



INSOL
INTERNATIONAL



The General Moratorium

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INTRODUCTION

- The general moratorium allows a company in financial distress sufficient breathing space to restructure its affairs by placing a stay or prohibition on all legal proceedings against the company in business rescue.
- **Section 133(1)** of the Companies Act of 2008 (“the Act”) states that no legal proceedings, with the inclusion of enforcement action, may be commenced or proceeded with against the company or in relation to any property belonging to the company or lawfully in its possession, unless with the written consent of the appointed business rescue practitioner or by leave of the court.
- The purpose of the provision is to afford a distressed company enough time to restructure its affairs without diverting resources into defending and opposing legal proceedings as opposed to rescuing the company.
- **Section 133(3)** further provides for the suspension of the running of prescription for all potential claims against the company. This provision seeks to balance the need to prevent an influx of litigation against the company while it restructures its affairs on the one hand and considering the impact the moratorium would have on the rights of creditors on the other.

APPLICATION

- ***Timsani (Pty) Ltd (in business rescue) and another v Afrimat Iron Ore (Pty) Ltd*** provided that “the general moratorium is a defence *in personam*: it is a personal, temporary benefit in favour of a company undergoing business rescue **that cannot be utilised indefinitely to delay the claims of creditors or result in the extinction of their claims**”. As such, a creditor has no locus standi to rely on non-compliance with the section, only the business rescue practitioner may seek its protection.
- The moratorium applies for the duration of the business rescue however, section 150(2)(b)(i) of the Act provides that this can be extended beyond business rescue proceedings if catered for in the business rescue plan.
- “Legal proceedings”: Chapter 6 does not define “legal proceedings”. However case law demonstrates that the intention of the moratorium is to cast the net as wide as possible in order to include any conceivable type of legal action against the company in business rescue. Legal proceedings include any matter to be referred to a court, tribunal or any other formal proceedings intended to adjudicate a matter, including an arbitration.

APPLICATION (cont.)

- “Enforcement action”: Similarly, Chapter 6 does not define “enforcement action”. Fortunately the SCA considered the meaning of “enforcement action” in the case of ***Cloete Murray & Another NNO v FirstRand Bank t/a Wesbank 2015 (3) SA 438 (SCA)***. It held *inter alia* that an “enforcement action” is a species of legal proceedings, involving the enforcement of obligations.
- “In relation to any property belonging to the company, or lawfully in its possession”: The moratorium is not applicable to legal proceedings involving property belonging to another company or property unlawfully possessed by the company in business rescue. Similarly, the moratorium will not apply if the company’s rights in terms of a contract are validly cancelled.
- “In any forum”: The moratorium extends to legal proceedings brought by way of arbitration proceedings.
- The moratorium does not extend to juristic acts such as the cancellation of an agreement / contract or the dispatch of a letter of demand.

INSTANCES IN WHICH THE MORATORIUM MAY BE LIFTED

▪ Section 133(1) is not an absolute bar to legal proceedings but a procedural limitation on any claims against the distressed entity. The moratorium is subject to the following exceptions:

a. Section 133(1)(a): With the written consent of the business rescue practitioner;

b. Section 133 (1)(b): With the leave of the court:

Arendse and Others v Van der Merwe and Another NNO held that an applicant seeking to obtain leave under this section must as a minimum requirement establish a *prima facie* case against the company under business rescue, with the court considering the following factors:

- 1. The effect that the grant or refusal of leave would have on the applicant's rights as opposed to other affected persons and relevant stakeholders;*
- 2. The impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and*
- 3. Whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7(k) and 128(b) of the Act.*

INSTANCES IN WHICH THE MORATORIUM MAY BE LIFTED (cont.)

Exceptions Continued:

- c. Instances where neither the consent of the business rescue practitioner or the leave of the court may not be required where an affected person exercises the right in terms of section 130(1) to set aside voluntary business rescue proceedings; in an application to remove a BRP in terms of section 139; and in any proceedings relating to the business rescue plan proposed by the BRP.
- d. Section 133 (1)(c): Set off against any claim made by the company in any legal proceedings;
- e. Section 133 (1)(d): Criminal proceedings against the company or any of its directors or officers;
- f. Section 133 (1)(e): In proceedings concerning any property or right over which the company exercises the power of a trustee;
- g. Section 133(1)(f): In proceedings by a regulatory authority in the execution of its duties after written notification to the BRP.

AN APPLICANT SEEKING LEAVE UNDER SECTION 133(1)(b)

- Number of factors to be taken into consideration by an applicant when seeking the leave of the court, they are as follows:
 - a. ***Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another***: the court must be presented with a properly motivated application which sets out sufficient detail supporting the need for interference in the business rescue process;
 - b. There is uncertainty as to whether leave must be obtained first before the main application is launched. It has been held that there is no reason why leave to commence or continue with legal proceedings against a company under business rescue must in every case be obtained before the institution of proceedings.
 - c. On the other hand, it has been held that an applicant must first seek leave from the High Court to commence legal proceedings before the main application may proceed and before the business rescue practitioner will be required to deliver answering affidavits on behalf of the company.

THE EFFECT OF THE MORATORIUM ON SURETIES AND GUARANTORS

- **Section 133(2)** of the Act states that a guarantee or surety by a company under business rescue in favour of any other person may not be enforced by any person against the company except with the leave of the court and in accordance with any terms the court considers just and equitable in the circumstances. The surety obligation would be stayed on the commencement of business rescue proceedings and could not be enforced in terms of section 133(1).
- ***Investec v Bruyns 2012 (5) SA 430 (WCC)*** provided that the moratorium is a defence *in personum* and would not have the effect of extinguishing the obligations of a principal debtor regardless of the protection provided towards the surety company under business rescue.
- ***New Port Finance Company (Pty) Ltd and Another v Nedbank Limited*** confirmed that a moratorium in favour of the company undergoing business rescue proceedings was a defence *in personam* and therefore did not avail itself to the company in business rescue's surety.