



INSOL
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The general moratorium (Chapter 3)

Roxanne Webster (Bowmans, Johannesburg)

What is the general moratorium?

- **Section 133 of the Act states that:**

“...no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable.”

- *Murray NO and Another v FirstRand Bank Ltd* – SCA case which perfectly describes the general moratorium.

- **What about prescription and the rights of creditors?**

- Section 133(3) of the Act provides that if the enforcement of any claim against the company is subject to time limit, such time limit prescribed for the enforcement of such claim will be suspended for the duration of the business rescue proceedings

- Think about section 7(k) of the Act - *“to provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all the relevant stakeholders”*

Features of the general moratorium

- Only available to the company and BRP. Its automatic – the BRP does not need to do anything in order to access the general moratorium. It applies by operation of law.
- It only applies for the duration of the business rescue proceedings. Section 150(2)(b)(i) provides that a business rescue plan may make provision for the moratorium to extend beyond the duration of the business rescue proceedings but it would only be a limited moratorium that may apply to a specific class of creditors. You don't often see this and if you do – those creditors affected by it must take proper advice and weigh up the pros and cons.
- Moratorium extends to all legal proceedings in any forum. So it does not just include summons or applications brought to court, it includes arbitration proceedings as well – see *Chetty t/a Nationwide Electrical v Hart NO and Another*
- It also includes enforcement action – what is enforcement action? *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank*.

Features of the general moratorium

- “or in relation to any property belonging to the company, or lawfully in its possession”
 - moratorium is not applicable to legal proceedings involving property belonging to another company or property unlawfully possessed by the company in business rescue.
 - If the company is not lawfully in possession of the property, that is, because those rights are based on a contract that was validly cancelled, section 133 does not apply. Think about *Cloete Murray* case. See case of *Madodza (Pty) Limited v Absa Bank Limited and Others*.
 - **What about the rights of landlords?**
 - See *Kythera Court v Le RendezVous Café CC and Another*.
 - *an applicant brought an application to evict a company in business rescue from its premises. Prior to the commencement of the business rescue, the company had fallen into arrears of its rental obligations. The landlord therefore cancelled its lease on 7 March 2016 (after the date of the commencement of business rescue). The company refused to vacate the premises on the basis of section 133 and argued that the landlord was precluded from cancelling the lease and launching the eviction application. The court held that the juristic act of cancelling the lease agreement does not constitute an enforcement action in terms of section 133(1) and it was therefore permissible for an agreement to be cancelled during business rescue proceedings. The court confirmed that the moratorium does not apply when the property in question does not belong to the company in business rescue or is not lawfully in its possession. Thus, eviction proceedings in relation to property not in the unlawful possession of a company in business rescue, are permissible. This judgment provides certainty for landlords as it has been determined that section 133(1) does not encompass legal proceedings for ejectment when a lease has been validly cancelled and the company in business rescue is an unlawful possessor of the property.*

Features of the general moratorium

- The moratorium does not extend to juristic acts such as the cancellation of an agreement / contract, or the dispatch of a letter of demand.
- Employment related issues - does the moratorium apply?

See case of *National Union of Metalworkers of South Africa (NUMSA) obo Members and Others v South African Airways and Other*

Uplifting the moratorium

- **There are always exceptions:**

1. With the consent of the BRP.

- But their consent is not an absolute bar meaning that if you do not receive their consent, you cannot institute proceedings.
- It is simply a procedural requirement to request their consent and if consent is not provided, you can still apply to court and seek the leave of the court to uplift the moratorium should the circumstances justify it.
- This does not mean that it is simply a free for all – that for every legal proceedings, you simply have to request the BRPs consent and if not obtained, you can seek the leave of the court. Leave will only be granted in certain circumstances.
- In most cases, the business rescue practitioner will not consent to the legal proceedings to be commenced or proceeded with unless it benefits the company in business rescue.

Uplifting the moratorium

2. With the leave of the Court

- See case of *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd and Another*
- Think of when you bring an urgent application and ask the court to deviate from the usual rules of court – in the same way, when you bring an application against a company in business rescue and request that the court uplift the moratorium, you must have a well-motivated application which sets out why, in this circumstances, the moratorium should be uplifted. The court must use the facts set out in your application to apply its mind on whether it is justified to uplift the moratorium.
- See case of *Arendse and Others v Van der Merwe and Another NNO*:
 - the effect that the grant or refusal of leave would have on the applicants' rights as opposed to other affected persons and relevant stakeholders;
 - the impact that the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial health; and
 - whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in sections 7 (k) and 128 (b) of the Act

Uplifting the moratorium

- There are even exceptions to the general rule that you must either obtain the BRP's consent or leave of the court:
 1. An application in terms of section 130(1) to set aside the voluntary business rescue process
 - See case of *LA Sport 4X4 Outdoor CC and Another v Broadsword Trading 20 (Pty) Limited and Others*
 - See case of *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited and Others* "The court herein held that there was no need to apply in terms of section 133(1)(b) for leave to institute proceedings to set aside the resolution, as sections 130(5) and 132(2)(a)(i) "permit applications to court to set aside a company's resolution to begin business rescue proceedings without rendering these sections subject to the leave of the court being granted in terms of s 133"
 2. An application to remove a business rescue practitioner in terms of section 139
 3. Any proceedings relating to the business rescue plan proposed by the business rescue practitioner
 - See case of *Moodley v On Digital Media (Pty) Ltd and Others*.

The purpose of section 133(1) is to prohibit the commencement or continuation of any legal proceedings against a company in business rescue. Section 133(1) is not concerned with the development, adoption and implementation of the business rescue plan but rather with the temporary "freezing or stay" of legal proceedings against a company in business rescue

Uplifting the moratorium

3. Set off

In terms of section 133(1)(c), legal proceeding against the company may be proceeded with if it amounts to a set-off against any claim made by the company in any legal proceedings, irrespective of whether the proceedings commenced before or after the commencement of the business rescue proceedings.

4. Criminal proceedings the company or any of its directors or officers.

5. proceedings concerning any property or right over which the company exercises the powers of a trustee

See cases of *Afrimat Iron Ore Proprietary Limited v Timasani Proprietary Limited (in business rescue)* and *Another Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd (SCA)*

4. proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

Seeking the leave of the court

- Factors to consider and include:
 1. 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
 2. Applicant seeking leave under section 133 must establish a prima facie case against the company in business rescue
 3. Leave first before main proceedings or apply simultaneously in one application
 - *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and Another* - 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
 - *Lockstock Investments (Pty) Ltd and Others v Peter van den Steen NO and Others* - The business rescue practitioners would be immensely prejudiced if they were to be expected to file answering affidavits, and incur costs and expenses in the process, in circumstances where the applicants might not even be granted leave by the court to proceed with the main application.

Sureties and guarantors

- Section 133(2) 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 leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
- See case of *Investec v Bruyins*

Section 133 (2) is a special provision dealing specifically with the enforcement of claims against the company based on guarantees and suretyships [by the company], and stipulates that in such cases the claims against the company may be enforced only with the leave of the Court. The business rescue practitioner is not empowered to consent to the enforcement against the company of claims based on guarantees and suretyships.

- *New Port Finance Company (Pty) Ltd and Another v Nedbank Limited; Mostert and Another v Nedbank Limited* where the court held that the statutory moratorium in favour of the company undergoing business rescue proceedings was a defence in personam and therefore that the statutory moratorium in favour of the company did not avail the surety.