THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 91/2020

In the matter between:

TIMASANI (PTY) LTD **FIRST APPELLANT**
(in business rescue)
WERNER CAWOOD **SECOND APPELLANT**

and

AFRIMAT IRON ORE (PTY) LTD **RESPONDENT**

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

Coram: WALLIS, SCHIPPERS AND NICHOLLS JJA AND GORVEN AND UNTERHALTER AJJA

Heard: 10 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time of hand-down is deemed to be 15h30 on 13 April 2021.

Summary: Business rescue – s 133 of the Companies Act 71 of 2008 (the Act) – moratorium on legal proceedings against company in business rescue – sale of company's assets – deposit provisionally paid pending conclusion of sale

agreements – sale not concluded – deposit not property belonging to company or lawfully in its possession – recovery of deposit not precluded by s 133.

Section 145(1)*(a)* of the Act – notice of court proceedings to creditors concerning business rescue proceedings – a general notification requirement – duty to notify creditors rests on business rescue practitioner.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molefe J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Schippers JA (Wallis and Nicholls JJA and Gorven and Unterhalter AJJA concurring):

[1] The first appellant, Timasani (Pty) Ltd (Timasani), which formerly conducted iron and manganese mining, was placed in business rescue on 28 July 2015. The second appellant, Mr Werner Cawood, an attorney, is the business rescue practitioner of Timasani (the BRP), and was authorised to sell its assets in terms of a business rescue plan adopted by its creditors. The respondent, Afrimat Iron Ore (Pty) Ltd (Afrimat), is a mining company that made an offer to purchase Timasani's assets, namely a farm located in Kuruman together with fixed improvements, buildings and fittings of a permanent nature (the farm), and mineral rights and mining equipment. In terms of that offer, Afrimat paid a deposit of R1 700 000 to Timasani. However, the contracts for the purchase of these assets did not materialise due to the non-fulfilment of suspensive conditions.

[2] The central issue in this appeal is whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings in s 133 of the Companies Act 71 of 2008 (the Act). The Gauteng

Division of the High Court, Pretoria (the high court), declared that s 133 of the Act was inapplicable and ordered Timasani to repay the deposit, together with interest, and the BRP to pay the costs of the application. The appeal is with its leave.

[3] The basic facts are uncontroversial. The BRP instructed Park Village Auctions (the auctioneer) to invite offers for the purchase of the farm, mineral rights and mining equipment. The auctioneer published an invitation on its website in terms of which offers for Timasani's assets were required to be submitted to the auctioneer's office by 10 March 2017. A deposit of 15% was payable on submission of an offer and the balance within 30 days of confirmation of its acceptance. The managing director of Afrimat raised certain queries concerning the offer with the auctioneer. The latter answered those queries, provided Afrimat with a draft offer to purchase the assets which it had prepared (the OTP) and advised Afrimat to contact the BRP directly if it had further enquiries.

[4] This led to Afrimat making a written counter-offer for the purchase of the assets on 10 March 2017, subject to certain amendments and additions to the OTP. The material terms of the counter-offer were these. The base purchase price for the farm, mineral rights and mining equipment was R17 million excluding VAT, transfer duties and agent's commission. Afrimat undertook to pay a deposit of 15% of the base purchase price within 48 hours of written acceptance of its offer. The deposit was to bear interest which would accrue for Afrimat's benefit. The balance of the purchase price was payable upon fulfilment of the following conditions precedent: the conduct of a legal, technical and financial due diligence investigation yielding satisfactory results and approval of an agreement by Afrimat's Board of Directors. Afrimat would not be liable for any liabilities of Timasani, including any costs associated with its business rescue.

[5] By letter dated 27 March 2017, the BRP confirmed that Afrimat's offer had been circulated to all affected parties and unanimously accepted by creditors. The BRP was therefore authorised to accept Afrimat's offer on behalf of Timasani. The letter also stated the following. Afrimat's offer was accepted on the terms as supplemented in correspondence between the parties after receipt of Afrimat's counter-offer on 10 March 2017 (although a deposit of 15% of the purchase price was required in terms of the OTP, the parties had agreed subsequently on a deposit of 10%). The offer was also accepted on the basis that the agreed 21-day due diligence period would commence on 28 March 2017. The deposit of 10% of the purchase price of R17 million, ie R1 700 000 (the deposit) had to be paid directly into a separate investment account of Timasani held with Investec Bank. In conclusion the BRP said:

'We further confirm that the deposit will be retained on behalf of yourselves in this interest-bearing account pending the outcome of the due diligence proceedings and conclusion of the final agreements.'

[6] On 29 March 2017 Afrimat paid the deposit into Timasani's account at Investec Bank and commenced with the due diligence exercise. When it was completed Afrimat furnished the BRP with a draft Sale of Assets Agreement relating to the movable assets, and a draft Sale of Immovable Property Agreement in respect of the farm. According to those agreements the purchase price of the assets was R13 million and that of the farm, R4 million.

[7] A dispute then arose concerning the amount of commission for which Afrimat was liable. In an invoice to the BRP dated 31 May 2017, the auctioneer claimed commission on the purchase price of all the assets, ie on R17 million, as well as costs in relation to advertising, publications on social media and security. On the same day the BRP informed Afrimat that the agreements had to be

amended to cater for the commission and advertising costs of the auctioneer, 'as per the initial offer to the public on the auction conditions that Afrimat agreed [it] would pay additionally to the purchase price'. The BRP said that the deposit was insufficient to cover those costs and suggested that any shortfall be paid to the auctioneers on signature of the agreements.

[8] Afrimat's stance was that it was not liable for the auctioneer's commission on the purchase price of all the assets and that it was liable for 10% commission on the purchase price of the farm, ie R400 000. This was based on clause 9 of the OTP which provided that the purchaser, in addition to the purchase price, would pay agent's commission of 10% plus VAT, calculated on the purchase price of the property. The OTP defined the 'Property' or 'Farm' as 'the immovable property'. Further, clause 5 of the draft Sale of Immovable Property Agreement provided that the purchase price of the farm was R4 million. Afrimat also denied liability for social media and advertising costs.

[9] Whilst this dispute remained unresolved, Soliter Myn Ondernemings BK (Soliter), a mineral rights-holder, asserted its right to the surface use of the entire farm in terms of a lease concluded with Timasani. In a letter to the appellants and the Board of Directors of Timasani, Soliter sought confirmation that the farm would only be sold subject to its rights under the lease agreement. Soliter also claimed ownership of certain stockpiles on the farm which were subject to a mineral beneficiation programme and required an assurance that possession of the stockpiles would not be handed over to anyone.

[10] In a letter by Afrimat's attorneys to the BRP dated 13 June 2017, it was stated that the encumbrance in favour of Soliter had not been disclosed to Afrimat during the due diligence it had undertaken. In the same letter, Afrimat's position concerning the auctioneer's commission was set out, namely that it had not

participated in any online auction and that it had engaged the BRP on the basis of the terms in the OTP which was clear on the commission payable, ie 10% of the price of the immovable property sold. The letter went on to state that Afrimat's offer remained open for seven days subject to the following:

'4.1 It being accepted that our client is only liable to pay R400,000 (excluding VAT) for the agent's commission to the auctioneers and that our client is not liable for any other costs . . .

4.2 Soliter in writing waiving in a form acceptable to our client any reliance on any alleged claim that it has over the immovable property of Timasani; and

4.3 the above to be recorded and inserted into the draft written agreements supplied to you on 26 May 2017 and to be signed by the parties.

5. On the lapse of the aforesaid 7 days:

5.1 our client's offer is withdrawn and it specifically reserves its right to institute any necessary proceedings to recover any loss suffered by it as a result of this transaction not proceeding; and

5.2 our client's deposit held by you to be immediately repaid along with all interest that accrued thereon.'

[11] The subsequent waiver by Soliter of its mineral rights was considered inadequate inter alia on the ground that it was equivocal and Afrimat's offer was not accepted within seven days. Consequently, on 21 June 2017 Afrimat's attorneys informed the BRP that its offer to conclude the sale agreements had lapsed and requested that the deposit be repaid. When it had not been repaid by 30 June 2017, Afrimat launched an application against the appellants in the high court for repayment of the deposit. It sought an order directing the BRP to pay the costs of the application in his personal capacity on the basis that its claim arose as a result of his conduct.

[12] The appellants opposed the application on the following grounds. Afrimat failed to comply with the provisions of s 133(1) of the Act because the application could not be instituted without the written consent of the BRP or leave of the court. Afrimat's failure to join the auctioneer and Timasani's creditors as

respondents was fatal to its case. There were material disputes of fact on the papers which precluded the granting of final relief. The BRP had throughout acted in an official capacity and Afrimat did not establish any basis for an order that he pay the costs of the application in his personal capacity.

[13] As stated earlier, the high court (Molefe J) made an order declaring that s 133 of the Act did not apply to the proceedings instituted and ordered Timasani to repay the deposit to Afrimat. The court reasoned that s 133(1) was inapplicable because the deposit was no longer lawfully in the possession of Timasani when the sale agreements did not materialise and Timasani had exercised the powers of a trustee as contemplated in s 133(1)*(e)*. The non-joinder point was dismissed on the basis that neither the auctioneer nor Timasani's creditors had a direct and substantial interest in the dispute between Timasani and Afrimat in relation to the repayment of the deposit. The court held that it was unnecessary to join the creditors as parties to the application and to the extent that there was any such duty, it rested on the BRP. Regarding the costs order sought against the BRP, the court held that there was no evidence to justify such an order.

[14] It is convenient firstly to deal with non-joinder. It was argued on behalf of the appellants that the application should have been dismissed because Afrimat failed to join all the creditors of Timasani in terms of s 145(1) of the Act. The application, so it was submitted, affected Timasani's financial position which resulted in less funds being available to creditors. It was further submitted that the auctioneer should also have been joined since this 'was imperative for the dispute to be properly ventilated'.

[15] The appellants' reliance on non-joinder was misplaced. The test is whether a party has a direct and substantial interest in the subject matter of the proceedings, ie a legal interest in the subject matter of the litigation which may

be prejudicially affected by the judgment of the court.[1] The deposit was a provisional payment pending the fulfilment of suspensive conditions and the conclusion of final agreements. The auctioneer had no interest in the terms upon which the deposit was paid and it was not held on its behalf. The auctioneer's claim for commission and advertising costs – as against the BRP who had instructed it – remained unaffected by the order directing Timasani to repay the deposit. The high court correctly held that the auctioneer had no legal interest in the subject matter of the application.

[16] As to the interest of creditors, s 145(1) of the Act provides:

'Each creditor is entitled to–

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in the company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.'

[17] Two points are required to be made. First, s 145(1) sets out in some detail the rights and obligations of creditors when participating in business rescue proceedings as a whole, in addition to the rights conferred on creditors as 'affected persons' by specific provisions of Chapter 6 of the Act.[2] Subsection 1*(a)* is a general notification requirement to creditors of court proceedings, decisions and meetings concerning the business rescue. It has nothing to do with the joinder of creditors in legal proceedings involving a company in business rescue. Having

[1] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) para 66.
[2] Professor P Delport et al *Henochsberg on the Companies Act 71 of 2008* at 506.

regard to the language, context and purpose of s 145,[3] this is underscored by ss 145(2) and 145(3). Subsection (2) provides that in addition to the rights in subsection (1), each creditor has the right to vote to amend, approve or reject a proposed business rescue plan and if that plan is rejected, to propose an alternative plan or make an offer for the interests of other creditors.[4] In terms of subsection (3), creditors are entitled to form a committee to be consulted by a business rescue practitioner in the development of a business plan.

[18] Second, and consistent with the text, context and purpose of s 145, subsection (1)*(b)* confers on creditors a statutory right to participate in any legal proceedings that arise during the business rescue proceedings of a company. In this respect s 145(1)*(b)* stands on an equal footing with s 131(3) of the Act, in terms of which each affected person has a right to participate in an application to place a company in business rescue.[5] In both cases the leave of the court to intervene in the proceedings is not required, but the court may need to regulate the procedure to be followed if the affected person or creditor wishes to file affidavits.[6]

[19] Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in terms of s 145(1)*(a)* rests on the business rescue practitioner. Being a general notification requirement,

---

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, 2012 (4) SA 593 (SCA), affirmed recently in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 23; 2019 (5) SA 1 (CC) para 29.

[4] Section 145(2) Companies Act 71 of 2008 (the Act) provides:

'In addition to the rights set out in subsection (1), each creditor has–

(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and

(b) if the proposed business rescue plan is rejected, a further right to–

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153. . . .'

[5] In terms of s 128(1)*(a)* of the Act, an **'affected person'** includes 'a shareholder or creditor of the company'.

[6] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC) para 21; *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para 30.

the purpose of s 145(1)*(a)* is to inform creditors of court proceedings brought during business rescue: it does not require the joinder of every creditor in such proceedings. This is hardly surprising as the business rescue practitioner has full management control of the company during business rescue proceedings;[7] is obliged under the Act to keep creditors abreast of developments in the business rescue, and knows who the creditors are and which of them may wish to participate in the relevant legal proceedings. Two cases were cited in support of the submission that s 145(1)*(a)* required the joinder of all creditors in any legal proceedings involving the company in business rescue.[8] However, both these cases involved the fate of the business rescue plan and contentions that directly affected the financial interests of creditors. They were not authority for the submission advanced.

[20] It follows that in the circumstances, Afrimat was not required by s 145(1) of the Act to join all Timasani's creditors in the application to recover its deposit. The deposit was paid provisionally pending the conclusion of final agreements. When this did not happen Afrimat was entitled to repayment thereof. No right of any creditor to payment of any amount was affected by the high court's order directing Timasani to repay the deposit. On this aspect too, the high court was correct.

[21] This brings me to the alleged disputes of fact in the answering affidavit. They have no substance. In short, the appellants alleged that Afrimat 'misrepresented its commitment toward the purchase of the assets' as a result of which Timasani did not proceed with the online auction. Afrimat, the BRP said, 'effectively hijacked the online auction', snatched at a bargain and was trying to

[7] Section 140(1)*(a)* of the Act.
[8] *Absa Bank Ltd v Naude NO and Others* [2015] ZASCA 97; 2016 (6) SA 540 SCA and *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* [2017] ZASCA 131.

force Timasani to agree to terms and conditions relating to costs and commissions that suited Afrimat. Then it was alleged that all prospective purchasers were required to pay a deposit which 'represented a payment to secure participation' in the sale of Timasani's assets. The BRP went on to say that '[t]he deposit never represented a payment that was to be paid back to the Applicant'.

[22] None of these allegations however established any dispute of fact. Neither are they sustainable on the evidence. Nowhere was it stated – in either the auctioneer's invitation to submit offers or the correspondence that passed between Afrimat and the BRP which culminated in the draft agreements – that a non-refundable deposit was payable. On the contrary, the BRP's letter of 27 March 2017 makes it clear that the deposit would be retained on behalf of Afrimat and kept separately in an interest-bearing account, 'pending the outcome of the due diligence proceedings and conclusion of the final agreements'.

[23] Regarding the costs and commissions relating to the auction, the high watermark of the appellants' case was that the auctioneer's attorneys had 'confirmed that the terms and conditions of sale, pertaining to the costs and commissions, apply to any agreement reached'. This is hearsay. No affidavit by the auctioneer was filed. The appellants simply did not present a factual version in the answering affidavit. And there was no dispute concerning Afrimat's commitment to an agreement as is evidenced by the BRP's letter of 27 March 2017 and the reasons why the final agreements were not concluded. Neither was there any genuine dispute of fact in relation to Afrimat's stance that it did not participate in an online auction and that in accordance with the OTP, it was liable for a commission of only 10% of the purchase price of the farm.

[24] There remains the question whether s 133(1) of the Act precluded Afrimat from claiming repayment of the deposit. It provides in relevant part:

'**General moratorium on legal proceedings against company.** – (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except–

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) . . .

(d) . . .

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee;

(f) . . .

(2) During business rescue proceedings, a guarantee or surety by a company 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.

(3) If any right to commence proceedings or otherwise assert a claim against the company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.'

[25] Section 133 must be read as a whole: the different subsections of a provision dealing with the same subject matter must not be considered in isolation but read together so as to ascertain the meaning of the provision.[9] Section 133(1) is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect.[10] It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court. This Court has stated the purpose of s 133(1) as follows:

[9] *Aziz v Divisional Council, Cape and Another* 1962 (4) SA 719 (A) at 726E.

[10] *Chetty t/a Nationwide Electrical v Hart and Another NNO* [2015] ZASCA 112; 2015 (6) SA 424 (SCA) para 28.

'It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.'[11]

[26] Both *Cloete Murray v FirstRand Bank* and *Chetty v Hart* were concerned with claims existing prior to the commencement of business rescue. The same is true of the cases in the High Court involving attempts to recover possession from companies in business rescue of leased premises or a leased motor vehicle, the possession of which had been lawful prior to the commencement of business rescue.[12] So far as we can ascertain, this is the first occasion on which it has been sought to invoke the moratorium in s 133(1) in relation to a transaction concluded after the commencement of business rescue or property coming into a company's possession after that date. Entirely different factors come into play in that situation. A business rescue practitioner may borrow money, employ people or, as in this case, sell property, in the course of business rescue. If the business rescue practitioner does not meet those commitments, it is not apparent that imposing a moratorium on the enforcement of those contracts, or the recovery of what is due to third parties, serves any significant purpose of business rescue. It may operate to dissuade third parties from entering into transactions that are necessary to keep the business afloat while attempts are made to rescue it. We raised with counsel whether properly construed s 133(1) is concerned only with transactions concluded prior to the commencement of business rescue and the possession or ownership of property acquired or possessed prior to that date. However, neither was in a position to make any helpful submissions to us and it

[11] *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a WesBank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 14. See also *Chetty* fn 10 para 28.
[12] *Madodza (Pty) Ltd v Absa Bank Limited and others* [2012] ZAGPPHC 165; *Kythera Court v Le Rendez Vous Café CC & another* 2016 (6) SA 63 (GJ); *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and others* 2016 (6) SA 448 (D); *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd* 2016 (6) SA 501 (WCC).

would not be appropriate to decide the point without full argument. Fortunately the case can be resolved on the assumption that the moratorium may have effect in relation to transactions occurring after the commencement of business rescue.

[27] Section 133(2) is a special provision that deals specifically with the enforcement of claims against the company based on a guarantee or suretyship given by the company, which may be enforced only with the leave of the court. Being a special provision, s 133(2) applies to the exclusion of s 133(1) in relation to claims based on guarantees or suretyships.[13] In keeping with the purpose of the moratorium to provide a company in business rescue with breathing space to enable it to restructure its affairs, and to protect creditors, s 133(3) extends the time within which proceedings must be commenced or claims asserted against the company.

[28] The general moratorium in s 133(1) 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.[14] Indeed, and as stated, legal proceedings in relation to those claims may be initiated or continued with the consent of the BRP or leave of the court.

[29] The section is not easy to construe.[15] The prohibition says that 'no legal proceeding … may be commenced or proceeded with in any forum', save in the circumstances specified in the various sub-paragraphs. That stark prohibition is then qualified by inserting the words 'including enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession'. Enforcement action appears to relate to contractual or other

[13] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) para 17.
[14] See *Henochsberg* fn 2 at 482(32) and the authorities there cited.
[15] See the detailed discussion by Olsen J in *JVJ Logistics* fn 12.

obligations incurred prior to the business rescue. It would include any claim for specific performance, payment of a purchase price, or delivery of property or goods that had been sold. The second and third instances involve property that is either owned by the company or in its lawful possession. The insertions must be directed to some purpose, because they are unnecessary if a blanket prohibition on legal proceedings of any kind was the aim. But, prefacing them with the word 'including', suggests that there are other unspecified situations hit by the prohibition. On the other hand, if all claims of whatever type were the target, the insertions serve no useful purpose. Courts have treated the reference to property 'belonging to the company, or in its lawful possession' as excluding such property from the prohibition of legal proceedings. It would have been simpler then to refer to it in a sub-paragraph, as was done with property over which the company exercised the powers of a trustee. However, we must take the section as we find it and there seems no other reason for this insertion. No purpose connected to the process of business rescue warrants the company under business rescue being protected against proceedings to recover property that it neither owns, nor lawfully possesses.

[30] In my view, properly construed s 133(1) provides that during business rescue proceedings:

(1) no legal proceedings, including enforcement action, against the company; and

(2) no legal proceedings in relation to property belonging to or in the lawful possession of the company,

may be commenced or proceeded with in any forum. Put differently, the words ‘no legal proceedings’ straddle both the circumstances envisaged in (1) and (2). Thus, in *Cloete Murray v FirstRand Bank*,[16] it was stated that the inclusion of the term ‘enforcement action’ under the generic phrase ‘legal proceedings’ seems to

[16] *Cloete Murray* fn 11 para 32.

indicate that 'enforcement action' is a species of 'legal proceeding' or meant to have its origin in legal proceedings.

[31] This appeal concerns the moratorium in (2). Afrimat contends that s 133(1) is inapplicable because the deposit does not belong to Timasani and it is in unlawful possession thereof. The plain language of the words, 'no legal proceedings in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with', limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue, or property unlawfully possessed by the company.[17] Property 'belonging to the company' in s 133(1), sensibly construed, can only mean property belonging in a legally valid sense, such as property owned by the company,[18] which in s 133(1) is expressly distinguished from property 'lawfully in its possession'. Common sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent recovery of property not belonging to it or unlawfully in its possession.[19]

[32] This construction is reinforced by the immediate context. Section 134(1)*(c)* of the Act which deals with the protection of property interests during business rescue of a company is cast in similar terms and provides:

'134 **Protection of property interests** –(1) Subject to subsections (2) and (3), during a company's business rescue proceedings–

. . .

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.'

---

[17] *Kythera Court* fn 12 para 9.
[18] *Southern Value Consortium* fn 12 para 30.
[19] *Southern Value Consortium* fn 12 para 35.

[33] Section 134(1)*(c)* conditionally prohibits the exercise of any right in respect of property '*in the lawful possession of the company*' during business rescue proceedings, regardless of whether that property is owned by the company. It does not prohibit the exercise of a right in relation to property in the *unlawful* possession of the company.[20]

[34] Thus, in *Cloete Murray v FirstRand Bank*,[21] the cancellation of an instalment sale agreement by a creditor rendered unlawful the continued possession by a company in business rescue of the goods that formed the subject matter of that agreement. This Court held that although the moratorium in s 133(1) of the Act grants the company breathing space, the legislature did not intend to interfere with contractual rights and obligations of parties to an agreement. Likewise, in *Kythera Court v Le Rendez-Vous Café CC*,[22] it was held that the moratorium did not preclude vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue. The case concerned legal proceedings for ejectment where a lease had been validly cancelled and the company was an unlawful occupier.

[35] Applied to the present case, the agreement in terms of which the deposit was paid did not materialise. It is trite that when a contract is subject to a suspensive condition which is fulfilled, the obligations under the contract become enforceable.[23] On the other hand, if the condition is not fulfilled then it is as if the contract never came into existence, ie it is regarded as being void *ab initio*.[24] A

---

[20] *Kythera Court* fn 12 paras 10-11.
[21] *Cloete Murray* fn 11 para 40.
[22] *Kythera Court* fn 12 paras 9, 14 and 15.
[23] *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 432C; *Jurgens Eiendomsagente v Share* 1990 (4) SA 664 (A) at 674E-J, approving *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 695C-E.
[24] JW Wessels *The Law of Contract in South Africa* 2 ed (1951) para 1380; *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* [2012] ZASCA 160; [2013] All SA 266, 2013 (2) SA 133 (SCA) para 10.

party who has made a payment under a contract in anticipation of the fulfilment of a suspensive condition is entitled to the return of the money, unless the contract provides otherwise.[25] Once Timasani and Afrimat did not conclude the draft agreements submitted by Afrimat, there was no right to retain the deposit because it was not money that belonged to the company; neither was it property lawfully in its possession. The agreement in regard to the deposit was that it would be held in a specific account and would accrue interest for the benefit of Afrimat. That made it clear that if the anticipated agreement did not materialise the deposit had to be repaid. Timasani was rightly ordered to repay the deposit.

[36] The deposit was not property over which Timasani exercised the powers of a trustee as contemplated in s 133(1)*(e)* of the Act. The high court, with reference to the definition of 'trustee' in the Concise Oxford Dictionary, namely 'a person or a member of the board given control or powers of administration of property in trust with a legal obligation to administer it solely for the purposes specified', concluded that s 133(1)*(e)* also limited the application of the moratorium.

[37] The high court erred. Timasani held no title to any trust property belonging to Afrimat. The deposit was not paid as property in trust. Timasani was not given any powers of administration typically exercised by a trustee, such as taking investment decisions regarding trust assets, advancing trust capital or distributing trust assets to beneficiaries. It did not incur any fiduciary duty in respect of the deposit. Fundamentally, Afrimat's claim was not founded on any breach of trust on the part of the appellants. The section is addressed to companies that hold funds in trust, such as incorporated firms of attorneys, estate agents, professional

[25] See G B Bradfield and R H Christie *Christie's Law of Contract in South Africa* 7 ed (2016) at 172 and the authorities collected in fn 162.

trustees and financial institutions owing fiduciary duties in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001.

[38] In the result the appeal is dismissed with costs.

_____

A SCHIPPERS
JUDGE OF APPEAL

APPEARANCES

For appellant:	L K van der Merwe
	Instructed by:
	Koster Attorneys, Pretoria
	McIntyre van der Post, Bloemfontein
For respondent:	A J Daniels SC
	Instructed by:
	Webber Wentzel, Johannesburg
	Noordman Attorneys, Bloemfontein