



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 643/2022

In the matter between:

ERGOMODE (PTY) LTD

APPELLANT

and

CRAIG DERECK JORDAAN NO

FIRST RESPONDENT

BRETT LESLIE HOLDING NO

SECOND RESPONDENT

SAKHILE CONTRACT MINING (PTY) LTD
(in business rescue)

THIRD RESPONDENT

GIDEON MINING & BENEFICIATION
(PTY) LTD

FOURTH RESPONDENT

INDEPENDENT COAL MARKETING
COMPANY (PTY) LTD

FIFTH RESPONDENT

COMMISIONER OF THE SOUTH
AFRICAN REVENUE SERVICE

SIXTH RESPONDENT

ARADOM (PTY) LTD

SEVENTH RESPONDENT

GARY MAZAHAM

EIGHTH RESPONDENT

ABAPHUMELELI TRADING 115 CC
t/a PORTALOO

NINETH RESPONDENT

RENTTECH SOUTH AFRICA (PTY) LTD

TENTH RESPONDENT

SIBONISWE COAL LABORATORY

ELEVENTH RESPONDENT

SERVICES CC	
STALLION SECURITY (PTY) LTD	TWELFTH RESPONDENT
COAL PROCUREMENT	THIRTEENTH RESPONDENT
SA (PTY) LTD	
DARRYL HENDRICKS	FOURTEENTH RESPONDENT
STREET SPIRIT TRADING	FIFTEENTH RESPONDENT
131 (PTY) LTD	
VERALOGIX (PTY) LTD	SIXTEENTH RESPONDENT
KEENAN HENDRICKS	SEVENTEENTH RESPONDENT
F E SKOSANA	EIGHTEENTH RESPONDENT
J MAOME	NINETEENTH RESPONDENT
M X ZULU	TWENTIETH RESPONDENT
T M ZITHA	TWENTY-FIRST RESPONDENT
J P MATHE	TWENTY-SECOND RESPONDENT
S G MATHE	TWENTY-THIRD RESPONDENT
N E NEFEFE	TWENTY-FOURTH RESPONDENT
M J MATHONSI	TWENTY-FIFTH RESPONDENT
S SIFUNDZA	TWENTY-SIXTH RESPONDENT
K J MALOPE	TWENTY-SEVENTH RESPONDENT
L P MAKABANE	TWENTY-EIGHTH RESPONDENT
R J KHANYE	TWENTY-NINTH RESPONDENT
M E HELEPE	THIRTIETH RESPONDENT
N S MOKOENA	THIRTY-FIRST RESPONDENT
M E TWALA (ELIAS)	THIRTY-SECOND RESPONDENT
M TWALA	THIRTY-THIRD RESPONDENT
J G JOUBERT	THIRTY-FOURTH RESPONDENT
VOICE OF WORKERS OF	THIRTY-FIFTH RESPONDENT
SOUTH AFRICA CIVIL RIGHTS UNION	
NATIONAL UNION OF METAL	THIRTY-SIXTH RESPONDENT

WORKERS OF SOUTH AFRICA

Neutral citation: *Ergomode (Pty) Ltd v Jordaan NO and Others (643/2022)*
[2024] ZASCA 10 (29 January 2024)

Coram: PETSE DP and MOCUMIE, WEINER and MOLEFE JJA and
WINDELL AJA

Heard: 31 August 2023

Delivered: 29 January 2024

Summary: Business rescue – s 133 of the Companies Act 71 of 2008 – moratorium on legal proceedings against company in business rescue – landlord’s hypothec over company asset – tacit hypothec before ‘perfection’ – whether the extension of the time period for the publication of the business plan was validly done and the plan validly adopted.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Mtimunye AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Molefe JA (Petse DP and Mocumie, Weiner JJA and Windell AJA concurring):

[1] The appellant, Ergomode (Pty) Limited (Ergomode), instituted legal proceedings by way of notice of motion in the Mpumalanga Division of the High Court, Middelburg (the high court), seeking an order to set aside the third respondent's business rescue plan as well as to have its landlord's tacit hypothec perfected. Only the first, second and third respondents opposed the application, which was dismissed with costs. The appeal is with leave of the high court.

[2] The background facts are uncontroversial. On 23 October 2020 the third respondent, Sakhile Contract Mining (Pty) Limited (Sakhile), was placed under business rescue in terms of s 129(1) of the Companies Act 71 of 2008 (the Act). On 30 October 2020 the first and second respondents, Mr Craig Dereck Jordaan and Mr Brett Leslie Holding were appointed as business rescue practitioners (BRPs) of Sakhile. Sakhile owns a coal washing plant (the plant) situated on Ergomode's property pursuant to a lease agreement entered into between Ergomode and Sakhile, in terms of which Sakhile occupied a portion of Ergomode's premises. The plant was operated from the leased premises until

August 2020 when the owner of the filter press, a component of the plant, removed the filter press from the plant. This rendered the plant non-functional.

[3] At the date of the commencement of the business rescue, Sakhile owed arrear rental of more than R18,2 million¹ to the landlord, Ergomode. The latter submitted a claim in the said amount. However, the BRPs deducted approximately R4,8 million from the claim. They asserted that the latter amount represented damages suffered by Sakhile as a result of the removal of the filter press which was supplied by Filtaquip (Pty) Limited (Filtaquip), in terms of an agreement concluded between IPC Benefication (Pty) Ltd (IPC), a related entity to Ergomode, and Filtaquip. The deduction was also subsequent to Ergomode's alleged non-compliance with its environmental licenses. Accordingly, the BRPs valued Ergomode's claim at approximately R12,8 million.

[4] On 30 March 2021, the majority creditors and other interested parties adopted a business rescue plan at a meeting convened in terms of s 151 of the Act. The business rescue plan, inter alia, provides for the relocation and refurbishment of the plant. On 22 February 2022 the BRPs, acting in terms of s 136(2) of the Act, suspended the lease agreement between Sakhile and Ergomode with immediate effect and gave instructions to their agent to remove the plant from Ergomode's property.

[5] The BRPs based the business rescue plan on the proposal by the fifth respondent, Independent Coal Marketing Company (Pty) Ltd (ICMC), a company controlled by the fourteenth respondent, Mr Darryl Hendricks. The proposal was that ICMC would purchase the plant from Sakhile in terms of an

¹ On the papers there is a dispute in relation to the correct amount owing, but nothing turns on this.

instalment sale agreement. The plant was to be removed, refurbished and re-established, and the agreed purchase price was R26,3 million.

[6] Before the plant could be removed and effect given to the business rescue plan, Ergomode sought leave in terms of s 133 of the Act to institute an application to: (a) perfect its landlord's hypothec over the plant as real security over the arrear rentals; (b) set aside the BRPs determination in terms of s 145(5) of the Act that it is not an independent creditor; (c) condonation for its admitted failure to comply with s 145(6) of the Act; and (d) declaring the adoption of the business plan on 30 March 2021 to be of no force or effect or, alternatively, for same to be reviewed and set aside.

Procedure for adoption of the business rescue plan

[7] In the main, Ergomode sought an order declaring the adoption of the business plan on 30 March 2021 to be of no force or to be reviewed and set aside. Section 150(1) of the Act provides that the BRPs, after consulting the creditors, other affected persons and the management of the company, must prepare a business plan for consideration and possible adoption at a meeting held in terms of s 151. The business plan must, in terms of s 150(5), be published within 25 days after the date on which the practitioner(s) were appointed, or such longer time as may be allowed by the court on application by the company, or by the holders of a majority of creditors' voting interest.

[8] In this case the following sequence of events ultimately led to the adoption of the business rescue plan. On 12 November 2020 the BRPs held the first meeting of creditors. On 8 January 2021, the BRPs sent an email to all known affected persons requesting an extension of the date of the publication of the business rescue plan to 28 February 2021. The addressees were requested to respond to the email if they did not agree to the extension, and further advised

that if they did not respond at all, it would be taken that they agree to the extension. None of the creditors responded to the email. The BRPs consequently informed the creditors that the extension to 28 February 2021 had been granted.

[9] On 24 February 2021, the BRPs again requested, by email to all affected persons, a further extension of the publication of the plan to 15 March 2021. Again the creditors were requested to respond to the email only if they did not agree to the proposed extension. If they did not respond to the email it would be taken that they agreed to the extension. Ergomode sent an email objecting to the extension, and this was the only response received by the BRPs. On 26 February 2021, the BRPs informed all affected persons that the creditors had voted in favour of the extension to 15 March 2021. The plan was then published on 15 March 2021 and was thereafter adopted by the majority creditors on 30 March 2021.

[10] In the high court, counsel for Ergomode argued that the time period for the publication of the business rescue plan as provided for in s 150(5) had lapsed because there was no valid extension of the time for the publication of the plan beyond 31 January 2021, alternatively, 28 February 2021. As a consequence, no business rescue plan could, absent a valid extension, be validly adopted thereafter.

[11] Ergomode further contended that s 150(5) requires that express consent must be obtained from creditors in a formal meeting to extend the 25-day period within which the business rescue plan must be published. In this regard, Ergomode relied on *DH Brothers Industries (Pty) Ltd v Gribnitz NO and*

Others.² It submitted that without a formal meeting and in the absence of express consent having been given, the purported extensions were legally ineffectual.

[12] It is common cause that Ergomode participated in the business rescue proceedings and did not raise any objection pertaining to the publication of the business rescue plan, (or any other issue) at the meeting of 30 March 2021, where the business rescue plan was adopted. Accordingly, Ergomode's reliance on *DH Brothers* is misplaced as the facts in this matter are distinguishable. In *DH Brothers*, the BRP sent emails to creditors on a number of occasions requesting an extension of the time within which to publish a plan, and did not request a response or state that if no response was received, failure to respond would be deemed as consent to the requested extension. On the contrary, in this matter the BRPs invited a response from the affected persons. In *DH Brothers*, the court adopted the approach that failure to publish a plan within the prescribed time or extended period results in the termination of the business rescue proceedings.³ This statement was, however, disapproved of by this Court in *Panamo Properties (Pty) Ltd and Another v Nel and Others*.⁴

[13] Business rescue is designed to ‘provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interest of all relevant stakeholders’.⁵ A liberal interpretation of the Act must therefore be adopted so as to strike a balance between the rights and interests of the relevant shareholders and the company in business rescue. Section 150(5)(b) does not expressly require a meeting to be held to extend the time periods for the publication of the business rescue plan. Other than that the

² *DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others* [2013] ZAKZPHC 56; 2014 (1) SA 103 (KZP); [2014] 1 All SA 173 (KZP) (*DH Brothers*).

³ *Ibid* para 28.

⁴ *Panamo Properties (Pty) Ltd and Another v Nel NO and Others* [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] (5) SA 63 (SCA) paras 28-29.

⁵ Section 7(k) of the Companies Act 71 of 2008.

extension must be allowed by the majority of the creditors' voting interest, there is no other prescribed formality.

[14] At no time during the meeting of 30 March 2021, or at any time prior thereto, did Ergomode raise the issue that the time period for the publication of the business rescue plan had lapsed. The majority of the creditors allowed the extension(s) sought for the publication of the business rescue plan. Therefore, Ergomode's belated attempt to impugn the process long after the adoption of the plan was prompted by Ergomode's dissatisfaction with the outcome of the adopted plan. Thus, Ergomode's contention that: (a) the business rescue plan was not approved in terms of s 151; (b) that the s 151 meeting was not properly convened; and (c) that the purported adoption of the plan is a nullity, is plainly unsustainable.

Notice to affected persons

[15] Section 151(2) of the Act obliges the BRP to deliver a notice of a meeting called for the purpose of considering the plan to all affected persons.⁶ Ergomode argued that the BRPs failed to give notice of the s 151 meeting to at least two of the affected people, namely Biretta Investments (Pty) Ltd (Biretta), one of Sakhile's creditors and Voice of Workers of South Africa Civil Rights Union (VW-SACRU) the thirty-fifth respondent purportedly representing Sakhile's

⁶ **'151 Meeting to determine future of company -**

(1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan. [Sub-s (1) substituted by s. 95 Act No. 3 of 2011.]

(2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out—

(a) the date, time and place of the meeting;

(b) the agenda of the meeting; and

(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153.'

employees. Therefore, the adoption of the business rescue plan and the decisions taken at the meeting are void.

[16] Firstly, in respect of the VW-SACRU, the BRPs submitted that they had no knowledge whatsoever that VW-SACRU represented any of Sakhile's employees. At the time of the commencement of the business rescue proceedings, National Union of Metal Workers of South Africa (NUMSA), the thirty-sixth respondent, represented the employees. When the employees' meeting was held on 12 November 2020, NUMSA was invited to the meeting but failed to attend. Instead, three employees attended the creditors meeting on the same day. The employees gave proxies to a co-worker, Mr Keenan Hendricks (the seventeenth respondent), to represent them.

[17] Secondly, counsel for the BRPs submitted that Mr Erskine's wife is the sole director of Biretta, which in turn is a 10% shareholder in Sakhile. Mr Erskine, the sole director of Ergomode and the deponent to the affidavits filed on its behalf, is recorded as Biretta's representative. Ergomode's argument in this regard must also fail as the BRPs complied with s 151(2).

Section 144 of the Companies Act

[18] It is necessary to briefly deal with the issue of whether NUMSA is also an interested party. Section 144(1) of the Act provides that employees who are unionised shall be represented by their trade union in business rescue processes. NUMSA represents the interests of Sakhile's employees who are or were its members when Sakhile was placed in business rescue. On 15 February 2022, it was joined as an interested party by order of the high court. However, thereafter it remained supine. In this Court, NUMSA made common cause with Ergomode and argued that the BRPs impermissibly allowed an employee (ie. a co-worker) to represent other unionised employees by proxy contrary to the dictates of s

144(1)(a). Therefore, the business rescue plan adopted at the meeting of 30 March 2021 is, so it was submitted, of no force or effect and falls to be set aside.

[19] As I see it, the clear purpose of s 144(1) is to provide unionised employees with a platform for representation in the business rescue process. The relevant part of s 144(1) provides:

‘144 Rights of employees – During a company’s business rescue proceedings any employees of the company who are –

(a) represented by a registered union may exercise any rights as set out in this Chapter –

(i) collectively through their trade union; and

(ii) in accordance with applicable labour law; or

(b) not represented by a trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.’

[20] Counsel for NUMSA submitted that it is common cause that the employees in question are members of a trade union and yet they were represented at the meeting by proxy and not by their union. Counsel argued that the entire structure of Chapter 6 of the Act shows a legislative intent that registered trade unions should represent employees collectively, and that s 144 distinguishes between employees who are members of a trade union and employees who are not. This, so the argument went, was therefore a recognition of the importance of trade unions and their collective representation. It was contended that votes cast on behalf of the employees by the purported proxy holder failed to meet the required threshold for adoption of the business rescue plan and that the BRPs, in allowing an employee to represent other unionised employees by proxy, acted in contravention of s 144(1)(a).

[21] In my view, properly construed, s 144(1) entitles employees to exercise their rights, either directly or by proxy through an employee organisation (a trade

union) or representative. Were the interpretation espoused by NUMSA and Ergomode to prevail, that would lead to employees whose union is invited but does not attend the meetings (as it happened in this case) to be unrepresented and unable to participate in the business rescue proceedings. Clearly, that would not serve the best interests of the employees.

Review of the BRPs' determination - s 145(6)(a)

[22] I turn now to deal with the BRPs' determination of Ergomode as a non-independent creditor under s 145(5) of the Act. Ergomode contests its determination as a non-independent creditor. In this regard, s 145(6) provides that a creditor who is aggrieved by a business practitioner's determination may bring an application to court to review such a determination, and that such application must be instituted within five days after receiving a notice of determination. Section 145(5)(a) empowers a BRP to determine whether a creditor is independent for the purpose of the business rescue proceedings. An 'independent creditor' is defined in s 128 of the Act as a person:

'(a) who is a creditor of the company (including an employee of the company) who is a creditor in terms of s 144(2); and

(b) who is not related to the company, a director of the company, or the business rescue practitioner.'

[23] Ergomode was informed of its determination as a non-independent creditor on 26 November 2020. The five-day period within which Ergomode could apply to court lapsed on 3 December 2020. But, it inexplicably challenged the BRPs' decision only on 30 March 2021, which was long past the five-day period. The BRPs decision was based on the fact that Mr Erskine's wife is a shareholder in a company that is a minority shareholder in Sakhile and therefore 'related to the company'. Ergomode, whilst conceding that it failed to timeously challenge its determination, nevertheless insists that the BRPs should have

determined that it is an independent creditor. Ergomode also sought condonation for the institution of its review application outside the prescribed five-day period.

[24] Subsections 145(5) and (6) provide:

‘(5) The practitioner of a company must –

- (a) determine whether a creditor is independent for the purposes of this Chapter;
- (b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)(b); and
- (c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.

(6) Within five business days after receiving a notice of a determination contemplated in subsection (5) a person may apply to a court to –

- (a) review the practitioner’s determination that the person is, or is not, an independent creditor; or
- (b) review, re-appraise and re-value that person’s voting interest as determined in terms of subsection 5(b).’

[25] As to Ergomode's application for condonation made from the Bar, the high court found that, in the absence of a substantive application for condonation setting out a full and satisfactory explanation as to why s 145(6)(a) was not complied with within the stipulated time, alternatively, within a reasonable time, it could not assist Ergomode. Before this Court, Ergomode argued that the wording of s 145(6) is to be contrasted with the other provisions in s 145 in particular and Chapter 6 in general. It was contended that the other sections of the Act explicitly provide a procedural mechanism to apply to court for condonation, on good cause shown, where there has been non-compliance with the prescribed time limits. It was further argued that the five-day limitation in s 145(6) constitutes an unwarranted limitation of the constitutional right of access to court entrenched in s 34 of the Constitution. Therefore, so the argument

went, a restrictive construction of the limitation would allow the court to condone a late application to review a determination under s 145(1) of the Act. In this regard counsel relied on the dictum in *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others*⁷ dealing with s 150(5) of the Act.

[26] Finally, Ergomode submitted that a liberal construction of s 145(6) favours granting condonation for non-compliance with the prescribed time limits and the setting aside of the BRPs' determination to the effect that Ergomode is not an independent creditor. On the contrary, the inflexible approach adopted by the BRPs would invariably lead to injustice. If the determination is set aside, then Ergomode's vote as an independent creditor would be decisive.

[27] The Act is silent on whether a failure to apply to court for the review of the business rescue practitioners' determination within the stipulated time of five days as provided in s 145(6) may be condoned. Consequently, Ergomode's reliance on *Shoprite* where the Court was dealing with s 150(5) which, unlike s 145(6), explicitly provides for extension of the time stipulated therein is misplaced. However, even if it is accepted that it is open to an aggrieved party to apply for condonation in respect of the five-day time period, Ergomode has in any event failed to make out a case for condonation. No facts were provided by Ergomode as to why the application was launched only on 21 April 2021 after the adoption of the business rescue plan.

[28] The purpose of the time periods is to provide for the BRPs determination to be challenged before voting on the proposed business rescue plan as such determination, inter alia, determines the voting rights of a creditor. Considering that business rescue is envisaged to be a speedy process, it would in any event

⁷ *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and Others* (35/2014) [2015] ZASCA 76; 2015 (5) SA 63 (SCA) (*Shoprite*).

not be in the interests of justice for condonation to be granted. This is so because: (a) Ergomode took part in the proceedings; (b) it voted at the meeting against the adoption of the business rescue plan; and (c) it did not object to the determination until after the business rescue plan was adopted.

[29] Furthermore, Ergomode's argument that the limitation in s 145(6) is extremely short and thus infringes the constitutional right of access to court as entrenched in s 34 of the Constitution, does not avail it in circumstances where the constitutional validity of the provision has not been frontally challenged for at least two reasons. First, Ergomode's access to court was not in any way limited; second, Ergomode cannot raise this argument at this stage when it did not rely on s 34 of the Constitution in the high court. Thus, Ergomode should also fail in relation to this aspect of its case.

Moratorium on legal proceedings in terms of s 133 of the Act.

[30] Upon a company being placed under business rescue, a temporary moratorium on the rights of creditors of the company is triggered in terms of s 133 of the Act. The section provides, in relevant parts, as follows:

'General moratorium on legal proceedings against company _ (1) During business rescue proceedings, no legal proceedings, 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 written consent of the practitioner;
- (b) with leave of the court and in accordance with any terms of the court considers suitable;
- (c) ...
- (d) ...
- (e) proceedings concerning any property or right over which the company exercises the powers of a trustee;
- (f) ...'

[31] As a result, Ergomode sought leave in terms of s 133 to be permitted to institute legal proceedings to perfect its landlord's hypothec. The BRPs opposed the application. They asserted that Ergomode failed to comply with s 133(1) of the Act because it was precluded from instituting legal proceedings without the written consent of the BRPs or, failing which, the leave of the court.

[32] Section 133 must be read as a whole and its different subsections dealing with the same subject matter, as is the position here, must not be considered in isolation. Rather, they must be read together so as to ascertain the meaning of the provision.⁸ Section 133 is a general moratorium provision that applies in relation to the assets and liabilities of the company immediately upon business rescue coming into effect.⁹ The manifest purpose of this section is to protect the company under business rescue against legal claims, save when the written consent of the BRP is obtained or, failing such consent, leave of the court.

[33] Accordingly, s 133 is meant to grant a company placed in business rescue a moratorium to provide it, in popular parlance, with breathing space whilst every attempt is made to rescue the company in financial distress, by designing and implementing a business rescue plan.¹⁰ The term 'legal proceedings' in s 133 include claims in general, but also claims instituted, as in this instance, to perfect security. Consequently, Ergomode was, as a matter of law, obliged, as a preliminary step, to seek leave of the BRPs or of the court to commence proceedings against Sakhile (in business rescue). This, it failed to do. Instead, it

⁸ *Aziz v Divisional Council, Cape and Another* 1962 (4) SA 719 (A) at 726E. See also *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, Kwazulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC) para 52.

⁹ *Chetty t/a Nationwide Electrical v Hart and Another NNO* [2015] ZA SCA 112; 2015 (6) SA 424 (SCA); [2015] 4 All SA 401 (SCA) para 28.

¹⁰ *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 14.

heedlessly embarked on legal proceedings against Sakhile in the face of the unequivocal prohibition contained in s 133(1) of the Act.

Perfection of the landlord's hypothec

[34] In a situation where a lessee company is placed in business rescue, the landlord's claim for arrear rental is affected by the general legal moratorium in terms of s 133 of the Act. The moratorium precludes the landlord from taking legal action to perfect its hypothec after the commencement of the business rescue process, unless the business rescue practitioner or the court grants consent to the perfection. It is common cause that Ergomode is Sakhile's landlord and that it is owed arrear rental. Both parties are in agreement that the plant, which is Sakhile's major asset, is in Ergomode's possession and it has not been used since 2020. Ergomode seeks leave to perfect its landlord hypothec and thereby convert it into real security as it is already in possession of the plant and is owed rental. The issue is whether the general moratorium in terms of s 133 applies to post commencement debt, and if so, whether leave should be granted to Ergomode to perfect its hypothec through attachment or interdict.

[35] A landlord's hypothec comes into effect the moment rent is in arrears, and is enforceable against the debtor immediately. The landlord's hypothec creates a *jus in personam ad servitutem adquirendam*, ie. a personal right to perfect the hypothec to make it enforceable against third parties. The effect of perfection is that the right is converted to a real right enforceable against all and sundry.

[36] By contrast, the landlord's unperfected hypothec ranks as a concurrent claim in business rescue proceedings. Ergomode's submission is that arrear rental is owed both pre-commencement and post-commencement of the business rescue up to and including 21 February 2022, when the BRPs suspended Sakhile's obligations under the lease and gave notice to that effect to Ergomode.

[37] The post-commencement debt commenced from 23 October 2021 to 21 February 2022, when the BRPs suspended the lease agreement. It was argued on behalf of Ergomode that s 136(3) only applies to an agreement that has been suspended or cancelled, and it accordingly applies only to the period after the notice of suspension, and that the notice of suspension was clearly prospective. As Ergomode is already in possession of the plant and the rent is overdue, it contended that it has a personal right of retention that it can exercise against Sakhile or the BRPs immediately. Accordingly, the perfection of the hypothec does not change Sakhile's or the BRPs' position.

[38] Ergomode therefore submitted that the general moratorium does not apply to post-commencement debt and that the business rescue plan only applies to pre-commencement debt. Accordingly, Ergomode is entitled to enforce its hypothec untrammelled by the strictures of s 133(1). Alternatively, Ergomode argued that by virtue of its personal right of retention against Sakhile, perfection of the hypothec would not affect the rights of the company in business rescue. Accordingly, the court ought to exercise its discretion to grant leave to Ergomode in terms of s 133(1). I proceed to consider these contentions in turn.

[39] The landlord's tacit hypothec is real security created by operation of the law to secure the lessor's claim against the lessee for arrear rental. The entitlement of the lessor to apply for the attachment of goods of the lessee at the leased premises is the remedy's most important feature. The hypothec comes into existence the moment the lessee falls into arrears with the rental and it terminates upon payment of the due amount.

[40] However, prior to the attachment or the lessee's insolvency, the hypothec holder (ie lessor) obtains no real right of security, with the effect that the subject

matter of the hypothec (*invecta et illata*), can simply be removed from the leased premises, thus depriving the lessor of his security.¹¹ Only once the lessor's hypothec has been perfected (by way of a court order and attachment) does the lessor acquire real security that entitles the lessor to prevent the lessee or anyone else from removing the lessee's goods from the leased premises. The landlord only obtains a right to approach the court for perfection and an order authorising attachment. Only on attachment is the real right and preference vested. There is no dispute on the papers that Ergomode's tacit hypothec was not perfected before Sakhile was placed in business rescue. Consequently, Ergomode's leave to perfect the hypothec must fail.

[41] It follows that the conclusion of the high court cannot be faulted. The issues raised in this appeal are without merit and consequently the appeal must fail.

[42] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

D S MOLEFE
JUDGE OF APPEAL

¹¹ *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T).

Appearances

For appellant:	S Vivian SC (with him J Bhima)
Instructed by	Tracey Lomax, Johannesburg Honey Attorneys, Bloemfontein
For the 1 st , 2 nd and 3 rd respondent	M Snyman SC (with him A Mare)
Instructed by:	BrandMullers Inc., Middelburg Theron Jordaan Smit Inc., Bloemfontein
For the 36 th respondent:	LK Siyo (with him R Kruger)
Instructed by:	CN Phukubje Inc., Johannesburg Sally Attorneys, Bloemfontein