot suspend a reciprocal obligation with the intention that the company in business rescue will not perform in terms of the suspended obligations while expecting the counterparty to continue performing. This is due to the concept of reciprocity under common law and, therefore, the general rules of contract will apply during business rescue.[99] In *Homez Trailers and Bodies v Standard Bank*,[100] the BRP wanted to invoke his section 136(2)(a) power by suspending the obligation of the company in business rescue to repay an overdraft facility with its bank while expecting that the bank to keep making the overdraft facility available to the company in rescue. However, the contract with the bank allowed the bank to suspend the overdraft facility if there was a deterioration in the financial position of the company.[101] This is an example of an *ipso facto* clause, which is enforceable in South African insolvency law.[102] In line with its contractual right to do so, the bank suspended the overdraft facility after becoming aware that the business has entered business rescue.[103] Resultingly, the BRP was not able to exercise his section 136(2)(a) power,[104] which meant that he was unable to suspend the obligations of the company in business rescue while continuing to expect the other contracting party to perform its contractual obligations.

If a BRP suspends a contract, it cannot preclude a contracting party from cancelling such a contract if there was a breach of contract by the company prior to the commencement of business rescue.[105] Furthermore, if the company failed to honour its obligations during business rescue proceedings but the BRP suspended the obligations in terms of such an agreement, cancellation by the counterparty may be possible but then such non-compliance in terms of the obligations cannot result in the company being in unlawful possession of the property.[106] This might have an effect

[99] See the commentary on section 136(2) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(30).
[100] *Homez Trailers And Bodies (Pty) v Standard Bank of South Africa Ltd* (35201/2013) [2013] ZAGPPHC 465 (27 September 2013) para 7.
[101] Para 2.
[102] *Friedshelf 113 (Pty) Ltd v Baksons (Pty) Ltd t/a Bakos Brothers and Another* (18898/19) [2019] ZAGPJHC 376 (25 September 2019) para 19. See also *Kritzinger and Another v Standard Bank of South Africa* (3034/2013) [2013] ZAFSHC 215 (19 September 2013) para 53-54.
[103] *Homez Trailers And Bodies (Pty) v Standard Bank of South Africa Ltd* (35201/2013) [2013] ZAGPPHC 465 (27 September 2013) para 6.
[104] Para 25.
[105] See the commentary on section 136(2)(a) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(29).
[106] 526(29).

on when the counterparty wishes to exercise its property rights through an enforcement action where lawful possession will play an important part.

An important interplay between lawful and unlawful possession commences when a creditor cancels an agreement during the period when the company enjoys a temporary moratorium. This interplay is important, as the moratorium provided for in terms of section 133 of the Act only allows for the protection of property of which the company is in lawful possession. This important interplay can have material consequences and cause competing rights between the BRP and the creditors of the company and will be discussed in more detail in Chapter 4 below.

If the BRP has suspended or cancelled an obligation in terms of an agreement before it became due, the counterparty should only be entitled to a claim for damages.[107] Therefore, if the BRP has validly suspended an obligation in terms of an executory contract, the failure to perform in terms of a suspended obligation after the commencement of business rescue can never amount to a breach of contract and the counterparty should only be entitled to a claim for damages rather than the supposed breach being a ground for cancellation or giving rise to a claim for specific performance. However, the matter is not entirely that simple when a suspended obligation has a reciprocal obligation. In this case, if the counterparty has fully performed its obligation, the latter cannot be precluded from cancelling such an agreement, provided that the cancellation is valid.[108]

As mentioned above, a concern with section 136(2) is that it is unclear from the wording of the provision whether, when the obligations under executory contract are suspended, the company in business rescue can elect to receive benefits despite not performing.[109] The Act is silent on the scenario where a creditor has performed in terms of its obligations but has not received counter-performance because the BRP has elected to suspend the obligations of an agreement partially or conditionally.[110] The intention of the legislature surely could not have been to enable a company in business rescue to suspend obligations in terms of executory contracts while expecting the counterparty to continue performing. In these instances, the ordinary

[107] S 136(3) of the Companies Act 71 of 2008.
[108] *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) paras 37-38.
[109] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 50.
[110] *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) para 38.

rules of contract law should apply, allowing the creditor to raise the *exceptio non adimpleti contractus* as a defence and, in the event where materiality and contractual notices apply, the creditor will have the right to cancellation.[111]

In the case of reciprocal obligations arising from a contract, a party does not need to perform in terms of the contract unless it has received counter-performance.[112] Given that BRPs can elect to suspend obligations in terms of contracts entirely, partially or conditionally, the counterparty only needs to perform in terms of the obligations that have not been suspended. Therefore, when dealing with these conflicting suspensive performance obligations, the contract between the parties needs to be thoroughly studied to determine which counter-performance matches with the suspended performance.[113]

The *exceptio non adimpleti contractus* defence can be relaxed in light of fairness.[114] Since the courts have allowed for the relaxation of the *exceptio non adimpleti contractus* in some instances, it could be viewed as value-based reasoning and an attempt to do justice between the contracted parties.[115] Judicial discretion in this regard serves an important purpose, as the *exceptio non adimpleti contractus* can lead to hardship and injustice between parties.[116] Van der Linde argues that business rescue could be a factor that a court could consider in applying its discretion whether or not to relax the *exceptio non adimpleti contractus* and resultingly allow a company in business rescue to receive performance in terms of a suspended obligation while not performing.[117]

Suspension will only be effective if there are no reciprocal obligations tied to the obligation that is sought to be suspended by the BRP. Therefore, the suspension power will only be effective in contracts that have divisible or matching obligations. This might be the case in complex contracts but with simple executory contracts it will hardly ever exist. For example, in terms of a contract of lease, the lessor's obligation to allow the lessee to occupy the premises is tied to the lessee's obligation to pay the rent. If the BRP suspends the obligation to pay rent, the company cannot logically be

[111] Para 38.
[112] *Smith v Van Den Heever and Others* 2011 (3) SA 140 (SCA) para 14.
[113] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 225.
[114] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) 421.
[115] A Hutchison "Reciprocity in contract law" (2013) 24 *Stell LR* 1-30 16-17.
[116] 28.
[117] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 225.

entitled to continue occupying the premises. In a nutshell, suspending the obligations under a contract will only mean that the company in business rescue cannot be compelled to perform;[118] it will not prevent a creditor from cancelling the contract or stop it from exercising its property rights through repossession or ejectment proceedings.

Furthermore, where the obligations in terms of agreement have been suspended partially or conditionally by a BRP, the counterparty to the agreement should be able to enforce the performance of those parts that have not been suspended.[119] This creates the possibility for a claim of specific performance that in itself could be detrimental to the rescue prospect of a company, but we have not seen such a claim entertained by our courts as of yet.[120] This may be due to the fact that a claim for specific performance will be barred by the moratorium and the party to an agreement that has been suspended will only be entitled to claim damages.[121]

3.5.2.4 Cancelling an agreement

The BRP may cancel a contract upon a court application provided that the grounds for cancellation are just and reasonable.[122] Although the BRP can suspend obligations in terms of contracts other than employment contracts, he cannot unilaterally decide to cancel these agreements; he can only cancel these agreements by establishing reasonable cause by way of a court order.[123]

In what follows, I will provide examples of the impact of the BRPs suspension power on three categories of executory contracts, namely instalment sale agreements, lease agreements and employment contracts. Although reference is made to the moratorium, the latter is only discussed in more detail in the next chapter.

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[118] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 27. See also *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) paras 37-38.
[119] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 224.
[120] 224.
[121] S 136(3) of the Companies Act 71 of 2008.
[122] S 136(2)(b).
[123] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 44.

3.5.3 Instalment sale agreement

3.5.3.1 The typical operation of an instalment sale agreement

A typical instalment sale agreement involves two contracting parties, the seller and the purchaser, where goods are sold subject to a condition that ownership will only pass upon the payment of the final instalment. Although the purchaser is given possession upon conclusion of the agreement, transfer of ownership is therefore suspended until payment of the full purchase price at a future date. If the purchaser defaults on its payment obligations, the owner will be entitled to cancel the agreement and repossess the goods. The seller has this right to repossess the goods until such time as the buyer pays the purchase price in full because, pending payment of the final instalment, ownership will remain with the seller.[124]

3.5.3.2 An example of an instalment sale agreement in business rescue

In *Cloete Murray*,[125] a creditor cancelled an instalment sale agreement and repossessed the goods with the consent of the BRP. The court was tasked with determining whether such repossession and cancellation of an existing agreement constituted an enforcement action. This came after the business rescue proceeding was converted to liquidation proceedings, but the cancellation of the instalment sale agreement occurred when the company was still in business rescue.[126] The liquidating creditors questioned the conduct of the BRP for allowing such a cancellation to take place during business rescue proceedings and the subsequent repossession of the goods.[127]

The liquidating creditors submitted that a cancellation of an agreement is contrary to the principle of the temporary moratorium as envisaged in section 133(1) of the Act.[128] The moratorium is of cardinal importance for providing the company with breathing space to restructure its financial affairs and allowing the BRP to cooperate with creditors in developing a business rescue plan.[129] The legislature's intention with the moratorium was to cast the net as wide as possible to protect the company from

[124] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 23.
[125] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[126] Para 6.
[127] Para 25.
[128] Para 8.
[129] Para 14.

claims instituted against it.[130] However, the court decided that protection via a moratorium cannot preclude a creditor from exercising its contractual right to cancel an agreement where a breach has occurred before the company commenced with business rescue proceedings.[131] The court's reasoning was that the cancellation of a contract does not amount to enforcement action, as an enforcement action is ancillary to formal legal proceedings and in the South African context will only arise in the case of a lawsuit.[132]

The court in *Cloete Murray* reasoned that the moratorium will not prevent a creditor from cancelling an agreement and that sufficient safeguards exist, such as the suspension power of the BRP, to stop the creditor from cancelling a lease agreement and repossessing the goods.[133] The court further explained that, if a company's agreements were automatically suspended upon entering business rescue proceedings, section 136(2)(a) of the Act would be ineffectual and nullified, as there would be no need for a power to suspend agreements if the moratorium automatically suspended obligations in terms of agreements.[134]

In terms of *Cloete Murray*, one of the reasons why the BRP consented to the repossession of goods was that it was favourable to the company at the time when he made the decision.[135] The BRP did not invoke his suspension power, and although the reason for this is not clear from the judgment, it might be due to the fact that that the suspension of the obligations would not have made a difference and the company would have been better off if the BRP did not invoke his suspension power.

Suspension cannot guarantee that a creditor will be prohibited from cancelling an agreement, but if invoked it could discourage the creditor from attempting to cancel the contract. In fact, by suspending obligations, the BRP might be able to negotiate and engage with such a creditor in showing that the business rescue can offer the creditor a better return upon successful rescue.

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[130] See the commentary on section 133(1) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 525.
[131] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 36.
[132] Para 32. See also S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 659.
[133] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 35.
[134] Para 39.
[135] Paras 5-6.

3.5.4 Lease agreements

3.5.4.1 Essentialia of a lease agreement

A contract of lease is an agreement entered between two parties with the requisite intention, where the lessor will give temporary use and enjoyment of property to the lessee in exchange for the payment of a rent.[136] If the lessee has failed to pay its rent, the lessor can either institute an action for specific performance or cancel the lease. In order for a party to cancel an agreement validly, it has to communicate such decision with the defaulting party.[137] After valid cancellation, if the lessee has failed to return the property in the case of a movable property or vacate the property in the case of immovable property, the lessor can enforce its property rights by applying for an order for repossession or eviction. In terms of a contract of lease in business rescue proceedings, cancellation of a lease agreement is normally based on a contractual breach: either non-performance by failing to pay rent or where the act of commencing with business rescue constitutes an act of insolvency, as per an *ipso facto* clause.[138]

3.5.4.2 An example of a contract of lease in business rescue proceedings

In *Kythera Court v Le Rendez-Vous*,[139] the close corporation that entered into business rescue proceedings failed to make its rental payments to the lessor prior to and during business rescue. The lessor then cancelled the lease agreement after a sufficient period of non-payment and applied for an eviction order against the principal lessee.[140] The court had to determine whether either or both the eviction order and the cancellation of the lease amounted to legal proceedings or enforcement action that would ultimately contravene the moratorium. The court reiterated the decision in *Cloete Murray*, confirming that the cancellation of an agreement based on a breach prior to the commencement of business rescue does not constitute enforcement action for purposes of the moratorium.[141] After the lessee defaulted in its payments and failed to vacate the premises, it became an unlawful occupier.[142] Therefore, the eviction

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[136] P Stoop "The law of lease" 2011 *Annual Survey of South African Law* 868-874 869. See also *Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Others* 2011 (1) SA 24 (SCA) para 12.
[137] *Swart v Vosloo* 1965 (1) SA 100 (A) 101.
[138] *Friedshelf 113 (Pty) Ltd v Baksons (Pty) Ltd t/a Bakos Brothers and Another* (18898/19) [2019] ZAGPJHC 376 (25 September 2019) para 19.
[139] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ).
[140] Paras 3-4.
[141] Para 13.
[142] Para 14.

order and the cancellation of the lease did not constitute legal proceedings or enforcement action and, thus, the moratorium was not applicable.[143]

What is of importance in *Kythera Court v Le Rendez-Vouz* is that Boruchowitz J reasoned that if the BRP had invoked his suspension power, he could have prevented the landlord from cancelling the agreement.[144] However, this reasoning is not perfectly accurate, as the company in this case fell into arrears before it commenced with business rescue.[145] Although the lease was cancelled after the company entered business rescue proceedings,[146] the breach occurred before the business rescue commenced. Therefore, the court was correct in its position that the lessor could validly cancel the agreement.[147] However, the court probably erred in its comment regarding the suspension power of the BRP, as he would not have been able to suspend the obligations that were in breach at the time when the business rescue proceedings commenced.

3.5.5 Employment contracts

3.5.5.1 What is an employment contract?

A contract of employment is a consensual contract between an employer and employee, whereby an employee undertakes to perform his personal services for a certain period for an employer in return for the payment of a salary or wages.[148]

3.5.5.2 Employment contracts during business rescue

When the company enters business rescue proceedings, the employees continue in their employment on the same terms and conditions as before business rescue proceedings were initiated.[149] This continuation of employment agreements is dependent on changes that occur in the ordinary course of attrition or if the employees agree to different terms and conditions.[150] The BRP may not suspend any provision of

[143] Para 16.
[144] Para 31. See also *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 35.
[145] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) para 28.
[146] Para 30.
[147] Paras 29-30.
[148] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 56. See also s 1(a) of the Basic Conditions of Employment Act 75 of 1997 for the definition of an employee and employer.
[149] S 136(1) of the Companies Act 71 of 2008. See also T Joubert & A Loubser "The role of trade unions and employees in South Africa's business rescue proceedings" (2015) 36 *ILJ* 21-39 33.
[150] S 136(1)(a)(i)-(ii) of the Companies Act 71 of 2008.

an employment contract,[151] and a court may not authorise the cancellation of any employment contracts during business rescue proceedings.[152] If an employee is retrenched in terms of the business rescue plan, such a retrenchment will be subject to sections 189 and 189A of the Labour Relations Act 66 of 1995.[153]

It is important to distinguish between sections 136(1)(a) and 136(1)(b) of the Companies Act. Section 136(1)(a) allows for the complete protection of employees during business rescue proceedings, where the terms and conditions of employment can only be changed through the ordinary course of attrition or by way of consent by the employee.[154] Section 136(1)(b) reaffirms the position that if a retrenchment occurs in a manner other than what is contemplated in section 136(1)(a), the BRP is under a legal duty to conduct such a retrenchment in compliance with sections 189 and 189A of the Labour Relations Act.[155]

The position regarding whether employment contracts can be cancelled during business rescue proceedings will depend on whether or not a business rescue plan has been proposed.[156] There is no statutory provision that empowers a BRP, in terms of section 136(1) of the Companies Act, to retrench employees without a business rescue plan.[157] If a notice to commence a consultation process is scheduled without a business rescue plan, the consultation process will be considered premature and constitute an act of procedural unfairness.[158]

3.6 Conclusion

The suspension power of the BRP remains a contentious issue. The courts have not had sufficient opportunity to elaborate on the interaction between sections 136(2), 133 and 134 of the Act.[159] This concerns the suspension power of the BRP and the protection that is supposed to be afforded by the moratorium. Where the suspension power is invoked, it is often used too late, and notwithstanding such suspension power,

[151] S 136(2A)(a)(i). See also *Ex parte Nell and Others NNO* 2014 (6) 545 (GP) para 29.
[152] S 136(2A)(b)(i) of the Companies Act 71 of 2008.
[153] S 136(1)(b).
[154] *National Union of Metal Workers of South Africa obo Members and Another v South African Airways (SOC) Limited (In business rescue) and Others* 2020 (7) BCLR 888 (LC) para 31.
[155] Para 35.
[156] Para 34.
[157] Para 34.
[158] Para 34
[159] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 222.

the creditor will be allowed to cancel the contract or withhold performance based on the general common law principle of reciprocity. Furthermore, BRPs tend not to utilise their suspension power adequately or where they do intend on suspending an obligation under an agreement, the company typically would have already committed a breach prior to the company entering business rescue, rendering section 136(2)(a) unavailable to them.

I would argue that the suspending powers should be converted into a duty rather than a mere power of a BRP, as a failure to invoke this provision could be detrimental to the rescue of a company. After the BRP has suspended obligations, he can then always elect to reassume the obligations. However, the suspension power of the BRP does not have a retrospective effect and, therefore, the best cause of action should be to suspend all obligations upon being appointed to office, remedying any breach that could possibly exist and then continuing with the contract.

The next chapter will focus more closely on the moratorium and its interaction with the powers of BRPs as far as executory contracts are concerned.

Chapter 4

Conflict between the powers of the business rescue practitioner and the rights and obligations of creditors due to the moratorium

4.1 The moratorium

4.1.1 Introduction

In order to adequately investigate the financial affairs of the company and to draft the business rescue plan, the BRP and company will have to be assisted with some breathing space from counterparties asserting their claims against the distressed company. This breathing space is (or should be) provided for by the moratorium. Indeed, the BRP cannot adequately exercise his powers in terms of executory contracts if he is constantly faced with legal proceedings or enforcement action.

Before analysing the moratorium, it is necessary to discuss its purpose and function. Subsequently, I will investigate the types of proceedings that are currently barred by the moratorium and how a creditor can lift the moratorium.

4.1.2 Moratorium during judicial management

Under the 1973 Companies Act, the court could grant a moratorium that would accompany a provisional judicial management order.[1] The moratorium provided a stay on all actions, proceedings, executions of writs, summonses and other processes against a company.[2] The moratorium did not automatically ensue when a provisional judicial management order was issued but had to be applied for separately.[3] Usually, the company applying for judicial management would have included in its application a prayer for a moratorium on legal proceedings and enforcement action.[4] Due to the fact that a successful rescue would be unlikely without a moratorium, it was normally

[1] S 428(2) of the Companies Act 61 of 1973.
[2] S 428(2).
[3] A Loubser "Business Rescue in South Africa: A procedure in search of a home" (2007) 40 *Comparative and International Law Journal of Southern Africa* 152-171 154.
[4] A Loubser "Judicial management as a business rescue procedure in South African corporate law" (2004) 16 *SA Merc LJ* 137-163 153.

granted alongside the provisional judicial management order and subsisted when a final judicial management order was granted.[5]

The provisional and final judicial manager was tasked with restoring the company to a successful concern and, to this end, the moratorium was aimed at preventing creditors from instituting enforcement proceedings.[6] Legal proceedings and enforcement action could only proceed if the court lifted the moratorium by granting the appropriate leave.[7] Indeed, it was close to impossible for a creditor to enforce its contractual remedies during the moratorium.[8] Much like business rescue, the objective of judicial management was to postpone liquidation and provide for a moratorium that would subsist for a period fixed by the court or an indefinite period, enabling a company to meet its obligations and become a successful concern once more.[9]

4.1.3 Moratorium during business rescue

4.1.3.1 General

Some form of respite is fundamental to any rescue attempt, in which period a company is allowed a window of opportunity to focus on financial restructuring, even if it means that the creditors will be left in a state of abeyance.[10] Therefore, business rescue would not be possible without a moratorium.[11] The moratorium is one of the main incentives that business rescue offers to a company that can be utilised to recover some of its management control and primarily focus on restructuring its ailing affairs.[12] The moratorium has been designed specifically to allow BRPs, in conjunction with creditors and affected parties, to design a business rescue plan and achieve a successful rescue.[13]

Consequently, for the aims of business rescue to be achieved, there has to be temporary supervision over the company and its property, a temporary moratorium to

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[5] 153-154.
[6] P Kloppers "Judicial management reform – Steps to initiate a business rescue" (2001) 13 *SA Merc LJ* 358-378 359.
[7] S 428(2) of the Companies Act 61 of 1973.
[8] P Kloppers "Judicial management – A corporate rescue mechanism in need of reform" (1999) 10 *Stell LR* 417-435 430.
[9] *Millman NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd intervening 1972* (1) SA 741 (C) 744.
[10] R Bradstreet "The new business rescue: Will creditors sink or swim" (2011) 128 *SALJ* 352-380 372.
[11] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 422.
[12] R Bradstreet "The new business rescue: Will creditors sink or swim" (2011) 128 *SALJ* 352-380 365.
[13] *Business Partners Ltd v Tsakiroglou and Others* 2016 (4) SA 390 (WCC) para 20. See also *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 14.

serve as protection against legal proceedings and enforcement action, and the development and implementation of a business rescue plan to allow the company to return to operate on a solvent basis.[14] The moratorium, however, is not an indefinite form of protection and not an absolute bar to legal proceedings; it should only function as a temporary form of protection.[15] The fact that the legislature chose the word "temporary" should be a clear indication that the duration of the effect of the moratorium on the rights of creditors and their respective claims against a company should be for a brief period only.[16]

The Act states that, during business rescue proceedings, "no legal proceedings, including enforcement action" may be brought against the company in rescue.[17] The caveat to this provision, however, is that the company should be in lawful possession of the property.[18] This protection afforded to a company in lawful possession of property is strengthened by section 134(1)(c) of the Act, which reiterates that despite any provision of any agreement, no person may exercise any right in respect of property in the lawful possession of a company in business rescue.[19] The provisions of the Act regarding the moratorium, however, do not provide for the position where a counterparty exercises its property rights against a company that is in unlawful possession of property.[20]

A moratorium further serves the purpose of allowing the company the necessary breathing space to assess and restructure its business affairs to return to a state of resuming operations that would render the company solvent.[21] Business rescue aims at achieving the efficient rescue and recovery of a financially distressed company by balancing the rights and interests of all relevant stakeholders.[22] The moratorium has specifically been provided in the Act to achieve the purpose of rescuing a company.[23]

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[14] S 128(1)(b)(i)-(iii) of the Companies Act 71 of 2008.
[15] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) para 8. See also *South African Bank of Athens Ltd v Zennies FreshFruit CC and a related matter* (2018) 2 All SA 276 (WCC) para 43 where the court held that the various mechanisms of business rescue proceedings were not designed to prejudice the creditors indefinitely.
[16] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 60.
[17] S 133(1) of the Companies Act 71 of 2008.
[18] S 133(1).
[19] S 134(1)(c).
[20] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ) para 11.
[21] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 28.
[22] S 7(k) of the Companies Act 71 of 2008.
[23] S 128(1)(b). See also *South African Property Owners Association v Minister of Trade and Industry and Others* 2018 (2) SA 523 (GP) para 17.

The interference of creditors could mitigate business rescue as a whole and hinder the aim of business rescue from being achieved.[24] The object of the moratorium is to prevent a BRP from being overwhelmed by litigation and ultimately preventing the BRP from attending to his utmost important function of saving the company by depriving him of his time and effort.[25]

During business rescue proceedings, the company is afforded a general moratorium on legal proceedings, including enforcement action, against the company or in relation to property lawfully in its possession as per section 133(1) of the 2008 Act.[26] However, the moratorium can be lifted under certain circumstances. Legal proceedings and enforcement action may be instituted in any forum under the following circumstances: where the BRP has agreed to such proceedings or enforcement action by way of written consent; with the leave of the court and in line with the terms of such leave that the court deems suitable; where there is a set-off against a claim made by a company in legal proceedings, regardless of whether such legal proceedings commenced before or during business rescue proceedings; where criminal proceedings have commenced against the company or any of its directors before or after business rescue proceedings commenced; where proceedings have commenced before or during business rescue and involve either property or a right that the company exercises as a trustee; or legal proceedings by a regulatory authority in the execution of its duties after it has lodged a written notice with the BRP.[27]

The moratorium should, however, not serve as a shield for the company to fend off legal proceedings if the company is not deserving of such protection.[28] Business rescue and the accompanying moratorium should not serve as a scapegoat to avoid liquidation proceedings to enable the insiders of a company to pursue their own ulterior motives at the cost of frustrating the rights of creditors.[29] For this reason, the Act

[24] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 422-423.
[25] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 39.
[26] S 133(1) of the Companies Act 71 of 2008.
[27] S 133(1)(a)-(f).
[28] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 40.
[29] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para 15. See also AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 60.

contemplates instances where the creditor may seek leave of the court to institute legal proceedings[30] despite the moratorium and even if the BRP has not consented.

The section 133(1) moratorium is described most accurately as a statutory moratorium,[31] serving as a procedural bar to the initiation or continuation of legal proceedings.[32] Essentially, the moratorium envisaged in section 133(1) of the Act is a dual moratorium that suspends the rights of creditors to institute legal proceedings and their right to enforce their proprietary rights.[33]

The moratorium suspends legal proceedings brought against the company, but not legal proceedings instituted by the company in business rescue.[34] This feature of the moratorium is bound to cause conflict between the rights of creditors and those of the BRP, as this allows for a situation where claims made against a company would be suspended by way of the moratorium but the counterclaim of the company would not be suspended and is enforceable.[35] This does not mean that the claim against the company is invalidated, but rather that the claim can only be enforced once business rescue proceedings have seized and the moratorium has therefore been lifted. Therefore, the enforcement of claims made against a company by a creditor are prevented for the period during which the company is placed under the moratorium.[36]

A moratorium is similar to a defence *in personam*, which is characterised as a personal privilege in favour of a company.[37] Therefore, it is a defence or ground that only the BRP can rely on, not a defence or ground on which a creditor can rely.[38] Resultingly, the statutory moratorium is not available as a defence for a surety of a company.[39] Whether a company as principal debtor is released of its obligations in part or in whole is immaterial to the nature and value of the claim instituted by a creditor against a surety, as suretyship does not prevent recovery by a creditor against a company in business rescue.[40] This is due to the surety not enjoying the same benefit of the moratorium as the company in business rescue and because the recovery right

[30] S 133(1)(a)-(f) of the Companies Act 71 of 2008.
[31] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) para 17.
[32] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 38.
[33] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 60.
[34] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 45.
[35] Para 47.
[36] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 41.
[37] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) para 18.
[38] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 43.
[39] *Business Partners Ltd v Tsakiroglou and Others* 2016 (4) SA 390 (WCC) para 10.
[40] *New Port Finance Co (Pty) Ltd and Another v Nedbank Ltd* 2016 (5) SA 503 (SCA) para 12.

of creditors against sureties should not be prejudiced.[41] The surety would be entitled to a right of recourse against the company who is the principal debtor. However, with regard to recovery of an amount by a creditor during the moratorium period, the surety will have to honour its obligations.[42]

Ultimately, the BRP and court have the power to lift the moratorium on certain legal proceedings and enforcement actions.[43] If the BRP refuses to give consent, the creditor can approach the court directly to obtain leave,[44] as section 133(1)(b) allows a creditor to ask leave of the court regardless of the written consent (or lack thereof) of the practitioner.

4.1.3.2 Stay on legal proceedings

From the Act, it is unclear what exactly constitutes "legal proceedings". This is problematic for both creditors and BRPs, as it requires courts to play a role in determining whether or not the case at hand constitutes legal proceedings. The courts effectively have to grapple with the wording and purpose of section 133 to interpret and apply it in a manner that is fair and in line with the philosophy of business rescue as a whole.[45] Determining exactly what type of proceedings constitute legal proceedings has been a point of dispute since the inception of the judicial management regime under the old Companies Act, which dispute has yet to been resolved,[46] due to the failure of the legislature to provide a definition of "legal proceedings" in both the old and the new Act.

Legal proceedings are ancillary in nature to contractual obligations and, therefore, the prohibition of any legal proceeding necessarily would affect contractual rights adversely.[47] It has been accepted generally that legal proceedings entail proceedings involving a lawsuit,[48] and this principle has been confirmed in *Cloete Murray v Firstrand Bank*.[49]

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[41] Para 13.
[42] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) para 22.
[43] S 133(1)(a) of the Companies Act 71 of 2008.
[44] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 45.
[45] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 61.
[46] *Chetty t/a Nationwide Electrical v Hart NO and Another* (12559/2012) [2014] ZAKZDHC 9 (25 March 2014) para 12.
[47] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 61.
[48] *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) 399.
[49] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 31.

4.1.3.3 Enforcement action

In addition to a stay on legal proceedings, no execution or enforcement action may be initiated by a creditor during the moratorium either. However, if such action was commenced before the company entered business rescue, such action should be stopped until the written consent of the BRP or leave of the court is obtained.[50] From the judgment in *Madodza*,[51] it is clear that no legal proceedings or enforcement action may be brought against a company in business rescue. But what exactly constitutes "enforcement action"?

The court in *Cloete Murray v Firstrand Bank*[52] was called upon to interpret the meaning of "enforcement action". The court *in casu* referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality*[53] for guidance on the interpretation of "enforcement action" with relevance to the moratorium.[54] Instances where courts are required to interpret the meaning of "legal proceedings" and "enforcement action" showcase how the courts have grappled with giving meaning to statutory provisions while balancing the rights of creditors with those of the company in business rescue.[55]

As mentioned in 4.1.3.2 above, it has been accepted that legal proceedings in the South African legal context generally refers to a lawsuit.[56] An enforcement action, in turn, is ancillary to legal proceedings, where the enforcement or execution is made by way of a court order through writs of execution or attachment.[57] Enforcement refers to the enforcement of obligations,[58] where such an enforcement action is instituted in a forum.[59] A forum refers to any court or tribunal[60] and, therefore, an enforcement action refers to an action by way of legal proceedings.[61]

Furthermore, the court in *Cloete Murray* held that the cancellation of an agreement does not amount to enforcement action, as cancellation and enforcement

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[50] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012) para 16.
[51] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).
[52] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[53] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[54] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) paras 29-30.
[55] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 61.
[56] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 31.
[57] Para 32.
[58] Para 32.
[59] Para 32.
[60] Para 32.
[61] Para 33.

are mutually exclusive terms.[62] Cancellation entails the termination of rights while enforcement is where a party enforces obligations. A failure to interpret the terms "cancellation" and "enforcement" as mutually exclusive would contradict the purpose of section 133 of the Act.[63] If the act of cancellation is misconstrued as constituting an act of enforcement, it would fundamentally change South African contract law.[64] The company enjoying a temporary moratorium is allowed a respite or a breathing space from legal proceedings of creditors.[65] However, this breathing space should not interfere with the contractual obligations of the company and its creditors.[66] According to this reasoning, the creditor is allowed to cancel an agreement based on non-performance and enforce its property rights after such cancellation.

Section 133 does not provide for a blanket prohibition on legal proceedings and enforcement action against a company, since it can be lifted through the consent of the practitioner or with leave of the court.[67] When interpreting the word "against" in terms of the section 133, it should mean that it includes actions that would oppose or be to the detriment of the company seeking to be or have been placed under business rescue.[68]

In *Merchant West Working Capital Solutions (Pty) Ltd*,[69] the court held that in order to obtain leave of the court, a formal well-motivated application must be lodged with the court motivating why leave should be granted.[70] However, the court in *LA Sport 4X4 Outdoor CC and Another*[71] held that a formal application is not necessary.[72] Where a party applies for leave of the court to relax the moratorium, the court will consider the protection that the moratorium should or should not afford rather than focusing on the formal application.[73] Failure to obtain leave would not invalidate a court

[62] Para 33.
[63] M Laubscher "*Cloete Murray and Another v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA" (2015) 18 *PELJ* 1882-1899 1886.
[64] 1893.
[65] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 40.
[66] Para 40.
[67] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 422.
[68] *Lange NO and Others v Maartens NO and Others* (1094/2019) [2020] ZANCHC 8 (20 March 2020) para 15.
[69] *Merchant West Working Capital Solutions (Pty) LTD v Advanced Technologies and Engineering Company (Pty) Ltd and Another* (13/12406) [2013] ZAGPJHC 109 (10 May 2013).
[70] Para 67. See also *Redpath Mining South Africa (Pty) Ltd v Marsden No and Others* (18486/2013) [2013] ZAGPJHC 148 (14 June 2013) para 71.
[71] *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015).
[72] Para 27.
[73] Para 28.

application and the court can impliedly grant such leave afterwards even if there was a failure to obtain such leave in advance.[74] Furthermore, only the High Court can permit an applicant to proceed with legal proceedings or an enforcement action.[75]

4.1.3.4 How the moratorium operated in Cawood

A good example of a case where the general moratorium barred legal proceedings, including enforcement action, instituted against a company in business rescue is *Cawood NO and Others v Swanepoel t/a Reaan Swanepoel Attorneys and Others*.[76] The case concerned Lebaka Construction who rendered services to a municipality. The municipality did not make payment for the services rendered by Lebaka.[77] Lebaka, however, was indebted to another company, Numan.[78] Before Lebaka could make payment to Numan, Numan obtained a judgment against Lebaka and the sheriff issued a writ of execution against the movable property of Lebaka.[79] Before the money was paid over to Numan, Lebaka entered into business rescue proceedings.[80] The municipality then paid the money owing to Lebaka over to Numan in accordance with the writ of execution.[81] The BRP of Lebaka questioned the validity of the execution and argued that this is enforcement action should be barred by the moratorium. The question the court then had to answer was whether the writ of execution constituted an enforcement action.[82] The court referred to *Cloete Murray*[83] and held that an enforcement action includes a writ of execution or attachment order.[84] Accordingly, the writ of execution indeed constituted enforcement action and the money paid over by the municipality had to be repaid to Lebaka as such payment was unlawful.[85]

What is interesting from the judgement is that counsel for Lebaka (the company in business rescue) argued that the payment of the money by way of the writ of

[74] Para 41.
[75] *Marques and Others v Group Five Construction (Pty) Ltd and Others* (D1051/19) [2019] ZALCJHB 185 (25 July 2019) para 13.
[76] *Cawood NO and Others v Swanepoel t/a Reaan Swanepoel Attorneys and* Others (69041/2015) [2015] ZAGPPHC 1042 (29 September 2015).
[77] Para 5.
[78] Para 5.
[79] Para 5.
[80] Para 9.
[81] Para 13.
[82] Para 17.
[83] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[84] *Cawood NO and Others v Swanepoel t/a Reaan Swanepoel Attorneys and* Others (69041/2015) [2015] ZAGPPHC 1042 (29 September 2015) para 25.
[85] Para 30.

execution deprived the other creditors when they had to be in "equal footing".[86] I would argue that this same line of reasoning should be considered when an order for repossession is made, as depriving a business in rescue of property will similarly be to the detriment of other creditors as the asset will no longer be available for the purpose of achieving a successful concern.

4.2 Conflict arising from cancellation and repossession

4.2.1 Introduction

This section will consider how cancellation and subsequent repossession affect business rescue proceedings. I will investigate how the courts have dealt with the interaction between a counterparty enforcing its contractual rights and the BRP and the company in business rescue who rely on the moratorium to afford it protection. However, as will be seen, the moratorium does not preclude a creditor or counterparty from exercising its property rights.

Naturally, conflicts will often occur between the company and its creditors during the course of business rescue. Business rescue, through the lens of the creditors, might seem to prejudice their recovery rights but the rescue process is ultimately aimed at repaying them in full after achieving a successful rescue.[87] It is undeniable that any creditor faces the risk of not receiving performance by the company placed under business rescue.[88] During the ordinary course of business, the company will have incurred contractual debts prior to and during business rescue in order for the company to operate successfully. It is therefore paramount that the company in business rescue should honour these obligations as the interests of creditors are "material factors" that will determine the success of the company.[89] Keeping this in mind, however, any attempted rescue of the business would likely fail if creditors could simply escape executory contracts.[90] Therefore, for business rescue to be successful, both the company in rescue and its creditors will play an important part in achieving a

[86] Para 22.
[87] R Bradstreet "The new business rescue: Will creditors sink or swim?" (2011) 128 *SALJ* 352-380 373.
[88] K van der Linde "Ondernemingsredding en kontrakte: Is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 226. See also MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 422.
[89] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 60.
[90] K van der Linde "Ondernemingsredding en kontrakte: Is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 219.

successful rescue. The creditors further play a decisive role in the adoption and implementation of a business rescue plan, as their voting interests could influence business rescue proceeding in its entirety.[91]

It is evident that the moratorium, in its endeavour to provide protection while the company undergoes rehabilitation, inadvertently places restrictions on the rights of creditors when attempting to prevent them from exercising their proprietary rights.[92] Even though the exercise of enforcement rights by creditors should be suspended by the moratorium, there remains sufficient protection for creditors.[93] The creditors are the biggest financial stakeholders and ultimately have to approve the business rescue plan proposed by the BRP.[94] Therefore, prejudicing their interests might result in the ultimate failure to get a business rescue plan approved.

It is important that a moratorium is afforded to a company to enable the company to achieve the purpose of business rescue. Regardless of its success, business rescue will materially affect the rights of third parties that could have been enforced against a company,[95] but it is aimed at steering the company towards the possibility of returning to a solvent basis or to provide a better return for its creditors than would have ensued if an immediate liquidation order had been granted.[96] It is clear that creditors will be vulnerable whenever they are not allowed to instituted forms of recourse against the company in business rescue, where the business rescue serves the needs of the business at hand but not the interests of creditors as well.[97]

Furthermore, the problem is that the Act is silent on what exactly constitutes a creditor within business rescue proceedings.[98] This leaves the door open for pre-commencement creditors and post-commencement financiers to lay claims against

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[91] MF Cassim "South African Airways makes an emergency landing into business rescue: Some burning issues" (2020) 137 *SALJ* 201-214 211.
[92] AO Nwafor "Moratorium in business rescue scheme and the protection of company's creditors" (2017) 13 *Corporate Board: Role, Duties and Composition* 59-67 66. See also MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 420-449 420.
[93] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) para 45. See also K van der Linde "Ondernemingsredding en kontrakte: Is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 219.
[94] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para 8.
[95] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others* 2012 (2) SA 378 (WCC) para 10.
[96] MF Cassim "South African Airways makes an emergency landing into business rescue: Some burning issues" (2020) 137 *SALJ* 201-214 203.
[97] R Bradstreet "The new business rescue: Will creditors sink or swim" (2011) 128 *SALJ* 352-380 365.
[98] MF Cassim "South African Airways makes an emergency landing into business rescue: Some burning issues" (2020) 137 *SALJ* 201-214 212.

the company in business rescue in their capacity as creditors.[99] Employees are also not excluded from the ambit of a company's creditors, as they enjoy a super-priority when claims are to be paid.[100]

4.2.2 Current legal position regarding executory contracts: case law

If the company has committed a breach of contract prior to or during business rescue proceedings, the counterparty will be allowed to cancel such an agreement. After cancellation, the counterparty will enforce its contractual rights by repossessing the property. In terms of the moratorium, before a counterparty is allowed to proceed with this enforcement, either the consent of the BRP or the court will have to be obtained. However, when a contract has been cancelled, the company in business rescue is no longer in lawful possession of the property and therefore the moratorium will not apply. Consequently, leave of the court or consent of the BRP to cancel the agreement is not required. A company in business rescue can only rely on the moratorium to give it protection where the company has proven that the cancellation of the agreement was invalid, otherwise it will be in unlawful possession of the property.[101] The problem with being in unlawful possession of property is that it will affect the use of the property by the BRP. If the property is in unlawful possession of the BRP, the BRP can no longer utilise the property to rescue the company.

In other words, whether or not the company enjoys protection under the moratorium will depend entirely on whether or not the company is in lawful possession of the property.[102] For the company to be in lawful possession of the property, the BRP would have had to suspend the obligations in terms of that agreement, but such suspension can only be made in terms of an agreement that has not been breached prior to the commencement of business rescue proceedings.

According to the current legal position, the creditor, as a party to an agreement, should be able to exercise its contractual rights when performance is owed to it, regardless of the fact that counterparty company has entered business rescue.[103] This

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[99] 212.
[100] 213.
[101] *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) para 24.
[102] *Sibanye Gold Ltd t/a Sibanye-Stillwater and Others v Sevigraph 42 CC; Rand Uranium (Pty) Ltd v Sevigraph 42 CC; Sibanye Gold Ltd t/a Sibanye-Stillwater v Sevigraph 42 CC* (28249/2019; 28248/2019; 28247/2019) [2020] ZAGPJHC 384 (22 October 2020) para 23.
[103] *Kritzinger and Another v Standard Bank of South Africa* (3034/2013) [2013] ZAFSHC 215 (19 September 2013) para 54.

would entail that a creditor would be entitled to compel a company in business rescue to honour its contractual obligations. Where the BRP has partially, conditionally or wholly suspended obligations in terms of an agreement, the creditor would not be able to enforce the performance of such obligations.[104] However, the creditor cannot be precluded from cancelling such an agreement.[105]

The creditor should be able to recover any amount owing to it before the commencement of business rescue, but should not be allowed to recover any amounts resulting from obligations that have been suspended during business rescue.[106] Following the *178 Stamfordhill* judgment, this would mean that the company in business rescue should only be held liable for the rent in terms of the lease up until the company has commenced with business rescue proceedings.[107] Where a BRP suspends a lease agreement, it simply means that the company in business rescue cannot be compelled to perform.[108]

In what follows, I discuss a number of selected cases in chronological order based on the date on which judgement was delivered, from earliest to most recent. The purpose of the discussion is to demonstrate how the courts have struggled with the concept of "lawful possession" in terms of section 133 of the Companies Act and, where applicable, instances where the lawful possession issue also affected the suspension power of the BRP in terms of section 136(2) of the Companies Act.

Being in unlawful possession of property will be fatal to the company in business rescue. This not only has dire consequences to the property at stake, but also to the business rescue proceedings in its entirety and will leave the BRP in a position where he has no other remedy but to forfeit the possession of the property.

Accordingly, where an affected person (normally a creditor) succeeds with lifting the moratorium, often an accompanying order is made to set aside the business rescue proceedings. In such a case, the commencement of business rescue proceedings was futile from the start and the company would have been better off entering a compromise with its creditors or pursuing other informal corporate rescue procedures.

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[104] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 27.
[105] Para 27.
[106] Para 25.
[107] Para 25.
[108] Para 27.

It will also be seen that when the company is in unlawful possession of property, the court will typically find that the BRP cannot rely on the moratorium and, consequently, the leave of the court or consent of the BRP will not be required for the owner to repossess the property.

I would argue that the mere act of cancelling an executory contract by a creditor should not render the whole of section 133 ineffectual, as the basic concept of obtaining leave of the court or consent of the BRP still needs to be adhered to or at the very least be a procedural requirement that cannot be disregarded.[109]

4.2.2.1 Madodza (judgment delivered on 15 August 2012)

In *Madodza (Pty) Ltd v Absa Bank Ltd and Others*,[110] the applicant company in business rescue (Madodza) opposed a warrant of execution to remove its vehicles, obtained through a finance agreement on which it defaulted before the commencement of business rescue proceedings.[111] Counsel for Madodza argued that the repossession of the vehicles amounts to enforcement action and that the moratorium should provide a stay on such proceedings.[112] Counsel for the respondent argued that an order for the repossession of the vehicles had been obtained prior to the company entering business rescue. Counsel further argued that because the finance agreement had been cancelled before the company commenced with business rescue proceedings, the vehicles were no longer in the lawful possession of the company and, therefore, the moratorium could not offer any protection.[113]

The court agreed with the argument put forward by the counsel for the applicant that execution or enforcement proceedings initiated before business rescue proceedings had commenced should be stopped until the consent of the BRP or leave of the court has been obtained.[114] However, the court held that because the agreement was cancelled, the company was no longer in lawful possession, thus failing to meet the requirements for the application of the general moratorium in section 133.[115]

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[109] See the discussion in 4.2.2.4.
[110] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).
[111] Paras 4-7.
[112] Paras 10-16.
[113] Para 7.
[114] Para 16.
[115] Para 17.

Consequently, because the applicant was not in lawful possession of the vehicles, the applicant could not be entitled to protection under the moratorium.[116]

The court did not address the question whether the order for the removal of property constituted legal proceedings or enforcement action, after acknowledging that these terms are not defined in the Companies Act.[117] The court rather focused on whether the company was in lawful possession of the vehicles to determine if the moratorium would be applicable. The court referred to the *Oakdene Square Properties*[118] judgment and explained that, in order to allow a company to continue to operate on a solvent basis, it may be possible to limit the exercise of proprietary rights of creditors to achieve the goals of business rescue.[119] This is due to the fact that business rescue is aimed at balancing the interest of all relevant stakeholders, where the focus is no longer purely based on that of the creditors.

Notwithstanding, the court opted to uphold the order for repossession in favour of the creditor, regardless of what the impact of this decision would be on the company as a whole. The fact that there was a breach prior to the commencement of business rescue proceedings rendered the company in unlawful possession. However, the court did not adequately address the requirements regarding obtaining the consent of the BRP or leave of the court.

4.2.2.2 LA Sport 4X4 Outdoor (judgment delivered on 26 February 2015)

In *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others*,[120] the first respondent (Broadswoard Trading 20 (Pty) Ltd) passed a resolution to commence with business rescue proceedings, whereafter the appellants (LA Sport 4X4 Outdoor CC and TJM Products SA (Pty) Ltd) as affected persons applied to set aside this resolution based on a lack of reasonable prospect for rescue. However, the application to set aside the business rescue proceedings was dismissed in the court *a quo*,[121] hence the appeal in this decision. The first appellant cancelled three of its agreements (a sale agreement, dealership agreement and a licence agreement) with

[116] Paras 18, 26.
[117] Para 12.
[118] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ).
[119] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012) para 15.
[120] *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015).
[121] Paras 1-3.

the first respondent after the indebtedness of the first respondent was proved.[122] The breach occurred prior to business rescue proceedings. The court had to answer the question as to whether the notices of cancelation constituted legal proceedings or enforcement action as per sections 133(1) and 133(3) of the Companies Act.[123]

The court *a quo* in *LA Sport 4x4 Outdoor v Broadsword* held that when a creditor gives a notice of cancelation, it would constitute a "legal process" that should be barred under the moratorium.[124] This decision, however, was overturned when the matter was heard on appeal by a full bench of the High Court.[125] The appeal court held that a juristic act such as cancellation does not constitute a "legal process".[126] In support of the decision of the appeal court, the court in *Cloete Murray* referred to the court a *quo* judgment of *LA Sport 4x4 Outdoor* and held that the judge erred in his judgment when it prejudiced the creditors by regarding a notice of cancellation as legal proceedings.[127]

Another issue the court had to deal with was whether the rights under the abovementioned contracts amounted to property in possession of the company in relation to section 134(1)(c).[128] As established previously, the first respondent was found to be indebted to the first appellant. Furthermore, the sale agreement contained a *lex commissoria*, which is a cancellation clause that allowed the appellant to cancel the agreement and by virtue of such cancellation, the dealership agreement and the licence agreement of the first respondent could also be cancelled.[129] Tuchten J held that the rights under the contracts could not constitute property of the company in business rescue and even if these rights did constitute property, they were no longer property in possession of the company due to the fact that the contracts were lawfully cancelled.[130]

Even though the requirement of being in possession of property was not decided in terms of section 133(1) in this matter, but rather in terms of section 134(1)(c), one could argue that the judge would have come to same conclusion if the issue had to be decided in terms of section 133(1). Therefore, in the event that the rights under the

[122] Paras 15-17.
[123] Para 20.
[124] Para 42.
[125] Para 54.
[126] Para 43.
[127] *Cloete Murray and Another NNO v Firstrand Bank Ltd /A Wesbank* 2015 (3) SA 438 (SCA) para 42.
[128] *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) para 47.
[129] Paras 15-17.
[130] Para 47 read with para 51.

contracts could be interpreted to mean property, this property would no longer be in lawful possession of the company after the contracts had been cancelled validly. Consequently, if protection via a moratorium had to be claimed to prevent the cancellation of the contracts, it would have been ineffectual as the requirement of being in lawfully in possession of property would not have been met.

4.2.2.3 Cloete Murray (judgment delivered on 26 March 2015)

In *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank*,[131] the BRP consented to the repossession of goods pursuant to cancellation by the creditor.[132] The court had to determine whether the cancellation of a contract before the company commenced with business rescue proceedings constituted enforcement action. It held it did not.[133] The court did not address the issue whether such repossession would have been contra the protection afforded by the moratorium. The court merely held that an enforcement action should be interpreted as an enforcement via legal proceedings by means of an enforcement or execution of court orders such as a writ of execution or attachment.[134] Furthermore, the court mentioned that if the company relied on section 134(1)(c) for the protection of it property interest in the goods, it would have been met with the counterargument that it was an unlawful possessor, since the lessor validly cancelled the agreement, but this part of the judgment was merely *obiter*.[135]

This interpretation of "legal proceedings" and "enforcement action" raises serious questions. How can a party enforce property rights after valid cancellation without obtaining a court order? Would this then mean that if a contract is validly cancelled, the company is not protected by sections 133 and 134 of the Act as it is no longer in lawful possession of the property?

This is exactly what happened. After this judgment, the precedent was set that a counterparty to an executory contract can unilaterally cancel an agreement and such valid cancellation would not be barred by the moratorium. The implication of this, however, as will be seen below, is that the provisions of the moratorium will be completely ineffectual if valid cancellation has taken place. Due to the act of valid

[131] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[132] Paras 5-6.
[133] Para 33.
[134] Para 32.
[135] Para 22 read with para 25 and 26.

cancellation, property will be in the unlawful possession of the company in business rescue, which will limit the effects of sections 133, 134 and 136.

4.2.2.4 178 Stamfordhill (judgment delivered on 1 April 2015)

In *178 Stamfordhill CC v Velvet Star Entertainment CC*,[136] the applicant creditor sought a declaratory order confirming that the contract of lease had been cancelled and, in addition, that an eviction order be granted against the company in business rescue.[137] This application was brought as a result of the company being in arrears with it rental payments under a contract of lease.[138] The lessor sent a notice of cancellation after the commencement business rescue proceedings,[139] but the breach occurred before such commencement.

Counsel for the respondent argued the lease was suspended by the BRP by virtue of section 136(2) of the Companies Act.[140] Counsel for the applicant argued that the treatment of contracts by the BRP during business rescue should be the same as that of a liquidator of a company during liquidation or trustee in insolvency.[141] The contracts are neither terminated nor modified and the rights and obligations of the parties to the contract remain the same, which would include that the insolvent party must continue to perform its unfulfilled past obligations.[142] Counsel for the respondent further argued that the BRP cannot remain in possession of the property while not honour its obligations to pay rent.[143] The judge agreed with the submissions made by the applicant.[144]

Furthermore, counsel for the applicant submitted that because the lease was lawfully cancelled, the company was no longer lawfully in possession of the leased property.[145] This would entail that the company is undeserving of the protection afforded by the moratorium against legal proceedings and enforcement action and, thus, leave of the court to institute such proceedings was not required.[146]

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[136] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015).
[137] Para 5.
[138] Paras 3-4.
[139] Para 12.
[140] Para 21.
[141] Para 27.
[142] Para 27.
[143] Para 27.
[144] Para 27.
[145] Para 29.
[146] Para 29.

Thatcher AJ gave the necessary leave and granted an order for ejectment.[147] The reason for his decision was to limit the claim that the applicant will have against the respondent (company in business rescue) because of its continued occupation of the property, which will only mitigate and diminish the financial claims of all the other creditors against the company in business rescue.[148]

An agreeable aspect of the *178 Stamfordhill* decision is that the judge recognised that the leave of the court had to be obtained as part of the procedural requirements of section 133. The judge also did not entertain a debate on the requirement regarding the lawfulness of possession, but rather lifted the moratorium and allowed the ejectment of the company from the business premises on the basis that the continued occupation by the lessee will be financially detrimental to the company itself, the aggrieved creditor and all other creditors that have a claim against the company. This is a clear example of balancing the interest of all relevant stakeholders as is envisioned in the Act.

Lastly, the significance of the *178 Stamfordhill* decision is that it is supporting evidence that executory contracts in South African law are neither terminated nor altered by the mere fact of a company commencing with business rescue proceedings. These contracts are automatically assumed subject to the cancellation and suspension powers of the BRP.

4.2.2.5 Southern Value Consortium (judgement delivered on 23 November 2015)

In *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others*,[149] a retail company had defaulted on its rental payments in terms of a lease agreement before the commencement of business rescue, which contract was cancelled after such breach.[150] The creditor sought relief through an eviction order.[151] The company in business rescue raised the defence that the creditor should be precluded from using the *rei vindicatio* to repossess its property in light of the protection afforded in terms of the section 133 moratorium.[152]

[147] Para 31.
[148] Para 30.
[149] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC).
[150] Paras 7-8.
[151] Para 9.
[152] Para 25.

The court held that after the creditor cancelled the lease agreement, the company was no longer in lawful possession of the property and could not enjoy protection under the moratorium.[153] The court referred to *Cloete Murray*[154] and acknowledged the purpose of the moratorium to assist a company to restructure its financial affairs.[155] The court ordered the ejectment of the company from the premises and held that the company cannot restructure its affairs by using assets that it no longer has a lawful claim to.[156]

4.2.2.6 JVJ Logistics (judgment delivered on 7 June 2016)

In *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others*,[157] the applicant (a transport company) had fallen in arrears in terms of an instalment sale agreement concluded with the bank with regard to a vehicle that was the only vehicle in its possession.[158] The bank, who retained ownership of the vehicle, sought an order confirming the cancellation of the agreement and subsequent repossession of the vehicle, which was then granted before the company entered business rescue.[159] Counsel for the applicant referred to *Cloete Murray*[160] and argued that if the bank were allowed to repossess the vehicle, it would amount to an enforcement action that ought to be prohibited under section 133(1) of the Act.[161] Olsen J upheld this submission in part, but because the company was not "lawfully in possession", it could not be afforded the protection of the moratorium.[162] The court did not assess the merits of whether the order constituted enforcement action, but rather focused on whether the possession of the applicant company was lawful. The court adopted the approach followed in *Madodza*[163] and reasoned that when the bank cancelled the agreement, the applicant company lost its *jus possidendi* and, therefore, became an unlawful

[153] Paras 31-32.
[154] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[155] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 34.
[156] Paras 35-37.
[157] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD).
[158] Para 2.
[159] Para 2.
[160] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[161] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 13.
[162] Para 13.
[163] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).

occupier.[164] In other words, the company was undeserving of the protection afforded under the section 133 moratorium, as it no longer was in lawful possession.[165]

The court held that financial distress should not affect the claim for possession or the quality of such a claim.[166] Denying the owner the return of possession of its property cannot be justified by relying on a mere promise by a company that there would be an improvement in the rights of a creditor if the company were to be rescued successfully.[167] One can agree with the judgment in that a creditor should not be unduly deprived of its property rights based on a mere probability of rescue. However, this judgment supports the conclusion that South Africa still lacks a "rescue-culture",[168] since the interests of creditors seem to trump any other interests.

4.2.2.7 Finlayson (judgment delivered on 2 August 2016)

In *Finlayson NO and Others v Master Movers Cape CC and Others*,[169] the applicants, on behalf of the lessor, sought an order for the eviction of the company in business rescue, the lessee, from the business premises.[170] The company committed a breach when it defaulted on its rental payment before it commenced with business rescue proceedings.[171] The lessor cancelled the contract of lease after the business rescue proceedings commenced, but the lessee remained in possession of the property and failed to make any payments toward current and past rental amounts owing.[172]

The court referred to both *178 Stamfordhill*[173] and *Cloete Murray*[174] and reiterated the fact that business rescue proceedings could not preclude the creditor from cancelling the contract and that the cancellation of such a contract did not require the consent of either the BRP or leave of the court.[175] The court held that when the lease was validly cancelled, the lessee no longer had a right to occupy the premises.

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[164] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 25.
[165] Para 51.
[166] Para 47.
[167] Para 47.
[168] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 232
[169] *Finlayson NO and Others v Master Movers Cape CC and Others* (10589/16) [2016] ZAWCHC 96 (2 August 2016).
[170] Para 1.
[171] Para 13.
[172] Para 17.
[173] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015).
[174] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA).
[175] *Finlayson NO and Others v Master Movers Cape CC and Others* (10589/16) [2016] ZAWCHC 96 (2 August 2016) para 41.

However, although the lessor does not need the consent of the BRP or leave of the court before cancelling the lease agreement, the lessor does need the court's leave when seeking an eviction order, as required by section 133(1).[176]

The court did not mention the debate surrounding unlawful possession. However, since the court referred to the leave that needs to be obtained to lift the moratorium in terms of section 133, one can assume that judge acknowledged eviction proceedings as constituting enforcement action and that such proceedings should be barred by the moratorium unless leave of the court has been obtained. In my opinion, the court interpreted section 133 correctly when it granted the creditor permission to recover its property, without creating further legal problems by entering an unnecessary debate on unlawful versus lawful possession.

4.2.2.8 Acacia Leasing (judgment delivered on 16 March 2018)

In *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC*,[177] the company in business rescue (the lessee) committed a breach prior to commencing business rescue proceedings by defaulting on their rental payments. Consequently, the applicant (the lessor) cancelled the lease agreement before the commencement of business rescue.[178] The lessor sought an order cancelling the water and electricity supply to the lessee and an order evicting the lessee from the premises.[179] The BRP of the lessee relied on the moratorium to preclude the lessor from instituting the current legal proceedings and enforcement action.[180] In addition to relying on the moratorium, the BRP also raised the defence that he suspended all obligations in terms of the lease agreement.[181]

The court held that after the contract of lease was validly cancelled, the lessee was no longer in lawful possession of the property and consequently the company and its BRP could not invoke the protection of the moratorium, since the requirements for the latter were not met.[182] The court further confirmed that the BRP cannot invoke

[176] Para 42.
[177] *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018).
[178] Paras 12,13 and 24.
[179] Para 1.
[180] Para 23.
[181] Para 22.
[182] Paras 24 and 29.

section 136(2) with regard to property in respect of which the company is no longer in lawful possession.[183]

As discussed in *3.5.2.3* above, the BRP can only suspend obligations that have become due during business rescue proceedings. Not only is this case important for purposes of discussing lawful possession as a requirement for the moratorium, but it also demonstrates that BRPs still try to exercise their suspension power under circumstances where they are not entitled to do so.

4.2.2.9 Friedshelf 113 (judgment delivered on 25 September 2019)

In *Friedshelf 113 (Pty) Ltd v Baksons (Pty) Ltd t/a Bakos Brothers and Another*,[184] the company in business rescue (the lessee) opposed an application for summary judgment by the lessor to have the company evicted from its business premises.[185] The lessor cancelled the agreement after the company commenced with business rescue proceedings.[186] The company in business rescue raised the defence that the BRP suspended the obligations in terms of section 136(2) of the Companies Act.[187]

The application for summary judgement was dismissed and the lessee was granted leave to defend the action.[188] The court held that the lessee showed a *bona fide* defence that entitled it to defend the action after the court carefully considered the arguments made by the lessee, the provisions of the Act and prospect of the business being saved.[189]

Because this was an opposed application for summary judgment, one can only speculate as to what the outcome of the case would be should it proceed to trial. It is unclear from the judgment whether the breach of contract (failing to pay the rentals) occurred before or during business rescue. If the breached occurred before business rescue and the creditor validly cancelled the agreement, following the reasoning of practically all preceding cases on this issue,[190] the company will be an unlawful

[183] Para 30.
[184] *Friedshelf 113 (Pty) Ltd v Baksons (Pty) Ltd t/a Bakos Brothers and Another* (18898/19) [2019] ZAGPJHC 376 (25 September 2019).
[185] Para 8.
[186] Para 21.
[187] Para 10.
[188] Para 31.
[189] Paras 26-27.
[190] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012 paras 18,26. See also *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 47,51. See also *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para

occupier and be evicted from the premises. If the breach, however, occurred after business rescue has commenced, the contract could still be cancelled, but the BRP can invoke his suspension powers, which simply means the BRP cannot be compelled to perform.[191]

4.2.2.10 Timasani (judgment delivered on 13 April 2021)

The court in *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd*[192] was the first court that had to deal with a party to a contract claiming protection under the moratorium with respect to a transaction that occurred after the commencement of business rescue or where property came into the possession of the company after the date of commencement.[193] The issue was whether the legal proceedings for the recovery of a deposit made in terms of an offer to purchase that did not come into effect, was barred by the moratorium.[194]

The court held that the moratorium will be applicable to transactions that occurred after the commencement of business rescue the same way it does to transactions that occurred before commencement.[195] The court followed the approach of *Southern Value Consortium*[196] and reasoned that the moratorium cannot be applicable to property in the unlawful possession of a company.[197] The court held that because the contract of sale did not come into existence, the deposit had to be repaid as the deposit did not belong to the company and neither was it property in the lawful possession of the company.[198]

The judgment in *Timasani* is important not only with regard to the treatment of contracts that were concluded during business rescue, but also because the court held that interpreting the moratorium would have been simpler if “lawfully in its possession”

31. See also *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 25. See also *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 24,29.

[191] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para 27.

[192] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021).

[193] Para 26.

[194] Para 2.

[195] Para 26.

[196] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC).

[197] Para 31.

[198] Para 35.

had been a subparagraph of section 133(1) instead of being in the main text. [199] Therefore, the court recognised that the interpretation of lawful possession is a contentious issue.

4.2.2.11 Concluding remark

As seen in the above case discussions, lawful possession has been the deciding factor in determining whether or not the company will be entitled to the protection afforded by the moratorium. The courts are in favour of allowing cancellation and subsequent repossession by a counterparty without considering what the impact of such cancellation and repossession would be on business rescue as a whole. In what follows, I will discuss certain important concerns with the current legal position.

4.2.3 Concerns with the current legal position regarding executory contracts

4.2.3.1 Effect of executory contracts not being upheld

A concern with the current South African business rescue proceedings is executory contracts that are not upheld even though they are essential to the operations of a company.[200] The valid cancellation of a contract will mean the company is no longer in lawful possession of the property, which leaves the company vulnerable to repossession by the counterparty as seen from the above case discussions.[201] Since possession has become unlawful, the company may no longer use those assets for its benefit.[202] This would also mean the BRP can no longer utilise these assets, which could negatively affect the likelihood of returning the company to a solvent basis.

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[199] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021) para 29.

[200] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 219. See also MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 423 for examples of executory contracts that are essential to the success of the company that are currently being cancelled, which include lease agreements for movable and immovable property and instalment sale agreements.

[201] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012) paras 18, 26. See also *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 47, 51; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 31; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 25; *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 24, 29.

[202] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) paras 35-37.

The lack of an established rescue culture in South Africa[203] may very well be the reason why counterparties elect to cancel agreements with parties in business rescue and why the courts allow such cancellation and subsequent repossession to take place. South African courts still choose to favour outcomes in favour of creditors so as to not prejudice their contractual rights over seeking a favourable outcome that would favour the company in business rescue.[204]

One can understand why a creditor would not want a contract to continue to exist, as the company that has already defaulted before business rescue would in all likelihood continue to struggle to perform its obligations during business rescue. Therefore, it makes logical sense that business rescue cannot continue unabated while unduly depriving the creditor of its property rights. However, avoiding the prejudice of creditors when it comes to executory contracts by allowing cancellation and repossession comes at the price of failing to achieve the aims of business rescue as envisaged by sections 7(k) and 128 of the Act. The cancellation and subsequent repossession by a single creditor could cause the failure of the entire business rescue. However, this will depend on the importance of the contracted property in relation to the company. For example, if a lease agreement is cancelled and the company has to vacate the premises, the likelihood of rescue will be diminished substantially.[205] Given that the company is in financial distress, there would arguably be little, if any, reasonable prospect of successfully rescuing a company that has forfeited an essential asset.

In *Madodza*,[206] a transport company had to forfeit its leased vehicles that were crucial to the success of business rescue.[207] In *LA Sport 4X4 Outdoor*,[208] the retail store could no longer trade its business in a legitimate manner due to the contracts being cancelled.[209] In *Kythera Court*,[210] the restaurant was evicted from the business

[203] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 232.
[204] 237.
[205] *South African Property Owners Association v Minister of Trade and Industry and Others* 2018 (2) SA 523 (GP) para 20.
[206] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012).
[207] Para 26. See the discussion in 4.2.2.1.
[208] *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015). See the discussion in 4.2.2.2.
[209] Para 51. See the discussion in 4.2.2.2.
[210] *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ).

premises due to being an unlawful occupier.[211] In *178 Stamfordhill*,[212] the nightclub was evicted from the business premises for remaining in possession of property it no longer had a right to occupy.[213] In *Southern Value Consortium*,[214] the retail trader was evicted from its primary business premises.[215] In *JVJ Logistics*,[216] a transport company had its one and only vehicle repossessed.[217] Last but not least, in *Finlayson*,[218] the storage company was evicted from its business premises.[219]

In each of the abovementioned cases, it was clear that the companies were in breach of contracts due to defaulting on their rental or lease payments, which resulted in their ejectment from the business premises or the repossession of essential goods. What they all have in common is that the contracts that were cancelled were most likely their only means to achieve a successful business rescue. Transport companies cannot move goods without vehicles. Restaurants, retail stores, nightclubs and storage warehouses cannot continue trading if they do not have a premises to trade from.

When an essential contract is cancelled, I would argue that the reasonable prospect of success probably no longer exists. Accordingly, the business rescue would in most such instances have to be terminated.

Lawrenson argues that the cancellation of executory contracts by counterparties, which is the general tendency evident in current South African business rescue law, could have been prevented by the proposed clause 139 of the Companies Bill.[220] Clause 139(1)(a) of the Companies Bill, which was omitted from in the eventual Act, entailed that, despite any provision of an agreement to the contrary, a person who was supplying essential goods or services to the company before business rescue proceedings commenced had to continue the supply of such goods or services on the same terms and conditions when the company was placed in business rescue.[221] The only circumstances that could have changed the continuation of such an agreement

[211] Para 16. See the discussion in 3.5.4.2.
[212] *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015).
[213] Para 31. See the discussion in 4.2.2.4.
[214] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC).
[215] Paras 4 and 37. See the discussion in 4.2.2.5.
[216] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD).
[217] Para 2. See the discussion in 4.2.2.6.
[218] *Finlayson NO and Others v Master Movers Cape CC and Others* (10589/16) [2016] ZAWCHC 96 (2 August 2016).
[219] Para 44.
[220] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 662.
[221] Cl 139(1)(a)(i) of the Companies Bill of 2007 (*GG* 29630 of 12 February 2007).

was if the parties agreed to terms that were more advantageous to the company, if a court ordered otherwise or if the business rescue plan provided otherwise.[222]

It is clear from the proposed (but unrealised) provisions that executory contracts that are essential to the business of the company were initially intended to be upheld, which is contradictory to the position currently faced in business rescue law. Lawrenson further argues that the Act has certain serious weaknesses, which arose because business rescue was not preceded and no report existed from a commission of experts before the Act was implemented, despite fundamentally changing insolvency law through the introduction of business rescue.[223]

Another concern is that there is no *concursus creditorum* in business rescue. Allowing the enforcement of the rights of a single creditor could prejudice the claims that other creditors have against the company in business rescue. Counsel for the company in *Cawood NO and Others v Swanepoel t/a Reaan Swanepoel Attorneys and Others*[224] argued that, if enforcement is granted in favour of a single creditor, such creditor will no longer be on "equal footing" with the other creditors. I would argue that this consideration is something the courts should take into account before an enforcement action is allowed. This line of reasoning also supports the argument of upholding essential executory contracts.

4.2.3.2 The approach of the courts in respect of "lawful possession"

According to Van der Linde, the courts have followed two divergent approaches when deciding whether the moratorium should protect against ejectment and repossession proceedings following the lawful cancellation of a lease agreement.[225] The first approach is that the moratorium should not be applicable to ejectment or repossession proceedings, because after the lessor has validly cancelled the lease agreement, the company in business rescue is no longer in lawful possession of the property.[226] The

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[222] Cl 139(1)(a)(i)(aa)-(cc).
[223] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 662. See also A Loubser *Some comparative aspects of corporate rescue in South African company law* (2010) LLD thesis Unisa 1-387 5.
[224] *Cawood NO and Others v Swanepoel t/a Reaan Swanepoel Attorneys and* Others (69041/2015) [2015] ZAGPPHC 1042 (29 September 2015) para 22. See the discussion in 4.1.3.4.
[225] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 230.
[226] 231. See also *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012 paras 18, 26; *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 47, 51; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 31; *JVJ Logistics*

moratorium only protects property that belongs to the company or property that is lawfully in its possession.[227] Consequently, due to the moratorium not being applicable, when the counterparty seeks to enforce its property rights, consent of the BRP or leave of the court will not be required.[228] This approach is further strengthened by the fact that section 134(1)(c) of the Act only makes provision for the protection of property that is in lawful possession of the company.[229]

The second approach, which is considered the correct approach according to Van der Linde, is where the court acknowledges the moratorium and that it can only be lifted to allow enforcement proceedings when either the consent of the BRP or leave of the court has been obtained.[230] In terms of this approach, the court should grant leave before the property of the company is repossessed or the company is evicted from the premises.[231]

It is accepted that cancellation does not amount to legal proceedings or enforcement action because cancellation amounts to a termination of obligations; it is an unilateral act and not commenced or proceeded in a court or tribunal.[232] However, Cassim argues any cancellation should not adversely affect the continued possession of property by a company in business rescue, as a notice of cancellation cannot amount to the automatic repossession of such property.[233] The moratorium is supposed to impede the repossession of property, as it equates to an enforcement of obligations.[234] An enforcement action, after all, includes when a party enforces its rights,[235] such as the right to take possession after cancellation. Therefore, the correct

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(Pty) Ltd v Standard Bank of South Africa Ltd and Others 2016 (6) SA 448 (KZD) para 25; *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 24, 29.

[227] S 133(1) of the Companies Act 71 of 2008.

[228] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 230.

[229] S 134(1)(c).

[230] K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 231.

[231] 231. See *Finlayson NO and Others v Master Movers Cape CC and Others* (10589/16) [2016] ZAWCHC 96 (2 August 2016) para 42. See the *Finlayson* discussion in 4.2.2.7. See *178 Stamfordhill CC v Velvet Star Entertainment CC (1506/15) [2015] ZAKZDHC 34 (1 April 2015)* paras 30-31. See the *178 Stamfordhill* discussion in 4.2.2.4.

[232] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) paras 32-33.

[233] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 39 *SA Merc LJ* 419-449 425-426.

[234] 426.

[235] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 32.

procedure by the creditor should be to obtain the consent of the BRP or leave of the court before property is repossessed.[236]

The rationale for lifting the moratorium should be that a creditor will be prejudiced and deprived of its property rights if the company remains in occupation or possession of such property without honouring its payments for the use thereof. Essentially, the creditor has performed in full without receiving any counter performance. Under such circumstances, when the creditor applies for leave to repossess its property rights, the court will likely grant such leave. Therefore, when the court considers whether or not to grant leave, it should focus on the merits of the case and determine whether the enforcement proceedings will contribute to the aims of business rescue as set out in the section 7(k) and 128 of the Companies Act. When a court focuses on the interpretation of the term "lawful possession" as is evident in the case law discussed in 4.2.2 above, the merits of the case in the light of business rescue are rarely considered, while the courts instead tend to focus solely on the interests of the creditor who brought the application.

Where a court receives an application for leave to institute proceedings in a separate prayer, granting such leave will depend on the prospect of success of the main relief sought.[237] Therefore if leave of the court is asked regarding whether the counterparty can institute legal proceedings or enforcement action, the success of the application should depend on the merits of the case.[238]

If cancellation is all that is required to invalidate the moratorium without leave of the court or consent of the BRP, then it is not well-drafted moratorium. Any possessor who is party to a cancelled agreement, will find itself in unlawful possession and will not be protected by the moratorium and will be vulnerable to repossession. A domino effect exists in that cancellation will result in unlawful possession, which in turn will render the moratorium ineffective, which in many cases will cause the business rescue to fail. Surely, a mere notice of cancellation cannot be permitted to potentially cause the entire business rescue proceedings to become a fruitless exercise.

It is clear from case law that the courts have a tendency to mitigate the protection afforded by the moratorium,[239] more specifically when executory contracts are at

[236] S 133(1)(a)-(b) of the Companies Act 71 of 2008.
[237] *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) and Others* 2017 (4) SA 592 (GJ) para 27.
[238] Para 28.
[239] See the case discussions in 4.2.2. See also MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 432.

stake. It has been seen on several occasions that a company and its BRP as a party to an executory contract would offer some resistance to the cancellation, ejection and repossession proceedings instituted by a creditor, but to no avail.[240] Indeed, the courts appear to be in favour of making judicial exceptions to allow these types of proceedings instituted by creditors.[241]

4.3 Recommendations and conclusion

4.3.1 Recommendations

Before proceeding to the comparative study in the next chapter, it is useful at this stage already to provide some recommendations in response to the analysis conducted in this chapter. The first issue that needs to be addressed relates to essential executory contracts that are critical to the survival of the company and that, therefore, need to be upheld.[242] This would entail that a contract that is essential to the very existence of a company cannot merely be cancelled unilaterally by an aggrieved creditor, but rather in the event where the creditor elects to cancel such a contract, such cancellation should only be valid if leave of the court or consent by the BRP has been obtained. I propose that a provision similar to clause 139(1)(a) of the Companies Bill[243] should be revived and added to the Act. This provision should allow for the continued existence of an executory contract that is essential to the existence of a company. I propose that this revived clause should essentially provide the company with a second opportunity to remedy a breach before the creditor can elect to cancel such an agreement.

For this proposal to be financially viable for creditors, I additionally suggest that the legislator add a prerequisite to this revived clause, namely that the BRP should provide creditors with adequate assurance the breach will be remedied. Such assurance can be in the form security provided by either the BRP or the company in business rescue.

Secondly, if the current legal position is maintained whereby a contracting party can cancel a contract and following such valid cancellation is allowed to exercise its property rights through an enforcement action, I would suggest that the BRP be held

[240] See the case discussions in 4.2.2. See also K van der Linde "Ondernemingsredding en kontrakte: is die wederkerigheidsbeginsel uitgedien?" 2017 *TSAR Lieber Amicorum* 218-240 220.
[241] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 432.
[242] See the discussion in 4.2.3.1.
[243] Cl 139(1)(a)(i) of the Companies Bill of 2007 (*GG* 29630 of 12 February 2007).

personally liable for the continued "unlawful possession of property".[244] There is sufficient judicial precedent suggesting that if a breach occurred prior to the commencement of business rescue proceedings and the contract has been validly cancelled, the company will no longer be in lawful possession of the property and the owner of the property will be able to repossess the property.[245] BRPs should therefore stop their futile reliance on the moratorium as a defence when a contract has been validly cancelled before the commencement of business rescue.

In terms of section 141 of the Companies Act, if at any time during business rescue proceedings there is no longer a reasonable prospect for the company to be rescued, the BRP has to inform the court, the company and all affected persons of this and apply to court to have the business rescue proceedings discontinued and place the company into liquidation.[246] I would argue that when an instalment sale agreement or contract of lease has been validly cancelled and this will prevent a company from continuing its current business, a reasonable prospect of rescue will no longer exist. It is logical that a company will probably not be able to continue trading if its contract of lease has been cancelled and it can no longer use the business premises or leased assets. Following this reasoning, it would be disingenuous for a BRP to rely on the moratorium when a BRP ought to know that the company is in unlawful possession of such vital property. By prolonging the inevitable repossession or ejectment proceedings, he will only be frustrating the business rescue of the company and cause the accumulation of unnecessary legal costs when the company is already on the brink of insolvency. Making the BRP personally liable for the unlawful use or occupation of property could discourage the incurring of costs to merely postpone the inevitable.

Thirdly, the concept of lawful possession has proven to be a deciding factor when relief in terms the moratorium has been claimed.[247] In an attempt to avoid any future frivolous litigation with regard to lawful possession, the legislature should preferably

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[244] The concept of personal liability by an administrator for rent owed is a concept that is already evident in voluntary administration in Australia. See the discussion in 5.2.5.
[245] *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012 para 18, 26; *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 47, 51; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 31; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 25; *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 24, 29.
[246] S 141(2)(a)(i)-(ii) of the Companies Act 71 of 2008. See also the discussion in 3.4.2.
[247] See the case discussions in 4.2.2.

define the term "lawful possession" in the Act. This definition should include the circumstances that would render possession unlawful. The definition should, for example, reiterate the fact that business rescue does not affect the common law position in that lawful possession will only include possession of property for as long as a contract is still in existence and has not been cancelled.

4.3.2 Conclusion

The general moratorium is not an effective protective measure when it comes to barring legal proceedings and enforcement action from being instituted against a company in business rescue. A breach before business rescue commenced will almost always render the property in the unlawful possession of the company. Part of the problem is that the courts still find it difficult to interpret the wording of the moratorium provision.[248] The courts are stuck at debating whether the company is deserving of the protection afforded by the moratorium, by considering whether the action in question constitutes "legal proceedings" or "enforcement action" or when possession is lawful or unlawful.

From the discussion above, it is also evident that the issue of property being "lawfully in its possession" takes up unnecessary focus in judgments. For instance, in *Timasani*,[249] Schipper JA held that interpreting the moratorium would have been simpler if "lawfully in its possession" had been a subparagraph of section 133(1) instead of being in the main text. Instead of focusing on whether possession is lawful, the court should simply determine whether leave should be granted and allow the counterparty to institute its claim based on the merits of the case, which would include whether a creditor would benefit from the business rescue at the cost of being temporarily deprived of its property.

If the business rescue procedure had been developed with the purpose of allowing a company to restructure its financial affairs to allowing for an efficient rescue, then permitting a creditor to unilaterally cancel a lease that is of utmost importance to the existence of a company would negate the purpose of business rescue. If a creditor were to cancel an important agreement, it could result in a serious compromise of the operations of a company. This strengthens the argument that in South African

[248] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021) para 29.
[249] Para 29.

business rescue proceedings, executory contracts that are essential to the operations of a company are currently not adequately protected against cancellation by the counterparty.

Lastly, the problem with being in unlawful possession of property is that it will affect the use of the property by the BRP. If the property is in the unlawful possession of the BRP, the BRP can no longer utilise the property to rescue the company, rather than assisting the BRP, the moratorium has proven to fail as a protective measure.

Chapter 5

The approach of the United States of America and Australia regarding executory contracts during corporate rescue

5.1 United States of America

5.1.1 Introduction

In this part of the dissertation, I will investigate the reorganisation provisions of the United States of America (USA or US). The goal of this comparative study is to explore the similarities and differences between business rescue in South Africa and reorganisation as a corporate rescue procedure in the US. Ultimately, this will allow for the formulation of recommendations that could be utilised in South African business rescue law.

Reorganisation is specifically provided for in Chapter 11 of the US Bankruptcy Code.[1] Chapter 11 reorganisation as a corporate rescue procedure is the most widely recognised rescue system in the world.[2] Indeed, the introduction of the US Bankruptcy Reform Act has caused many countries of the world to adopt a similar corporate rescue regime.[3]

Chapter 11 has played an important part in influencing the adoption of business rescue in South Africa as well. Based on the recognition of its effectiveness, the South African Department of Trade and Industry acknowledged that in drafting the South African business rescue provisions, the US Chapter 11 Bankruptcy provisions would be considered.[4] By introducing business rescue, South Africa has become one of several developing countries to adopt the US corporate rescue system.[5]

Reorganisation is generally referred to as a Chapter 11 bankruptcy case, whereas liquidation is referred to as a Chapter 7 bankruptcy case. Chapters 1, 3 and

[1] Bankruptcy Reform Act (11 USC 1978).
[2] J Calitz "Is post-commencement finance proving to be the thorn in the side of the business rescue proceedings under the 2008 Companies Act?" (2016) 49 *De Jure* 265-287 273.
[3] H Rajak & J Henning "Business rescue for South Africa" (1999) 116 *SALJ* 262-287 263.
[4] The Department of Trade and Industry *Policy paper: South African company law for the 21st century: Guidelines for corporate law reform* (GN 1183 in GG 26493 of 23 June 2004) para 4.6.2.
[5] M Pretorius "Expectations of a business rescue plan: International directives for Chapter 6 implementation" (2014) 18 *South African Business Review* 108-139 109.

5 of the Code, which are considered the general provisions, apply to both Chapter 7 and Chapter 11 bankruptcy cases.[6]

The objective of reorganisation is to allow a troubled company to return to a state of operating successfully in the future.[7] The protection and preservation of the estate of the distressed company is the primary policy of reorganisation. The US believes in the principle of preserving the estate of the debtor in need of restructuring without causing unnecessary obstacles that may further diminish its value, but where creditors are also compensated for their potential losses that may arise from a company being or becoming insolvent.[8] Through allowing reorganisation, the company will effectively continue to provide its employees with jobs while generating a return for its owners and satisfying the claims of its creditors.[9] It is believed that the assets of a company would offer and generate more value in a rehabilitating company in contrast to selling them for a very low-price through a winding-up procedure.[10]

Reorganisation is a debtor-friendly system that protects the company in distress from claims by creditors and other parties who hold an interest in the company.[11] Furthermore, reorganisation is debtor-friendly in that it allows for a unified and comprehensive approach by involving both the distressed company and its creditors with returning a company to its normal operations. It is surmised that reorganisation as a corporate rescue procedure is preferred over the instance where secured creditors are able to foreclose on their collateral or where creditors could institute forced liquidation proceedings.

Reorganisation in the US should only be considered as a last resort, due to the many informal procedures that are available to a distressed company before it reaches a point of factual insolvency or where it suspects that it will likely become insolvent in the future.[12] Reorganisation takes place by way of court oversight and supervision

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[6] 11 U.S.C. § 103(a).
[7] *US v Whiting Pools Incorporated* (1983) 462 US 198 203.
[8] G Evans "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" (2010) 43 *Comparative and International Law Journal of Southern Africa* 337-351 345.
[9] *US v Whiting Pools Incorporated* (1983) 462 US 198 203.
[10] 203.
[11] J Calitz "Is post-commencement finance proving to be the thorn in the side of the business rescue proceedings under the 2008 Companies Act?" (2016) 49 *De Jure* 265-287 276.
[12] PL Kunkel & JA Peterson "Bankruptcy: the last resort" (2015) June *Agricultural Business Management* 1-5 5.

and, therefore, other avenues should be considered before unnecessarily involving a court.

One of the alternatives that could be considered is turnaround. Turnaround is similar to reorganisation, but it is not governed by the Bankruptcy Code. Turnaround entails external services that allow for the reversal of the decline of performance of a company.[13] Turnaround managers can facilitate the rehabilitation of a company,[14] and thereby help the company to return to normal operations on a solvent basis.[15]

5.1.2 Overview of reorganisation

What distinguishes the US corporate recue regime from most other jurisdictions is that the incumbent management remains in control of the company, and generally there is no administrator or supervisor appointed.[16] After reviewing its current regime, the American Bankruptcy Institute considered the approach of other countries that follow a management-displacement model, by way of a trustee or insolvency practitioner, but it maintained that due to the potentially high costs and disruption during reorganisation, the current position of keeping the management in control should be retained.[17]

Upon successfully filing a petition with the court, the company commencing with reorganisation is legally invested with the title of a "debtor in possession".[18] The debtor in possession consists of the existing management of a company.[19] During reorganisation, a trustee will only be appointed by the court in rare circumstances, such as where the incumbent management has committed acts of fraud, dishonesty, incompetence, or gross mismanagement of the company.[20]

Unlike the US, South Africa follows the approach of appointing a BRP, who takes control of the distressed company. The BRP has full management control over the

[13] M Pretorius "Tasks and activities of the business rescue practitioner: a strategy as practice approach" (2013) 13 *South African Business Review 17* 1-26 7.
[14] M Pretorius "A competency framework for the business rescue practitioner profession" (2014) 14 *Acta Commercii* 1-15 3.
[15] M Pretorius "Defining business decline, failure and turnaround: a content analysis" (2009) 2 *SAJESBM NS* 1-16 8.
[16] N Martin "The role of history and culture in developing bankruptcy and insolvency systems: The perils of legal transplantation" (2005) 28 *Boston College International and Comparative Law Review* 1-77 30.
[17] American Bankruptcy Institute "Commission to study the reform of Chapter 11' 2012-2014 Final Report and Recommendations" 22, available at http://commission.abi.org/full-report (accessed on 31 March 2021). See also J Calitz "Is post-commencement finance proving to be the thorn in the side of the business rescue proceedings under the 2008 Companies Act?" (2016) 49 *De Jure* 265-287 276.
[18] G McCormack "Control and cooperative rescue – An Anglo-American evaluation" (2012) 56 *International and Comparative Law Quarterly* 515-551 515.
[19] 11 U.S.C. § 1107.
[20] 11 U.S.C. § 1104(a)(1).

company[21] and may delegate some of his management functions to the existing managers.[22] The BRP forms part of management although he or she does not become a director of a company.

In the US, reorganisation can commence either voluntarily or under compulsion through the filing of a petition with the court. A voluntary bankruptcy case under Chapter 11 is commenced when the debtor, the company, files a petition with the court.[23] The majority of reorganisations are commenced by way of a voluntary petition by the debtor company seeking its own reorganisation.[24] A bankruptcy case can also commence involuntarily, or rather compulsory, where the holder of a claim against the company files a petition.[25] Generally, the holder of a claim is a secured creditor. Upon filing a petition for bankruptcy (more specifically reorganisation), an automatic order for relief is granted by the court.[26]

Much like reorganisation, business rescue in South Africa can also commence either voluntarily or under compulsion: voluntarily through a resolution passed by the board of directors or compulsory by way of a court application made by an affected person.[27] The key difference between the two regimes lies with the persons who may file for compulsory commencement. In terms of business rescue, the term "affected person" allows for a wider scope of application, as trade unions and shareholders are also included in the definition of an affected person.[28] In the US, only a holder of a claim may file a petition to commence reorganisation,[29] where the holder of a claim generally refers to a secured creditor.

Insolvency is not a requirement for filing a petition to commence with reorganisation in the US. Therefore, a company can commence with the procedure at any stage, whether or not it is in financial distress. Reorganisation is also available to any juristic person or type of company, with only a few restrictions on who would be disallowed from utilising reorganisation. Therefore, the party seeking to commence

[21] S 140(1)(a) of the Companies Act 71 of 2008.
[22] S 140(1)(b).
[23] 11 U.S.C. § 301(a).
[24] G McCormack "Control and cooperative rescue – An Anglo-American evaluation" (2012) 56 *International and Comparative Law Quarterly* 515-551 517.
[25] 11 U.S.C. § 303(b).
[26] 11 U.S.C. § 301(b).
[27] Ss 129(1) and 131(1) of the Companies Act 71 of 2008.
[28] S 128(1)(a) read with s 131(1) of the Companies Act 71 of 2008.
[29] 11 U.S.C. § 303(b).

reorganisation does not need to be a company.[30] This is different from other jurisdictions, such as South Africa, where an entity who wishes to commence with business rescue may only be a company[31] or close corporation.[32]

5.1.3 Automatic stay

A moratorium, similar to the one under business rescue, comes into existence at the moment when a company files a petition for reorganisation. The moratorium is known as an automatic stay,[33] which is a breathing spell that is fundamental to reorganisation.[34] It allows for the debtor company to develop a reorganisation plan that will benefit its creditors without any enforcement action brought against the company.[35] The moratorium only provides temporary relief for the debtor in possession, and final relief can only be granted by the confirmation of a reorganisation plan, which is subject to approval by the creditors.

The automatic stay is quite detailed when compared to its South African business rescue counterpart. The automatic stay is applicable to: the commencement or continuation of judicial, administrative or other proceedings against the debtor in possession;[36] recovering a claim against the debtor in possession before reorganisation commenced;[37] enforcement against the debtor or property forming part of its estate;[38] an act obtaining control or possession of the property of the estate of the debtor;[39] an act to create, perfect or enforce a lien against the property of the estate of the debtor during or before bankruptcy commenced;[40] any act to collect, assess or recover a claim against the debtor in possession;[41] any set-off of debt that was incurred before the bankruptcy case commenced;[42] and any tax liability as determined by the court.[43]

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[30] 11 U.S.C. § 322.
[31] S 128(1)(b) of the Companies Act 71 of 2008.
[32] Item 6 of Sch 3 to the Companies Act 71 of 2008.
[33] 11 U.S.C. § 362.
[34] MP Goren "Chip away at the stone: The validity of pre-bankruptcy clauses contracting around section 363 of the Bankruptcy Code" (2006) 51 *New York Law School Law Review* 1077-1104 1090.
[35] M Pretorius "Expectations of a business rescue plan: International directives for Chapter 6 implementation" (2014) 18 *South African Business Review* 108-139 113.
[36] 11 U.S.C. § 362(a)(1).
[37] 11 U.S.C. § 362(a)(1).
[38] 11 U.S.C. § 362(a)(2).
[39] 11 U.S.C. § 362(a)(3).
[40] 11 U.S.C. § 362(a)(4)-(5).
[41] 11 U.S.C. § 362(a)(6).
[42] 11 U.S.C. § 362(a)(7).
[43] 11 U.S.C. § 362(a)(8).

A court can, at the request of a party of interest, lift the stay on numerous grounds, for example where it can be proved that the property of the interested party will suffer irreparable damage.[44] A party of interest, can obtain relief from the stay by filing a motion in terms of § 362(d).[45] § 362(d) forests out three grounds that an aggrieved party can use to apply to court to grant relief from the automatic stay.[46]

The first ground is for "cause", which includes the lack of adequate protection of an interest in property.[47] This ground exists because secured creditors are entitled to receive adequate protection of their property and have the value of their collateral protected against being diminished.[48] The onus of proof rests on the creditor to prove this lack of adequate protection.[49] A party of interest who wants to lift the automatic stay is most often a secured creditor who wishes to foreclose on its collateral, but it can also be a contracting party who wishes to cancel an agreement or a party who wishes to institute legal proceedings.[50]

The second ground to lift the stay is when the debtor in possession commits an act against the property of a secured creditor, subject to the requirements that the debtor in possession does not have equity in such property and such property is not deemed necessary for an effective reorganisation.[51] This requirement is twofold: firstly, the secured creditor needs to prove that the value of the property does not exceed the value of liens secured by the property and, secondly, the creditor needs to prove that the property is not essential to the reorganisation of the company or alternatively that reorganisation in its entirety would be unsuccessful.[52]

The third ground is when a secured creditor applies for the lift of the moratorium when a company seeking reorganisation falls under the ambit of a single-asset real estate bankruptcy case.[53] In these cases, the secured creditor may foreclose on its

[44] 11 U.S.C. § 362(f).
[45] 11 U.S.C. § 362(d).
[46] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 2.
[47] 11 U.S.C. § 362(d)(1).
[48] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 2.
[49] 11 U.S.C. § 362(g)(1).
[50] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 3.
[51] 11 U.S.C. § 362(d)(2).
[52] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 3.
[53] 11 U.S.C. § 362(d)(3).

collateral if the company has not filed a reorganisation plan or has not repaid any of its past debts owed to the creditor, including monthly interest at the market rate.[54]

In South African law, the Companies Act makes provision for a creditor or party to lift the moratorium, amongst other ways, through the consent of the BRP or obtaining the leave of the court.[55] Given that reorganisation is largely a court supervised procedure in the US, permission to lift the moratorium will primarily come from obtaining leave of the court. In the US, therefore, a secured creditor or other interested party ought to wait for a brief period before it files its motion to lift the stay. In fact, the courts will be less likely to grant relief when a creditor does not provide a company entering reorganisation at least a brief period to attempt to restructure its bankruptcy estate.[56]

The debtor in possession is authorised to continue to operate the day-to-day business of the company, unless the court orders otherwise.[57] This would include the debtor in possession being able to use, sell or lease property in the ordinary course of business without the consent of the property holder.[58] However, the debtor in possession may not use, sell or lease a "cash collateral" without the consent of the property holder or the court.[59] A "cash collateral" includes cash, negotiable instruments, securities, cash equivalents or property burdened with a security interest.[60]

Business rescue in South Africa contains for similar provisions and allows for dispositions made by the BRP in the ordinary course of business.[61] Instead of prohibiting the disposition of a "cash collateral", the Companies Act provides for a prohibition on the sale of property subject to a security or title interest.[62] The company can dispose of the property if the consent of the security interest or title holder has been obtained.[63] However, such property can be disposed without consent if the

[54] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 3.
[55] S 133(1)(a)-(b) of the Companies Act 71 of 2008.
[56] J Friedland & M Bernstein "Chapter 11-'101': An overview of the automatic stay" (2004) December *American Bankruptcy Institute Journa*l 1-4 3.
[57] 11 U.S.C. § 1108.
[58] 11 U.S.C. § 363(c)(1).
[59] 11 U.S.C. § 363(c)(2)(a)-(b).
[60] 11 U.S.C. § 363(a).
[61] S 134(1)(a) of the Companies Act 71 of 2008.
[62] S 134(3)(a).
[63] S 134(3)(a).

proceeds of such disposal would discharge the company of its indebtedness to that holder.[64]

In the US, after the company has filed for reorganisation, the company has a prescribed 120-day "exclusivity period" to develop and file a reorganisation plan.[65] After such period has lapsed, the creditors will take over the development of and filing of a reorganisation plan.[66] The creditors in conjunction with the court need to approve the reorganisation plan.[67] The court will only approve a reorganisation plan if is equitable, fair, feasible and in the best interest of its creditors.[68] The plan should not only aim at repaying the creditors, but also to generate shareholder wealth.

5.1.4 Executory contracts

In terms of US law, an executory contract is a contract in which neither party has fulfilled its obligations.[69] The majority of the courts have adopted the "Countryman-Test" to determine the "executoriness" of a contract, where a contract will only be regarded as an executory contract if the obligations of both parties are underperformed to the extent "that the failure of either to complete the performance would constitute a material breach excusing the performance of the other".[70] This is slightly different from the position in South Africa with regard to executory contracts. In South Africa, an executory contract refers to an uncompleted contract, where either or both of the parties could have outstanding obligations.[71] However, the US courts have over the years relaxed the strict requirements of "executoriness" to include more contracts that would not initially have met the strict definition of an executory contract.[72]

In terms of Chapter 11, the debtor in possession, or the trustee (if appointed), may assume, reject or assign executory contracts or unexpired leases subject to the

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[64] S 134(3)(a).
[65] 11 U.S.C. § 1121(a)-(b). See also M Pretorius "Expectations of a business rescue plan: International directives for Chapter 6 implementation" (2014) 18 *South African Business Review* 108-139 113.
[66] 11 U.S.C. § 1121(c).
[67] 11 U.S.C. § 1126(a).
[68] M Pretorius "Expectations of a business rescue plan: International directives for Chapter 6 implementation" (2014) 18 *South African Business Review* 108-139 114.
[69] *Lubrizol Enterprises Incorporated v Richmond Metal Finishers Incorporated* (*In Re Richmond Metal Finishers Incorporated)* 756 F.2d 1043 (4th Cir. 1985) para 5.
[70] *Gloria Manufacturing Corporation v International Ladies' Garment Workers' Union* 734 F.2d 1020, (4th Cir. 1984) 1022.
[71] C Marumoagae "The law relating to executory contracts in South Africa during business-rescue proceedings" (2017) 2 *JCCL&P* 31-51 37.
[72] JA Pottow "A new approach to executory contracts" (2017) 96 *Texas Law Review* 1437-1472 1438. See also JL Westbrook & KS White "The demystification of contracts in bankruptcy" (2017) 91 *American Bankruptcy Law Journal* 481-534 495.

approval of the court.[73] Obtaining approval of the court to assume or reject an executory contract is mandatory rather than discretionary.[74] The reason why the debtor in possession should decide whether to assume or reject these contracts is because the debtor in possession, even though management remains unchanged, is regarded as a separate entity during reorganisation than what it was pre-reorganisation,[75] which means that the estate of the company pre-petition and during reorganisation are in fact different. An executory contract of a company, therefore, does not bind the company and its counterparties automatically, unless such contract is assumed.[76] Where the debtor in possession assumes the contract, it will bind the company and the counterparty as per the original terms.

Before the debtor in possession can assume an executory contract, it has to provide the creditor with the assurance that the company will perform in the future. Upon assuming the contract, the amount owed during reorganisation will form part of the administrative expenses of the bankruptcy estate which the company will have to pay.[77] The debtor in possession has to assume, reject or assign an executory contract before the reorganisation plan has been confirmed. The company also has to perform its obligations in terms of an executory contract or unexpired lease until the decision is made to assume or reject such a contract.[78] Most companies in the US lease assets and property rather than purchasing their own.[79] Taking this in account, it makes sense that the US Bankruptcy Code makes specific provision for the treatment of unexpired leases.

When deciding which contracts to assume and which contracts to reject, the debtor in possession will generally give preference to those contracts that would maximise the estate of the company while minimising the claims against it.[80] When executory contracts arise, the "business judgement rule" entails that the court should not interfere with the decision of the debtor in possession when it has decided to reject

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[73] 11 U.S.C. § 365(a).
[74] *Counties Contracting and Construction Company v Constitution Life Insurance Company* 855 F.2d 1054 (3d Cir. 1988) 1060.
[75] LM LoPucki & GG Triantis "A systems approach to comparing US and Canadian reorganization of financially distressed companies" (1994) 35 *Harvard International Law Journal* 267-344 292.
[76] 292.
[77] 11 U.S.C. § 365(b)(1)(A).
[78] 11 U.S.C. § 365(d)(3).
[79] K Ayotte "Leases, executory contracts and the impact of revised § 365(d)(4)" 2015 March *American Bankruptcy Institute Journal* 28-29 28.
[80] JL Westbrook "A functional analysis of executory contracts" (1989) 74 *Minnesota Law Review* 227-338 232-233.

a lease.[81] The business judgement rule is important because it acknowledges that the directors of a company are best equipped to make decisions on the well-being of a company, where neither the court nor the shareholders of a company can ever fully substitute the judgement of management.[82] However, if the management no longer acts in good faith or where it is unable to exercise its business discretion properly, the court will have to intervene.[83] However, the court will generally rely on the judgement of the debtor in possession, trusting that management will make decisions that will benefit the bankruptcy estate.[84]

Before a contract can be assumed, a breach that occurred before the company entered into reorganisation must be cured and if the breach cannot be remedied before assumption, adequate assurance has to be provided to the creditor that the debtor in possession will cure such a breach.[85] Where the company has committed a breach under an *ipso facto* clause, the debtor in possession does not have to cure such a breach, because *ipso facto* clauses are not enforceable when a company commences with reorganisation.[86]

Ipso facto clauses are clauses that entail that where a company defaults by becoming insolvent, or has commenced with insolvency proceedings, such an event of default will automatically entitle a party to cancel or accelerate an agreement.[87] In this regard, the US Bankruptcy Code specifically states that, regardless of the provisions of any agreement, an executory contract or unexpired lease may not be terminated merely due to the fact that the company has become insolvent or has commenced with reorganisation.[88] The debtor in possession, therefore, will be able to assume or reject contracts regardless of *ipso facto* clauses. It is important to note that, during reorganisation, an *ipso facto* clause is not obviated but is merely unenforceable while the company is still in reorganisation. The reason why *ipso facto* clauses are unenforceable is because reorganisation is presumed to enhance the value of the

[81] *Lubrizol Enterprises Incorporated v Richmond Metal Finishers Incorporated* (*In Re Richmond Metal Finishers Incorporated*) 756 F.2d 1043 (4th Cir. 1985) 1047.
[82] *Lewis v Anderson* 615 F.2d 778 (9th Cir. 1979) 781.
[83] 782.
[84] LM LoPucki & GG Triantis "A systems approach to comparing US and Canadian reorganization of financially distressed companies" (1994) 35 *Harvard International Law Journal* 267-344 294.
[85] 11 U.S.C. § 365(b)(1)(A).
[86] 11 U.S.C. § 365(b)(2).
[87] FB Tissot "The effects of a reorganisation on (executory) contracts: a comparative law and policy study" (Working Paper) 2012 June *International Insolvency Institute* 1-56 6.
[88] 11 U.S.C. § 365(e)(1)(A)-(C).

bankrupt estate while providing for effective rehabilitation.[89] An *ipso facto* clause does not leave the creditor remediless, since the performance due will form part of the administrative expenses of the estate, in terms of which the company will eventually have to pay its debts as if the contract remained in existence.[90]

In South Africa, *ipso facto* clauses apparently remain enforceable against a company after it commenced with business rescue. Commencing with business rescue is seen as a public announcement made by a company to its creditors that it will no longer be able to pay its debts.[91] This will constitute an act of insolvency as per an *ipso facto* clause.[92] Therefore, the creditor will be allowed to cancel or accelerate an agreement. Such cancellation of the contract is not seen as unlawful or unenforceable, as the creditor is merely enforcing its contractual rights.[93]

When a contract is assumed in the US, the obligation owed to the counterparty becomes a part of bankruptcy estate, and any liability due to a breach of such a contract will then be treated as an administrative expense.[94] When the debtor in possession rejects an executory contract, it is deemed as a breach pre-petition and any resultant liability will be treated as a general unsecured claim.[95] In addition, when a contract is rejected, the creditor will be entitled to claim damages.

Where the debtor in possession has assumed an executory contract but did not cure a default, the creditor will be allowed to cancel such an agreement.[96] However, the creditor cannot terminate an agreement before a debtor in possession has exercised its discretion in making a decision whether to reject or assume a contract.[97] In contrast to this, in terms of South African case law, cancellation by a creditor is allowed, because it is an unilateral act and does not constitute legal proceedings or enforcement action that is barred by the moratorium.[98]

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[89] YK Che & A Schwartz "Section 365, mandatory bankruptcy rules and inefficient continuance" (1999) 15 *Journal of Law, Economics and Organisation* 441-467 442.
[90] 11 U.S.C. § 365(b)(1)(A).
[91] *Kritzinger and Another v Standard Bank of South Africa* (3034/2013) [2013] ZAFSHC 215 (19 September 2013) para 53.
[92] Para 53.
[93] Para 54.
[94] 11 U.S.C. § 365(g). See also *In Re FBI Distribution Corporation* 330 F.3d 36 (1st Cir. 2003) 42. See also *NLRB v Bildisco & Bildisco* 465 US 513 (1984) 531.
[95] *In Re FBI Distribution Corporation* 330 F.3d 36 (1st Cir. 2003) 42. See also *NLRB v Bildisco & Bildisco* 456 US 513 (1984) 531-532.
[96] DW Bordewieck "The postpetition, pre-rejection, pre-assumption status of an executory contract" (1985) 59 *American Bankruptcy Law Journal* 197-230 202.
[97] 204.
[98] *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) paras 32-33.

In terms of an executory supply contract (for goods or services), a debtor in possession in the US can keep deferring assumption of such executory contract while compelling the counterparty to perform.[99] Furthermore, the court can also compel a creditor to perform, even though the company has committed a breach before it commenced with reorganisation by failing to pay for such goods or services.[100] However, in either scenario, the debtor in possession will be required to pay cash for the performance immediately upon receiving these goods.[101] The debtor in possession will eventually have to assume or reject an agreement, but it seems like the debtor in possession can use this power to assume or reject as a delay tactic.

The same delay tactic can be seen in terms of an unexpired lease. A debtor in possession is allowed a 120-day period to assume or reject an unexpired lease before it is automatically deemed rejected.[102] The court can extend this period with an additional 90 days.[103] Consequently, a debtor in possession potentially has 210 days to decide whether or not to accept an unexpired lease, during which period the creditor will have to perform in terms of the contract.

In terms of US bankruptcy law, an employment agreement is an executory contract.[104] Therefore, the employment contract will be subject to § 365 of the Bankruptcy Code.[105] The debtor in possession will be allowed to assume or reject such a contract. Furthermore, the debtor in possession may cancel any collective bargaining agreement if such cancellation is deemed a modification necessary for reorganisation.[106] Conversely, the BRP in South Africa may not cancel any employment contracts, as employees are employed on the same terms and conditions as they were before the business entered into business rescue proceedings.[107] Therefore, South African employees enjoy greater protection during business rescue than employees in the US when it comes reorganisation.

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[99] LM LoPucki & GG Triantis "A systems approach to comparing US and Canadian reorganization of financially distressed companies" (1994) 35 *Harvard International Law Journal* 267-344 292.
[100] 290.
[101] 290.
[102] 11 U.S.C. § 365(d)(4)(A).
[103] 11 U.S.C. § 365(d)(4)(B).
[104] CH Levy & GL Blum "Limitations on rejection of union contracts under the Bankruptcy Act" (1978) 83 *Commercial Law Journal* 259-263 259.
[105] 11 U.S.C. § 365.
[106] 11 U.S.C. § 1113(b)(1)(A).
[107] S 136(1)(a) of the Companies Act 71 of 2008.

5.1.5 Recommendations and conclusion

From the above discussion, it is evident that reorganisation and business rescue share a common goal of saving a distressed company. Reorganisation has its flaws and has been abused in the past. For instance, it has been used by large US companies such as Texaco to avoid a $13 billion tort claim.[108] However, there are some distinct features of reorganisation that could improve the current business rescue regime in South Africa and that would be worth considering if the South African legislature decides to amend the current business rescue provisions.

The first recommendation for South Africa is providing for a stricter and more detailed moratorium. The constant relaxation of the moratorium in South Africa has deteriorated its effectiveness.[109] The automatic stay in the US is quite extensive and clearly describes the grounds upon which the automatic stay can be lifted as well as the burden of proof.[110] Providing for a stricter and more detailed moratorium in South Africa will enhance its effectiveness, as currently the courts spend more time interpreting the terms "legal proceedings" and "enforcement action" than giving proper consideration of what the moratorium is supposed to protect. With a stricter and more detailed moratorium, the BRP will also be better equipped to deal with executory contracts.

The second recommendation relates to the duty of the debtor in possession in the US to cure a breach of an executory contract before it can be assumed or to provide adequate assurance to a creditor that a breach that occurred prior to reorganisation will be cured.[111] In South Africa, the cancellation of executory contracts in business rescue remains a problem and nothing would prevent a company from cancelling an agreement if a breach occurred before it commenced with business rescue proceedings. If the BRP can provide assurance to a creditor that a breach prior to business rescue will be cured, it can serve as a deterrence tool, preventing contracting parties from cancelling agreements.

Some notable differences worth mentioning are the suspension power of the BRP in South Africa compared to the avoiding power of the debtor in possession in

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[108] J Davis "Bankruptcy, banking, free trade, and Canada's refusal to modernize its business rescue law" (1991) 26 *Texas International Law Journal* 253-274 256.
[109] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419-449 432.
[110] See 11 U.S.C. § 362(d)(4) & 11 U.S.C. § 362(g).
[111] 11 U.S.C. § 365(b)(1)(A).

the US. Firstly, the Companies Act states that the obligations under a contract can be suspended in part, conditionally or in full by the BRP.[112] The US Bankruptcy Code does not provide the debtor in possession with a power to suspend an agreement; it only makes provision for assuming or rejecting an executory contract in full.[113] Whether or not the power of suspension ought to have been omitted from the Companies Act remains unclear, as it does not have much practical effect. The suspension of contracts serves no purpose and can too easily be countered with defences such as the *exceptio non adimpleti contractus*. If the US approach is to be followed instead, the BRP will only have the power to assume, reject or assign executory contracts.

The second notable difference is the avoiding power of the debtor in possession. The debtor in possession may avoid certain transfers that were made within 90 days prior to a bankruptcy petition being filed.[114] This avoiding power allows transfers to be reversed where such a transfer was made to the benefit of a specific creditor.[115] Benefitting a specific creditor would mean that the bankruptcy estate will have less funds to compensate other creditors, especially if the transfer was made to a creditor that ought to have been avoided. This same avoiding power is not present in the South African business rescue regime and, therefore, the implementation of such a power should be considered.[116]

It is believed that the management-displacement model is incompatible with dispersed corporate ownership structures.[117] This could be the case in South Africa, as a BRP, who has no internal knowledge of a company before he is appointed, is tasked with saving that company. In contrast, a debtor in possession has all the necessary knowledge of the company and could be in the best position to bring about

[112] S 136(2)(a) of the Companies Act 71 of 2008.
[113] 11 U.S.C. § 365(d)(3).
[114] 11 U.S.C. § 547(b)(4).
[115] 11 U.S.C. § 547(b)(1).
[116] Section 141(2)(c) makes provision for "rectifying the matter" by a BRP in terms of a voidable transaction, however, according to the authors of *Henochsberg* this section currently has no effect. This is due to the fact that voidable transactions are not defined in the Act, there is currently no sanction for non-compliance with this section and transactions with a third party will continue until they are set aside by a court. In this regard see the commentary on s 141(2)(c) in D Burdette, PA Delport, B Galgut, JA Kunst, PM Meskin and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (2011) LexisNexis Looseleaf Edition 526(63).
[117] G McCormack "Control and cooperative rescue – An Anglo-American evaluation" (2012) 56 *International and Comparative Law Quarterly* 515-551 516.

the necessary change. This is why the business judgement rule is highly effective in reorganisation in the US.

5.2 Australia

5.2.1 Introduction

Much like business rescue in South Africa, Australia has a corporate rescue mechanism in the form of voluntary administration. Voluntary administration serves as a procedure to be initiated by a company to avoid foreclosure of assets and the ultimate closure of the company. Voluntary administration has been praised for its success, but it has become unpopular in recent years. The reason for its lack of use is the compromises that the creditors organise with the company rather than using voluntary administration.

In this part of the comparative study, similarities and differences will be investigated between business rescue in South Africa and voluntary administration in Australia, which will provide useful recommendations for the South African business rescue regime. South Africa follows a similar management-displacement model that is evident in Australia rather than a debtor-in-possession model as is followed in the US. Voluntary administration, however, is strictly regulated by statue, whereas South Africa follows the approach of regulating the rescue procedure by statue, court oversight and judicial precedent. The reason why Australia serves as a good model for comparison is because the aim and objectives of voluntary administration are almost identical to those of business rescue.[118]

5.2.2 A brief history

Before the development of voluntary administration, a company in Australia had either official management or a scheme of arrangement available as corporate rescue avenues. Much like judicial management, the predecessor of business rescue in South Africa, official management and a scheme of arrangement did not have a lot of success in Australia. A scheme of arrangement has been described as a cumbersome, slow and costly procedure,[119] whereas official management was rarely invoked due to the

[118] C Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" (2008) 11 *PELJ* 104-137 111.
[119] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 158.

fact that it could only be used by a company to repay its debts.[120] Therefore, corporate rescue reform was needed, resulting in the publication of the "Harmer Report"[121] to bring about changes to corporate insolvency proceedings in Australia. The Harmer Report is widely recognised as the foundation for the corporate rescue regime in Australia. The Harmer Report noted that a more constructive approach had to be adopted to provide for the possibility to rescue a company.[122]

After the Harmer Report was published, voluntary administration made its first appearance when it was officially introduced by the Corporate Law Reform Act.[123] The aim of voluntary administration, as intended by the legislature, was to effect arrangements with creditors by companies who were facing financial distress and who were opting for a chance at rescue.[124]

The provisions regulating voluntary administration were later retained in Division 6, Part 5.3A of the Corporation Act,[125] which is the primary legislation that Australian companies must adhere to. Voluntary administration is an extra-judicial system that is quick, efficient and effective.[126] The court will only intervene to make orders when it is necessary to protect the interests of creditors.[127]

With the provisions of the Corporations Act finally being enacted, it has become clear that voluntary administration is something a company should consider. If the directors of a company fail to consider voluntary administration as an avenue, they could be held liable for insolvent trading. The directors of a company have a positive duty to prevent insolvent trading and if they suspect that the company will become insolvent, they have a duty to take appropriate action to prevent such an event from occurring.[128] Failing to fulfil such a duty could create both civil and criminal liability for the directors.[129]

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[120] 158.
[121] Australian Law Reform Commission "General Insolvency Inquiry" Report no. 45 of 1988, available at www.alrc.gov.au/publication/general-insolvency-inquiry-alrc-report-45/ (accessed on 24 March 2021).
[122] Para 52.
[123] The Corporate Law Reform Act 210 1992. See also WC Robinson "Statutory moratorium on proceedings against a company" (1996) 24 *Australian Business Law Review* 429-447 429.
[124] S Fridman "Voluntary administration: Use and abuse" (2003) 15 *Bond Law Review* 331-357 331.
[125] The Corporations Act 50 of 2001.
[126] C Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" (2008) 11 *PELJ* 104-137 113.
[127] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 170.
[128] S 588G of the Corporations Act 50 of 2001.
[129] *Westpac Banking Corporation v The Bell Group Ltd (In Liquidation)* [No 3] 2012 WASCA 157 para 774.

The duty to prevent insolvent trading stems from the duty that is bestowed upon the directors to act in the best interest of the company by adhering to statutory obligations and preventing any prejudice that may be caused to its creditors.[130] The directors can escape liability for a company becoming insolvent if they can prove that they took reasonable steps to avoid incurring debt that led to the company becoming insolvent,[131] or where they took the necessary action to appoint an administrator.[132]

Therefore, the Australian Corporations Act imposes a positive duty on directors to prevent insolvent trading.[133] The South African Companies Act prohibits reckless trading by a company in terms of section 22(1).[134] Originally, section 22(1) of the Companies Act cautioned companies from carrying on insolvent trading, but section 22(1) was amended so that "trading under insolvent circumstances" was omitted from the Act.[135]

Furthermore, section 77(3)(b) of the South African Companies Act imposes a civil liability on a director if the director has commenced trading the business of the company recklessly. However, section 22(1) no longer provides for insolvent trading and, therefore, insolvent trading would have to be equated to reckless trading before a director could be held liable for any damage or loss. The test for reckless trading is when a reasonable businessman, in the shoes of a director of a company, would be of the opinion that there is no reasonable prospect that the creditors would receive payment when due.[136] In addition to section 77, section 218 also creates the possibility of a civil action that may be brought against the director of a company for contravening any section of the Companies Act.[137] The South African Companies Act, therefore, provides for liability for reckless trading, but unlike the Australian Corporations Act, it does not explicitly mention that a company should consider business rescue to escape liability for insolvent trading.

[130] Para 920.
[131] S 588H(5) of the Corporations Act 50 of 2001.
[132] S 588H(6)(a).
[133] HE Wainer "The insolvency conundrum in the Companies Act" (2015) 132 *SALJ* 509-517 511.
[134] S 22(1) of the Companies Act 71 of 2008.
[135] S 14 of the Companies Amendment Act 3 of 2011.
[136] *Ozinsky NO v Lloyd and Others* 1992 (3) SA 396 (C) 414. See also *Philotex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) 145-146.
[137] S 218(2) of the Companies Act 71 of 2008.

5.2.3 Overview of voluntary administration

The voluntary administration procedure in Australia has two objectives. The primary objective is to maximise, as far as possible, the chances of a company continuing its existence.[138] The alternative objective of voluntary administration arises when there is no chance of the company continuing its existence, namely that the voluntary administration should provide a better return for the creditors than what immediate winding-up would have provided.[139]

Similarly, the primary objective of business rescue in South Africa is to implement a business rescue plan that will maximise the likelihood of the company continuing its existence on a solvent basis, with the alternative objective to provide for a better return to creditors than what would have ensued if an immediate liquidation order was granted.[140] On close comparison, the objectives of business rescue as governed by the Companies Act of South Africa are identical in substance to the objectives of voluntary administration as per the Corporations Act in Australia.

Voluntary administration provides the company with a quick, efficient and inexpensive method of restructuring that is relative free from judicial interference.[141] Due to these advantages, companies have opted to use voluntary administration over other formal restructuring procedures. Voluntary administration is supposed to last for a brief period, about 20 days, but will usually last longer in more complex administrations.[142] In other words, voluntary administration is only supposed to function as a short breathing space.[143] Voluntary administration is normally terminated when a deed of company arrangement has been executed.[144]

Voluntary administration begins with the appointment of an administrator.[145] The appointment of the administrator can be done by the company, a liquidator or a party who holds a secured interest in the whole, or substantially whole, of a company.[146] Of the three ways, most often the process will be initiated by the company placing itself

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[138] S 435A(a) of the Corporations Act 50 of 2001.
[139] S 435A(b).
[140] S 128(1)(b)(iii) of the Companies Act 71 of 2008.
[141] S Fridman "Voluntary administration: Use and abuse" (2003) 15 *Bond Law Review* 331-357 333.
[142] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 158 (fn 29).
[143] J Routledge "The decision to enter voluntary administration: Timely strategy or last resort?" (2007) 6 *Journal of Law and Financial Management* 8-12 8.
[144] *IMO Java 452 Pty Ltd* 1999 VSC 273 paras 3-4.
[145] S 435C(1)(a) of the Corporations Act 50 of 2001.
[146] Ss 436A-C.

under voluntary administration.[147] The company will appoint an administrator by way of passing an ordinary resolution.[148] This ordinary resolution can only be passed if the directors are of the opinion that the company is insolvent or will become insolvent at some point in the future.[149]

After the administrator has been appointed, he has to consult with the creditors and after convening a first and a second meeting, known as the "convening period", he has the responsibility to draft a rescue plan known as a deed of company arrangement.[150] After the plan has been drafted, its approval and subsequent execution are subject to the creditors' consent.[151] If the plan is accepted, it will be adopted (and executed), but if it is rejected, the company will enter into winding-up procedures.

When comparing South Africa with Australia, it appears that the BRP is equivalent to the administrator. However, the Australian Corporations Act does not mention if a reasonable prospect of success is required in order to commence with voluntary administration. For a company to enter voluntary administration, the Corporations Act merely requires the opinion of the board of directors that the company is likely to become insolvent.[152] In South Africa, a company can only commence with business rescue when it is financially distressed, as defined in the Act.[153]

5.2.4 Powers of the administrator

One of the advantages of voluntary administration is that the company can appoint its own administrator. Given that the administrator plays a key role in the voluntary administration procedure, it will be favourable to the company to appoint an administrator of their choice, rather than allowing a secured creditor, liquidator or provisional liquidator to appoint an administrator of their choice.[154]

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[147] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 159.
[148] S 436A of the Corporations Act 50 of 2001.
[149] S 436A.
[150] S 444A.
[151] S 444A.
[152] I Eow "The door to reorganisation: Strategic behaviour or abuse of voluntary administration" (2006) 30 *Melbourne University Law Review* 300-337 301.
[153] S 128(1)(f) of the Companies Act 71 of 2008.
[154] S Fridman "Voluntary administration: Use and abuse" (2003) 15 *Bond Law Review* 331-357 336.

The administrator is appointed by the managers to conduct the voluntary administration. Instead of the debtor-in-possession model that is followed in the USA, voluntary administration in Australia follows an administrator-in-control approach.[155] The administrator takes full control of the management and incurs personal liability for the contracts he entered into while in the position of administrator. The voluntary administrator has various powers and duties as per the Act. Once the administrator is appointed, he assumes immediate control of the business of the company, its property and its affairs.[156] He is then tasked with investigating the financial affairs of the company and to consider an appropriate course of action.[157] Also, one of the key duties of the voluntary administrator is to get approval from the creditors at their first and second meetings to approve and execute a deed of company arrangement.

In terms of the Corporations Act, the administrator incurs liability and indemnity for certain debts that the company incurred during voluntary administration.[158] The administrator incurs liability during his tenure for: services rendered; goods bought; property hired, leased or occupied; the repayment of borrowed money with interest; and any other borrowing costs.[159] The reason why the Corporations Act has included the personal liability of the administrator is to encourage and allow the creditors to contribute to the success of voluntary administration by increasing the likelihood that they will cooperate with the company in voluntary administration.[160] It makes sense that creditors will be more willing to negotiate and cooperate with a distressed company if someone other than the failing company would be held liable, and consequently they can enforce their claims against such a person.

The voluntary administrator has a more onerous task than the BRP, because of the personal liability he incurs for assuming executory contracts. However, there have been examples in case law where voluntary administrators were exempted from liability in terms of sections 443A and 443B of the Act, where the court had to weigh up granting such relief against the financial interest of the creditors as a whole.[161]

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[155] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 164.
[156] S 437A of the Corporations Act 50 of 2001.
[157] S 438A.
[158] Division 9 of Part 5.3A of the Corporations Act 50 of 2001.
[159] S 443A.
[160] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 667.
[161] *Winchelada Pty Ltd v Finetea Pty Ltd* 2020 VSC 357 paras 39 and 81-84. See also *In Re CBCH Group Pty Ltd* (No 2) 2020 FCA 472 paras 87-91.

5.2.5 Executory contracts and the moratorium

A moratorium is explicitly provided for in the Corporations Act.[162] However, the strength of protection afforded by the moratorium will depend on whether the counterparty is a secured or unsecured creditor. The secured creditors can almost always enforce their claims and proceed with legal or enforcement action. If a secured creditor holds a security interest over the whole or substantially whole of the business, it can enforce its security interest during the "decision period".[163] The "decision period" starts on the day that notice is given to the secured party that an administrator has been appointed and will end thirteen business days after such notice was given.[164]

Therefore, the moratorium will not be applicable to the secured creditor who has decided to exercise property rights during the "decision period". If the "decision period" expires and the secured creditors have not instituted enforcement action, they will be bound to the moratorium for the duration of the voluntary administration. However, in terms of section 441D, from the court may make an order that will prevent the secured creditor from repossessing its property even during the "decision period".[165]

Other than the exception mentioned above, the company under voluntary administration enjoys a general moratorium on legal proceedings and enforcement action.[166] However, legal proceedings and enforcement action can be commenced by either a secured or unsecured creditor where the written consent of the administrator has been obtained or where leave of the court has been granted.[167] This is similar to the position in South Africa, where legal proceedings and enforcement action can continue if the consent of the BRP or leave of the court has been obtained.[168]

The moratorium in Australia explicitly restricts the exercise of property rights by third parties.[169] A third party in terms of the Corporations Act is a person who is able to exercise rights in relation to property. This includes property belonging to the company that is used, occupied or possessed by a third party.[170] In addition, these restrictions on the exercise of property rights also apply to the company in voluntary

[162] Ss 440A-440J of the Corporations Act 50 of 2001.
[163] S 441A(1)(b).
[164] S 9 read with s 450(A)(3).
[165] S 441D of the Corporations Act 50 of 2001.
[166] Ss 440D and 440F.
[167] Ss 440D(1)(a)-(b) and 440F(a)-(b).
[168] S 133(1)(a)-(b) of the Companies Act 71 of 2008.
[169] S 440B of the Corporations Act 50 of 2001.
[170] S 440B(1).

administration who uses, occupies or possesses property of a third party.[171] These restrictions promote the premise that executory contracts need to be upheld by allowing for the continued possession of property by both contracting parties.[172]

To illustrate this position further, the following summary of restrictions on property of third parties is given. A secured third party in relation to property of the company cannot enforce its security interest.[173] A secured third party in relation to a possessory security interest in the property of the company cannot sell the property or enforce the security interest.[174] Furthermore, the third party who is a lessor of property used, occupied or possessed by the company under voluntary administration, may not carry out distress for rent or repossess its property or otherwise recover it.[175] Lastly, an owner, other than a lessor, may also not repossess its property or otherwise recover it.[176] This is subject to the exception of a secured creditor enforcing its property rights during the decision period.

From the discussion above, it is clear that Corporations Act places specific restrictions on the enforcement rights of secured creditors and property owners who did not act during the decision period and an almost absolute bar against enforcement action by the unsecured creditors. The moratorium in the South African Companies Act provides for the lifting of the moratorium by either obtaining the consent of the BRP or leave of the court.[177] The South African Companies Act also does not distinguish between secured and unsecured creditors when it comes to the strength of the moratorium.

The moratorium remains in force in Australia for as long as the administration continues.[178] Upon the execution of a deed of company arrangement, the moratorium comes to an end, and the company loses its right to possess the relevant property.[179] However, the court can make an order that will further extend the right to possess, regardless of a deed of company arrangement having been executed.[180]

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[171] S 440B(3).
[172] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 665.
[173] S 440B(3)(1) of the Corporations Act 50 of 2001.
[174] S 440B(3)(2) of the Corporations Act 50 of 2001.
[175] S 440B(3)(3)(a)-(b).
[176] S 440B(4).
[177] S 133(1)(a)-(b) of the Companies Act 71 of 2008.
[178] *Winchelada Pty Ltd v Finetea Pty Ltd* 2020 VSC 357 para 39.
[179] *IMO Java 452 Pty Ltd* 1999 VSC 273 para 6.
[180] S 444F(6) of the Corporations Act 50 of 2001.

When a company enters voluntary administration, the existing contracts are not terminated automatically and the fact that the company has entered into voluntary administration does not mean that the company intends to repudiate any of its existing contracts.[181] The administrator will have to assume or reject executory contracts or unexpired leases.[182]

In terms of assuming an executory lease agreement, section 443B of the Corporations Act makes specific provision for the repayment of occupied property expenses when a company is in voluntary administration.[183] If an administrator elects to continue with an agreement whereby the company enjoys possession or occupancy of property, the administrator will incur personal liability for the rent or other amounts payable form such date of election while the company continues to occupy, use or possess the property.[184] However, within five business days after voluntary administration has begun, the administrator can give the owner of the property or a lessor a notice which confirms that the company does not wish to exercise any of its rights in respect of the property.[185] The purpose of this section is that it allows the administrator to escape liability and will also give the administrator the opportunity to elect whether or not to continue with certain executory contracts. After the expiration of such five days, the administrator will automatically incur liability for the executory contracts.

As mentioned above, where the administrator has elected not to exercise any rights in respect of property, the administrator will not incur any personal liability.[186] A company will be deemed to exercise a right in the property when it uses the property or where it asserts a right against the owner or lessor.[187] If the administrator decides to reject a contract or not to exercise a right over the property, the company will be liable for the debt owed to the property owner.[188] The reason for this is that Australia follows a management-displacement model, where the administrator and company under voluntary administration incur separate debts and subsequent liabilities. However, the liability of the administrator will end when the voluntary administration is

[181] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 665.
[182] 665.
[183] S 443B of the Corporations Act 50 of 2001.
[184] S 443B(2).
[185] S 443B(3).
[186] S 443B(4).
[187] S 443B(6).
[188] S 443B(4).

terminated and, therefore, he can only be held liable for decisions made until the point that voluntary administration is terminated.[189]

When a company is placed under voluntary administration in Australia, the lessor seeking to cancel the lease should first obtain the consent of the administrator or leave of the court.[190] However, the courts rarely give permission to the creditor to continue with enforcement action, as it will contravene the purpose of voluntary administration.[191]

Previously, section 440C of the Corporations Act stated that the owner or lessor of property could not recover its property from the company in voluntary administration. Such repossession was possible only where the creditor obtained the permission of the administrator or leave of the court.[192] However, in 2017, section 440C was replaced with section 440B.[193] Section 440B now provides for a more detailed approach regarding the restriction and exceptions with regard to the enforcement of the rights of property owners, as explained above.

With regard to the legal position of an unsecured creditor enforcing its claim when the company has entered voluntary administration, the judgment in *IMO Colorado Group Limited*[194] is of importance.[195] The case involved two lessors, Ventana (Pty) Ltd and Pt (Ltd), who sought leave of the court to exercise their rights of repossession.[196] With respect to Ventana, its lease expired three days after the company had appointed administrators, but the company was precluded from repossessing its property due to the section 440C moratorium.[197] The lessor requested the consent of the administrator to repossess its property, but the administrator denied such request.[198] With respect to PT Ltd, the lease expired during the administration, but the lessee did not vacate the property and the company was precluded from repossession due to the moratorium.[199]

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[189] C Anderson "Ending a means to an end: Transition from the voluntary administration procedure to a deed of company arrangement or liquidation" (2004) 23 *University of Tasmania Law Review* 15-44 21.
[190] S 440B(2)(a)-(b) of the Corporations Act 50 of 2001. See also OM McCoy "Administrators and leases: Obligations and options" (2012) 24 *Australian Insolvency Journal* 24-29 25.
[191] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 666.
[192] S 440C(1)-(2) of the Corporations Act 50 of 2001.
[193] S 1507.
[194] *IMO Colorado Group Limited* 2011 VSC 552.
[195] S Lawrenson "Lease agreements and business rescue: In need of rescue" 2018 *TSAR* 657-670 665-666.
[196] *IMO Colorado Group Limited* 2011 VSC 552 paras 9 and 11.
[197] Para 20.
[198] Para 21.
[199] Para 23.

The common problem for both lessors was that their leases expired, and they were precluded from repossessing their property due to the moratorium specifically preventing the repossession of property by a property owner.[200] However, repossession may be allowed where the administrator has consented or where leave of the court has been obtained.[201] Therefore, both lessors applied for leave of the court.

If the court refuses to grant leave, the company will not be able to repossess its property but will still be entitled to receive rent in terms of section 443B.[202] In the current case, the court held that upon an application to enforce its rights, the owner had to prove that the enforcement will not adversely affect the company in administration.[203] For the court to grant leave, it will weigh up the prejudice caused to creditors through voluntary administration and the possibility of the company continuing to operate a going concern.[204] The court held that based on the financial position of the company in voluntary administration, the unsecured creditors, Ventana and PT, would not benefit from the moratorium due to them not being able to receive any dividend. Therefore, the court held that leave should be granted to allow the lessors to repossess their property.[205] This judgment reaffirmed the position that every property owner, whether secured or unsecured, can apply to court for leave to lift the moratorium.[206]

As mentioned above, the moratorium should only last until the company has executed a deed of company arrangement, which is adopted after the second creditors' meeting. The period between the appointment of the administrator and the end of the second creditors' meeting is known as the convening period. The convening period can be extended and, subject to such extension, the moratorium will also be extended.[207]

Following the discussion of *ipso facto* clauses in the US above, it is worth briefly discussing the position in Australia as well. Nothing in the Corporations Act expressly prevents a creditor of a company from enforcing an *ipso facto* clause. However, the

[200] S 440F of the Corporations Act 50 of 2001.
[201] S 440C.
[202] *IMO Java 452 Pty Ltd* 1999 VSC 273 para 2.
[203] *IMO Colorado Group Limited* 2011 VSC 552 para 55.
[204] Para 60.
[205] Paras 59-60.
[206] Para 61.
[207] *IMO SWC Management Pty Ltd* 2020 VSC 38 para 8 (fn 3).

Corporations Act places an express prohibition on the cancellation of essential services to the company during voluntary administration.[208] This prohibition is subject to the condition that the administrator requests the service provider to continue the supply of such service.[209] An essential service includes the supply of electricity, gas and water.[210] In terms of this prohibition, a supplier may not cancel the delivery of a service if the only reason for such cancellation is the fact that the company owes the service provider a debt.[211]

The BRP in South Africa may not cancel any employment contracts, as employees are employed on the same terms and conditions as they were before the business went into business rescue proceedings.[212] In contrast, the Corporations Act in Australia does not regulate how the administrator should deal with executory employment contracts. Therefore, employees do not have to be retained or employed on the same terms and condition during voluntary administration.[213] Australia recognises that employment contracts could be problematic to the rescue of a company and, therefore, they are allowed to be terminated.

5.2.6 Recommendations and conclusion

The voluntary administration process has been praised for its success in the past, being an efficient and effective corporate rescue procedure, but it has some weaknesses as well.[214] Also, there has been a decline in the usage of voluntary administration.[215] Firstly, one weakness lies in the fact that the unsecured creditors do not receive adequate protection during voluntary administration when compared to secured creditors, which is due to secured creditors being able to enforce their rights during the decision period. Secondly, there is room for the system to be abused, as the courts do not play an active role in the process. Furthermore, Australian courts have been cautious when dealing with voluntary administration cases, due to the

[208] S 600F of the Corporations Act 50 of 2001.
[209] S 600F(1)(a)-(b).
[210] S 600F(2).
[211] S 600F(1)(c).
[212] S 136(1)(a) of the Companies Act 71 of 2008.
[213] C Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" (2008) 11 *PELJ* 104-137 126.
[214] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 166.
[215] J Harris "Using voluntary administration to dilute minority shareholdings" (2016) March *Australian Restructuring Insolvency & Turnaround Journal* 22-27 22.

possibility of the system being abused by directors appointing administrators for ulterior purposes.[216] Moreover, voluntary administration currently has a high perceived failure rate, coupled with rising costs that have been described as a scenic route to liquidation.[217]

Nevertheless, voluntary administration offers some valuable lessons for the South African business rescue regime. Firstly, the Corporations Act admonishes directors of a company to avoid insolvent trading and to consider voluntary administration.[218] This is not something expressly mentioned in the Companies Act, which only makes provision for a prohibition on reckless trading.[219] Therefore, a prohibition on insolvent trading is something that arguably should be added to the South African regime.

The second lesson relates to the concept of an administrator incurring personal liability. When an administrator in Australia accepts an executory contract, he incurs liability for certain expenses such as the rent owed to lessors.[220] If the same concept is adopted in South Africa, it could make creditors more willing to cooperate with a BRP in his endeavour to allow the company to return to operations on a solvent basis.

The third lesson is in providing for a stricter and more detailed moratorium. The Corporations Act provides for a detailed moratorium and specific restrictions on the rights of property owners, while also differentiating between secured and unsecured creditors. Conversely, business rescue does not make a clear distinction between secured and unsecured creditors.[221] In voluntary administration, even where a lease has expired and the company is required to vacate the property, the lessor will be unable to repossess its property without permission of the administrator or leave of the court.[222] South Africa does not afford the company in business rescue this same protection and if a contract has been cancelled, the property can be repossessed.

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[216] See *Southern Palace Investments 265 (Pty) Ltd v Midnight Store Investments 386 (Pty) Ltd* 2012 (2) SA 423 (WCC) para 3, where Eloff AJ warned against the possible abuse by directors and stakeholders of a company using business rescue to achieve their own goals. He referred to the cautious approach by the Australian courts when dealing with voluntary administration cases in preventing such abuse. See also C Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" (2008) 11 *PELJ* 104-137 110.
[217] J Fu "The use of noncourt-based corporate rescue: does the Australian voluntary administration procedure provide a model for China?" (2017) 26 *International Insolvency Review* 153-175 163.
[218] S 588H(6) of the Corporations Act 50 of 2001.
[219] S 22(1) of the Companies Act 71 of 2008.
[220] S 443A of the Corporations Act 50 of 2001.
[221] C Anderson "Viewing the proposed South African business rescue provisions from an Australian perspective" (2008) 11 *PELJ* 104-137 132.
[222] *IMO Colorado Group Limited* 2011 VSC 552 para 23.

South African courts are stuck in a debate on whether the property is in unlawful or lawful possession of the company[223] and, therefore, the moratorium does not have its full effect. In other words, South Africa should consider amending its business rescue provisions to provide for a stricter and more detailed moratorium.

From the discussion above, it is evident that voluntary administration is strictly regulated by statute, where the provisions are somewhat onerous and overbearing. The Australian corporate rescue model is incredibly detailed, but too many restrictions could decrease the likelihood that a company will use such a system. Nevertheless, the recommendations from voluntary administration are more practically suited to South Africa than what the US reorganisation recommendations would offer because the BRP and the administrator fulfil more or less the same function.

[223] See the discussion in 4.2.2. See also *Madodza (Pty) Ltd v Absa Bank Ltd and Others* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012) paras 18, 26; *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others* (A513/2013) [2015] ZAGPPHC 78 (26 February 2015) paras 47, 51; *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 31; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) para 25; *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) paras 24, 29.

Chapter 6

Recommendations and conclusion

6.1 Recommendations

Business rescue in South Africa is not perfect and to increase its rescuing capabilities, the following recommendations are made in response to the study conducted in this dissertation.

Firstly, *ipso facto* clauses in South Africa should be made unenforceable. *Ipso facto* clauses could render most executory contracts unworkable, as they allow the creditor to cancel the contract from the point that the company is experiencing financial deterioration or commences with business rescue proceedings, where such an act will constitute a breach in terms of the contractual provisions.[1] In the US, *ipso facto* clauses are not enforceable after a company commences with reorganisation.[2] In Australia, nothing in the Corporations Act expressly prevents a creditor of a company from enforcing an *ipso facto* clause. However, the Corporations Act places an express prohibition on the cancellation of essential services to the company during voluntary administration.[3] Therefore, a supplier may not cancel the delivery of an essential service if the only reason for such cancellation is the fact that the company owes the service provider a debt.[4]

Essentially, in South Africa, clause 139 of the Companies Amendment Bill[5] should be reconsidered and revived through implementation, which will prevent a creditor from cancelling the supply of essential goods or services to a company in business rescue. Not only will *ipso facto* clauses be rendered unenforceable, but this

[1] See the discussions in 3.5.2.3, 3.5.4.1 and 5.1.4. See also *Homez Trailers And Bodies (Pty) v Standard Bank of South Africa Ltd* (35201/2013) [2013] ZAGPPHC 465 (27 September 2013) para 2 for an example of an *ipso facto* clause; *Friedshelf 113 (Pty) Ltd v Baksons (Pty) Ltd t/a Bakos Brothers and Another* (18898/19) [2019] ZAGPJHC 376 (25 September 2019) para 19 where the court held that being placed in business rescue can be grounds for cancellation due to it amounting to a breach of contract; *Kritzinger and Another v Standard Bank of South Africa* (3034/2013) [2013] ZAFSHC 215 (19 September 2013) paras 53-54 where the court also held an *ipso facto* clause is a ground for cancellation regardless of the company being in business rescue.
[2] 11 U.S.C. § 365(b)(2). See the discussion in 5.1.4.
[3] S 600F of the Corporations Act 50 of 2001. See the discussion in 5.2.5.
[4] S 600F(1)(c).
[5] Cl 139(1)(a*)(i)* of the Companies Bill of 2007 (*GG* 29630 of 12 February 2007). See the discussions in 4.2.3.2 and 4.3.1.

revived clause, can also prevent the cancellation of contracts where the entire prospect of success rests on a single contract.[6]

Secondly, either the suspension power of the BRP should be amended or the suspension power should be removed from the Act in its entirety. The current suspension power is too easily nullified by the counterparty cancelling the contract or using the *exceptio non adimpleti contractus* as a defence when reciprocal obligations are at stake.[7] Furthermore, it appears that BRPs currently do not use their suspension powers adequately and in cases where they do intend to invoke their suspension power, a contractual breach has typically already occurred, rendering the suspension power ineffective.[8] I would argue that there is no need for the suspension power, as it causes more confusion than clarity. A similar suspension power is not evident in either Australia or the US. Instead of the current suspension power, the recommendation is that the BRP should only be able to choose between performing in terms of the executory contract in full or rejecting it, as is the position in the US.

South Africa's business rescue regime is novel,[9] regardless of the concept being similar to comparable concepts found in foreign countries which are regulated by their own statutory regimes.[10] Resultingly, certain challenges may exist where no relatable answers are apparent in foreign jurisdictions. It is clear that the South African business rescue regime is based on the same principles as its foreign counterparts, with the focus on allowing a distressed company to return to operate on a solvent basis. However, there are material differences in the manners in which these corporate rescue mechanisms function.

The US follows a debtor-in-possession model whereby the distressed company is responsible for its own reorganisation. This makes it difficult to compare US law with South African law, as the two rescue systems differ fundamentally. What can be said, however, is that the approach of the US to executory contracts should be considered in South Africa. Reorganisation in the US allows the debtor in possession to assume or reject contracts in full.[11] In South Africa, executory contracts continue on the same

[6] See the discussions in 4.2.3 and 4.3.1.
[7] See the discussion in 3.5.2.3.
[8] See for example *Acacia Leasing (Pty) Ltd v JP Krugerrand Deals CC* (0001018/2017, 1019/2017) [2018] ZAGPPHC 884 (16 March 2018) para 30. See also the discussion in 4.2.2.8.
[9] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Project Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) para 11.
[10] *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and* Others 2012 (2) SA 378 (WCC) para 13.
[11] 11 U.S.C. § 365(d)(3). See also the discussion in 5.1.4.

terms as before the company entered into business rescue unless the obligations in terms of an agreement are suspended or cancelled. Australia, on the other hand, follows a management-displacement model that is similar to business rescue in South Africa. The most important aspect of the Australian corporate rescue model is the personal liability that an administrator incurs for accepting executory contracts.[12]

I therefore recommend, thirdly, that a new model should be followed in South Africa that includes both the Australian and American methods of treating executory contracts. Firstly, the BRP should only be allowed to assume or reject contracts in full and be given a 120 day "exclusivity period".[13] Currently the BRP must publish a business rescue plan within 25 days of being appointed.[14] Increasing the number of days would also increase the time the BRP has to determine which contracts to assume and which to reject. After appointment, the BRP should incur personal liability for the contracts he then assumes or rejects. This will increase the likelihood that creditors will abide by the contracts and not elect to cancel their contracts, as they can recover the amounts directly from the BRP.

Fourthly, the moratorium needs to be made more detailed and follow a stricter approach. The current moratorium has been relaxed over the years and is reaching a point of being almost ineffectual.[15] The US provides an almost unexhausted list of types of proceedings and actions that are barred by their automatic stay. However, the US also provides for several mechanisms to lift the stay and allow the counterparty to repossess its property. Australia, on the other hand, draws a clear distinction between secured and unsecured creditors. The South African moratorium is currently not specific enough. The legal battles in courts are often about whether proceedings constitute "legal proceedings" or "enforcement action" and whether possession is lawful or unlawful.[16] If the moratorium is made more detailed and specific, creditors and the BRP would know exactly when certain actions are barred under the moratorium. This would in turn assist in avoiding the costly litigation caused by the current uncertainties.

A possible solution is that the Companies Act should clearly define terms such "legal proceedings", "enforcement action" and "lawful possession". Another solution is

[12] S 443B(2) of the Corporations Act 50 of 2001. See the discussion in 5.2.5.
[13] 11 U.S.C. § 1121(a)-(b). See the discussion in 5.1.3.
[14] S 150(5) of the Companies Act 71 of 2008.
[15] See the discussions in 4.2.2 and 4.2.3.
[16] See the discussions in 4.2.2 and 4.2.3.

that the legislature should put "lawfully in its possession" as a subparagraph to the main text.[17] If these key terms are defined, the court can focus on whether the company is deserving of the protection afforded by the moratorium, basing its decision on the merits of the case, such as whether or not the creditor will benefit from the business rescue plan proposed.

Fifthly, a provision should be added to the Companies Act to hold the BRP personally liable for unlawful occupation when he knew, or ought to have known, that a contract was validly cancelled but nevertheless attempted to rely on the moratorium to bar such proceedings.[18] Only companies truly deserving of business rescue should be afforded the chance to rehabilitate. If for some reason the prospect of success of the company is non-existent at the time of commencement of business rescue proceedings or anytime during the process, specifically where the likelihood of a cancelled contract will lead to the failure of the company, the BRP needs to be held personally liable for the continued unlawful possession or occupation. Business rescue is not for the "terminally ill" or "chronically ill" but should only be available to companies that have a reasonable prospect of rescue.[19] If the latter cannot be achieved, the business should either be liquidated or enter a compromise with its creditors. In addition, when a company cannot be rescued or where the entire rescue process will depend on the continuation of an essential executory contract, the company can also consider informal procedures such as turnaround.

6.2 Conclusion

The introduction of business rescue has fundamentally changed corporate rescue in South Africa, whereby companies are afforded a second chance at rehabilitating and continuing their normal day-to-day operations on a solvent basis. Also, the rescuing of ailing companies can potentially help the South African economy by contributing financially and ensuring their workforce remains intact.

This dissertation focused on the topic of the powers of BRPs in respect of executory contracts. In what follows, I conclude the dissertation by summarising the

[17] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43 (13 April 2021) para 29.
[18] See the discussion in 4.3.1.
[19] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* (6418/2011, 18624/2011, 66226/2011, 66226/2011, 66226A/11) [2012] ZAGPPHC 359 (16 May 2012) para 12.

issues investigated and indicate whether, in the final analysis, the current legal framework for the treatment of executory contracts is acceptable.

The BRP is bestowed with the power to suspend obligations in terms of executory contracts or cancel these contracts when the appropriate leave is acquired. The problem with the suspension power is it will only apply in limited and specific circumstances. A BRP can only suspend obligations that would have become due during business rescue. For the suspension power to be of use, the company would have had to honour all its obligations up to the commencement of business rescue. This is a highly unlikely situations for a distressed company, who would in all likelihood have defaulted on one or more of its contracts. If the suspension power is used to suspend an obligation that has become due prior to business rescue, it will be to no avail as the company will be in unlawful possession of the property should the counterparty cancel the contract. Even if an obligation became due during business rescue, the suspension of obligations can easily be countered with cancellation or the *exceptio non adimpleti contractus*, as the creditors cannot be deprived of their property rights and cannot be forced to perform when they have not received counter performance. In this sense, suspension will only be effective if there are no reciprocal obligations tied to the obligation sought to be suspended. Furthermore, the suspension power cannot have retrospective effect and, therefore, the BRP must elect to suspend an obligation that became due during business rescue before the counterparty elects to cancel such a contract.

My conclusion regarding the suspension power is that it is of no real use. It can only function in financially unrealistic circumstances where the company honoured all its obligations before entering business rescue and continued to honour all its obligations during business rescue. Furthermore, a creditor who elects to cancel an agreement will achieve this outcome one way or the other. The BRP cannot preclude it from doing so by exercising its suspension power. Furthermore, BRPs tend to use their suspension power too late and when they do use it, it is usually countered easily.

With regard to the moratorium, I conclude that it does not adequately assist the BRP in its current form. Where a breach in terms of a contract occurred prior to or during business rescue proceedings, the moratorium will not prevent legal proceedings or enforcement action against a company where a contract was validly cancelled. Cancellation affects the lawfulness of possession and will preclude a BRP from relying on the moratorium as a defence.

The corporate rescue procedures of the US and Australia offer some useful lessons for South Africa. Most significant is the detailed moratorium in terms of the US and personal liability of the administrator in terms of Australia.

Therefore, the powers of the BRP in respect to executory contracts are not adequately addressed by the current legislative provisions regulating business rescue and are unacceptable. This is owed to the fact that there are limited provisions dealing with executory contracts, while these few provisions (most notably sections 133, 134 and 136) are not clear enough either. The latter is evidenced by the fact that courts are so often required to interpret sections 133, 134 and 136 of the Act.

Furthermore, the current business rescue regime in South Africa is not adequate in providing protection from the company against creditors enforcing their property rights in terms of executory contracts. A breach prior to business rescue will almost certainly lead to the cancellation of a contract and subsequent repossession of property. Some of the criticism against business rescue law is attributed to it only having been introduced recently. However, the system has been in effect for more than a decade and, therefore, it is time for the problematic provisions to be revised and amended.

When the new Companies Act was enacted, there were high hopes for new concepts such business rescue. Katz even argued that the new Companies Act gave South Africa the potential to become one of the best company law jurisdictions.[20] However, to be considered one the best company law jurisdictions in the world, legislative intervention is required to address the unclear provisions in the Act.

In conclusion, I end with the words of Wallis JA in *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO*[21] with regard to business rescue:

> "[The] commendable goals are unfortunately being hampered because the statutory provisions governing business rescue are not always clearly drafted. They have given rise to confusion as to their meaning and provide ample scope for litigious parties to exploit inconsistencies and advance technical arguments aimed at stultifying the business rescue process or securing advantages not contemplated by its broad purpose."

[20] M Katz "Will the new Companies Act be good for Corporate South Africa?" (2011) August *The Corporate Report* 1-6 6. See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2012 (3) SA 273 (GSJ) para 9.
[21] *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) para 1.

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