THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20104/2014
Reportable

In the matter between:

CLOETE MURRAY NO **FIRST APPELLANT**
MABUTHO LOUIS MHLONGO NO **SECOND APPELLANT**

and

FIRSTRAND BANK LTD T/A WESBANK **RESPONDENT**

Neutral citation:	*Cloete Murray NO & another v FirstRand Bank Ltd* (20104/2014) [2015] ZASCA 39 (26 March 2015)
Coram:	Navsa ADP, Ponnan and Zondi JJA and Schoeman and Fourie AJJA
Heard:	9 March 2015
Delivered:	26 March 2015

Summary: Business rescue proceedings ─ Interpretation of s 133(1) of the Companies Act 71 of 2008 ─ creditor of a company under business rescue cancelling a contract concluded prior to the commencement of business rescue proceedings ─ cancellation not constituting 'enforcement action' contemplated in s 133(1) ─ cancellation lawful.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Jordaan J sitting as court of first instance):

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

JUDGMENT

Fourie AJA (Navsa ADP, Ponnan and Zondi JJA and Schoeman AJA concurring):

[1] This appeal deals with the provisions of Chapter 6 of the Companies Act 71 of 2008 (the Act) relating to business rescue proceedings, but, in reality, it has to do with competing claims in liquidation. Be that as it may, the issue to be decided is whether, once business rescue proceedings under the Act have commenced, the creditor of a company under business rescue can unilaterally cancel an extant instalment sale agreement that it had concluded with the company prior to the latter being placed under business rescue.

Background

[2] On 22 July 2010 the respondent, FirstRand Bank Ltd t/a Wesbank (Wesbank), concluded a written Master Instalment Sale Agreement (the MISA) with Skyline Crane Hire (Pty) Ltd (Skyline), in terms of which Wesbank sold and delivered movable goods (the goods) to Skyline, with Wesbank retaining ownership in the goods until the purchase price had been paid in full.

[3] On 29 May 2012 the board of Skyline voluntarily resolved that Skyline be placed under business rescue in terms of the provisions of s 129 of the Act. The

resolution was filed with the Companies and Intellectual Property Commission on 30 May 2012, which date, in terms of s 132(1)*(a)*(i) of the Act, is the date upon which the business rescue proceedings commenced. Skyline had by then already fallen into arrears in respect of the monthly instalments payable to Wesbank under the MISA.

[4] On 30 May 2012 Wesbank dispatched a letter to Skyline, cancelling the MISA due to Skyline's failure to pay the monthly instalments due in terms thereof. The letter was addressed to Skyline at its chosen domicilium and in terms of clause 27 of the MISA it was deemed to have been received by Skyline three days later, ie on 3 June 2012.

[5] In the letter of cancellation Wesbank advised Skyline that the MISA was cancelled with immediate effect, while reserving Wesbank's right to repossess the goods; to value and sell same; to credit the proceeds to the relevant accounts and to claim damages.

[6] During the first week of July 2012, while the business rescue proceedings relating to Skyline were still in progress, the business rescue practitioner (the practitioner) appointed in terms of the Act to oversee the proceedings, consented to Wesbank repossessing and selling the goods forming the subject matter of the MISA. The proceeds realised from the sale were sufficient to discharge the debt owing by Skyline to Wesbank under the MISA, leaving a surplus of some R800 000. Wesbank retained the surplus, relying on set-off in respect of other amounts allegedly owing to it by Skyline.

[7] On 17 July 2012 the practitioner obtained an order from the North Gauteng High Court, Pretoria, discontinuing the business rescue proceedings, and placing Skyline in provisional liquidation. On 10 September 2012 a final order of liquidation was granted. The appellants were subsequently appointed by the master of the high court as the co-liquidators (the liquidators) of Skyline.

[8] The liquidators took the view that Wesbank's cancellation of the MISA was contrary to the provisions of s 133(1) of the Act and accordingly of no force or effect.

I will in due course return to the provisions of s 133(1). The liquidators contended that the full proceeds of the sale of the goods were to be paid over to them to be dealt with under ss 83 and 84 of the Insolvency Act 24 of 1936 (the Insolvency Act). These sections of the Insolvency Act regulate the manner in which the claims of creditors under instalment sale transactions are to be dealt with upon sequestration or liquidation.

[9] Wesbank, on the other hand, maintained that it had lawfully cancelled the MISA and was entitled to the full proceeds of the goods. In particular, Wesbank denied that s 133(1) of the Act precluded it from cancelling the MISA and dealing with the goods in the manner that it did.

[10] The liquidators then approached the North Gauteng High Court, Pretoria, for an order declaring that Wesbank's letter of cancellation of the MISA was contrary to s 133(1) of the Act and therefore invalid; that the MISA is to be administered by the liquidators in terms of the provisions of ss 83 and 84 of the Insolvency Act and that Wesbank is to pay over the full proceeds of the sale of the goods to the liquidators.

[11] Wesbank opposed the application. In the event, the matter was heard by Jordaan J, who dismissed the application, but granted the liquidators leave to appeal to this court.

Business Rescue Proceedings

[12] One of the declared purposes of the Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of relevant stakeholders (s 7(*k*)). Chapter 6 of the Act (ss 128 to 154) introduces the concept of business rescue proceedings, with s 128(1)*(b)* defining 'business rescue' as 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the

company. . . .'

[13] The temporary moratorium envisaged in s 128(1)*(b)*(ii), has been enacted by means of s 133 of the Act, which reads as follows:

'**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*) as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

(*d*) criminal proceedings against the company or any of its directors or officers;

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

(*f*) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.

(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 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 a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.'

[14] 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. See in general, F H I Cassim et al *Contemporary Company Law* 2 ed (2012) at 878-879; P Delport et al *Henochsberg on the Companies Act 71 of 2008* Service Issue 9 Vol 1 at 478(5) and H L Van Huÿssteen (2012) *An overview of the Business Rescue Moratorium Contained In Section 133 of the Companies Act*

71 of 2008, Masters of Law (Commercial Law) [unpublished thesis]: University of Johannesburg, Chapter 1 at 6-7. In fact, P Kloppers 'Judicial Management — A Corporate Rescue Mechanism In Need of Reform?' (1999) 10 *Stellenbosch* LR 417 at 429 aptly described the moratorium as 'a cornerstone of all business rescue procedures'.

[15] I should also refer to two related sections of the Act, namely s 134(1)*(c)* and s 136(2). Section 134(1)*(c)* provides that, during business rescue proceedings, 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. The effect of s 136(2) of the Act is that a contract concluded prior to the commencement of business rescue proceedings, is not suspended or cancelled by virtue of the business rescue, but that the practitioner may suspend, or apply to court to cancel, any obligation of the company under the contract.

Evaluation

[16] It is plain from the above that, in their application in the court a quo, the liquidators firmly pinned their colours to the mast of s 133(1) of the Act. This appears from their notice of motion seeking an order declaring that Wesbank's letter of cancellation was contrary to the provisions of s 133(1) of the Act and as such invalid. Similarly, in their founding papers the liquidators contended that the cancellation of the MISA constituted 'enforcement action' as meant in s 133(1) of the Act, and as it was effected without the consent of the practitioner or the leave of the court, it was invalid.

[17] In their heads of argument in this court, the liquidators reiterated that 'the issue arising out of the application [in the court below] was the determination of the proper meaning of s 133(1) of the Companies Act 71 of 2008 and particularly the correct interpretation of the meaning of the term . . . no legal proceeding, including enforcement action, against a company under business rescue may be commenced'.

[18] At no stage prior to the date in the next paragraph did the liquidators rely on the provisions of s 134(1)*(c)* of the Act as the basis for a finding that Wesbank's letter of cancellation was invalid. Although they did refer to s 134(1)*(c)* in their papers, it was only for the purpose of invoking it in aid of their interpretation of s 133(1) of the Act.

[19] However, one court day before the hearing of this appeal, supplementary heads were filed on behalf of the liquidators, in which they submitted that the cancellation of the MISA by Wesbank 'was invalid in terms of sections 133 and/or 134(1)*(c)* of the Companies Act'. Apart from the lateness of the supplementary heads, this court questioned whether the liquidators were permitted to rely on s 134(1)*(c)* as their cause of action, seeing that it was not raised in the court below and the parties have not had the opportunity of dealing with it in their papers or in argument. Nor was the court a quo called upon to deal with s 134(1)*(c)* as the foundation for the liquidators' case.

[20] Counsel for the liquidators, relying on the decision in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), submitted that the liquidators should be permitted to raise the s 134(1)*(c)* argument in this court. In *Barkhuizen* the Constitutional Court reiterated the well-known principle that the mere fact that a point of law is raised for the first time on appeal, is not in itself sufficient reason for refusing to consider it, and if the point is covered by the pleadings and its consideration on appeal involves no unfairness to the other party, a court of appeal may in the exercise of its discretion consider same.

[21] In my view the following considerations militate against the application of this principle in the present appeal:
(a) The s 134(1)*(c)* point was not raised in the pleadings before the court a quo.
(b) The reliance on s 134(1)*(c)* does not raise a discrete point of law; on the contrary, it would involve the determination of factual issues, to which I allude hereunder.
(c) The consideration on appeal of a cause of action based on s 134(1)*(c)*, will no doubt prejudice Wesbank. Particularly so, as it has not had the opportunity to deal with it in its pleadings or to consider what evidence may be required to counter it.
(d) This court will be required to consider a case based on s 134(1)*(c)*, which was

not pleaded and without the factual basis required for its determination. Nor would it have the benefit of a reasoned judgment by the court a quo on this issue.

[22] Had the liquidators based their application on s 134(1)*(c)* of the Act, the question would have arisen as to what the legal consequences were of the practitioner's consenting to Wesbank's repossession of the goods forming the subject matter of the MISA. Could this conduct of the practitioner not arguably be regarded as an acceptance of the termination of the MISA by Wesbank, with the result that the goods were no longer in the lawful possession of Skyline and s 134(1)*(c)* would therefore not be available to the liquidators in their quest to reclaim the goods or their proceeds from Wesbank? It also brings into sharp focus the factual basis on which the practitioner relinquished possession of the goods.

[23] In the same vein it could be asked whether the repossession of the goods with the consent of the practitioner, did not destroy the *substratum* of the MISA. One of the *essentialia* of an instalment sale agreement such as the MISA, is that the buyer is entitled to immediate possession of the relevant goods and to retain such possession pending payment of the full purchase price, when ownership in the goods will revert to the buyer. See M A Diemont and P J Aronstam *The Law of Credit Agreements and Hire-Purchase in South Africa* 5 ed (1982) at 2. The *essentialia* of a contract were described as follows by M Pothier *A treatise on the Law of Obligations or Contracts* vol 1 (1806) 56:

'Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract at all, or a contract of a different kind.'

(See also R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 164.) In these circumstances a similar legal consequence may follow, namely, that the repossession of the goods has resulted in the termination of the MISA and therefore the liquidators are unable to invoke s 134(1)*(c)* to reclaim the goods or the proceeds thereof. I should hasten to add that, as in the case of paragraph 22 above, I make no finding in this regard.

[24] I do appreciate that the consent of the practitioner, as described above, was not in writing as required in terms of s 134(1)*(c)* of the Act. However, I do not believe

that the requirement of writing should necessarily be regarded as peremptory rather than directory. In this regard, it is important to note that there is no sanction added in case the requirement is not met, nor does the section state that a failure to meet the requirement of written consent should be visited with nullity. Also, on the liquidators' own version, the practitioner, being fully aware of Wesbank's letter of cancellation, voluntarily consented to Wesbank repossessing the goods. In these circumstances it would lead to an injustice to construe the requirement of writing in s 134(1)*(c)* as peremptory and to hold that the practitioner's failure to consent in writing, rendered the repossession of the goods by Wesbank void. See *Nkisimane v Santam Insurance Company Limited* 1978 (2) SA 430 (A) at 433H-434E; *Taljaard v TL Botha Properties* 2008 (6) SA 207 (SCA) para 5; *Chief Executive Officer, South African Social Security Agency & others v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) para 28 and *Liebenberg NO v Bergrivier Municipality* [2012] 4 All SA 626 (SCA).

[25] Had the liquidators based their application on s 134(1)*(c)* of the Act, they may very well have been met with a defence along the lines suggested above. However, to properly consider a defence of this nature, evidence would be required regarding the circumstances in which and the intention with which possession of the goods had been relinquished. There are conflicting versions in the papers as to what the practitioner intended when he consented to Wesbank repossessing the goods. On the one hand, the liquidators allege that the practitioner allowed the repossession of the goods for purposes of safekeeping pending the winding-up of Skyline. On the other, they contend that the practitioner did not have any objection to Wesbank selling the goods in business rescue. Wesbank, however, alleges that the practitioner consented to the repossession of the goods as he felt that they were at risk of depreciation and it would be prudent to transfer possession to Wesbank.

[26] I should add that, had the liquidators sought relief in terms of s 134(1)*(c)* on the papers before the court a quo, the matter would have been decided on the facts as stated by Wesbank (see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634).This would inevitably have resulted in the dismissal of the application.

[27] In these circumstances, and for the further reasons alluded to in paragraph 21 above, the liquidators are not at this late stage entitled to base their case on s 134(1)*(c)* of the Act.

[28] Turning to s 133(1) of the Act, the liquidators' approach was that Wesbank's cancellation of the MISA constituted 'enforcement action' as meant in the subsection, and absent the consent of the practitioner or the leave of the court, the cancellation was of no force or effect. By contrast, Wesbank submitted that the cancellation of an agreement did not constitute 'enforcement action' as envisaged by s 133(1) of the Act, therefore the consent of the practitioner or the leave of the court was not required to effect a lawful cancellation of the MISA. The latter submission found favour with the court a quo.

[29] It follows that an interpretation of s 133(1) of the Act is called for, the crisp issue being whether the cancellation of the MISA by Wesbank by means of its letter of 30 May 2012, constituted 'enforcement action' as meant in s 133(1) of the Act.

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, this court reiterated that the inevitable point of departure in interpreting a statute is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. It should, however, be borne in mind that, if the words of the relevant provision are unable to bear the meaning contended for, then that meaning is impermissible. See *Firstrand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) para 27. It is also important to note that s 39(2) of the Constitution, which compels an interpretation of legislative provisions in the light of the values enshrined in the Bill of Rights, applies only where the language of the statute is not unduly strained. See *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25-26.

[31] Section 133(1) of the Act places a moratorium on 'legal proceeding, including enforcement action'. In the Afrikaans text the reference is to 'geregtelike stappe, insluitende afdwingingsaksie'. The Act does not contain a definition of these terms.

However, the term 'legal proceeding' is well-known in South African legal parlance and usually bears the meaning of a lawsuit or 'hofsaak'. See *Van Zyl v Euodia Trust (Edms) Bpk* 1983 (3) SA 394 (T) at 399C-D and *Lister Garment Corporation (Pty) Ltd v Wallace NO* 1992 (2) SA 722 (D) at 723G-H. Unsurprisingly, counsel were agreed that the cancellation of an agreement does not constitute a 'legal proceeding' as envisaged in s 133(1) of the Act.

[32] As to the meaning of the phrase 'enforcement action', in my view Wesbank correctly submitted that, in our legal parlance, 'enforce' or 'enforcement', usually refers to the enforcement of obligations. In the context of s 133(1) of the Act, it is significant that reference is made to 'no legal proceeding, including enforcement action'. (My emphasis.) The inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding', seems to me to indicate that 'enforcement action' is considered to be a species of 'legal proceeding' or, at least, is meant to have its origin in legal proceedings. This conclusion is strengthened by the fact that s 133(1) provides that no legal proceeding, including enforcement action, 'may be commenced or proceeded with in any forum'. (My emphasis.) A 'forum' is normally defined as a court or tribunal (see the Concise Oxford Dictionary 12 ed (2011)) and its employment in s 133(1) conveys the notion that 'enforcement action' relates to formal proceedings ancillary to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment.

[33] Moreover, the concepts 'enforcement' and 'cancellation' are traditionally regarded as mutually exclusive. The term 'cancellation' connotes the termination of obligations between parties to an agreement. However, the liquidators contended for a wider meaning to be attributed to the expression 'enforcement action' to include the cancellation of an agreement. In so doing, I believe that they are doing violence to the wording of s 133(1) of the Act. Cancellation is a unilateral act of a party to an agreement and save for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form of forum. In any event, as pointed out on behalf of Wesbank, it also does not make linguistic sense to speak of cancellation as having 'commenced or proceeded with' in any forum, as envisaged by s 133(1). It therefore seems to me that, linguistically, the phrase 'enforcement action' in s 133(1) is unable to bear the meaning of the cancellation of

an agreement, as contended for by the liquidators. Contextually it must be understood to refer to enforcement by way of legal proceedings.

[34] This is really the end of the matter, but for the sake of completeness I will succinctly deal with the remainder of the reasons for my conclusion. I have in paragraph 14 above, alluded to the purpose of the moratorium in s 133(1) of the Act, namely to provide a company in distress with the crucial breathing space to enable it to restructure its affairs. I accept, as stated in *Henochsberg* at 478(6), that the intention of the moratorium is to cast the net as wide as possible in order to include any conceivable type of action against the company. The liquidators submit that, having regard to this purpose, it would result in the inevitable demise of business rescue proceedings if any creditor is allowed to cancel any contract with a company under business rescue. Therefore, they contend that the net is cast so wide by means of s 133(1) of the Act as to include a moratorium against a creditor cancelling an agreement with a financially distressed company under business rescue.

[35] I do not agree with this submission. In my view there are sufficient safeguards in Chapter 6 of the Act to prevent the disastrous result foreshadowed by the liquidators. I refer to the following:
(a) In terms of s 136(2)*(a)* of the Act, the practitioner may, despite any provision of an agreement to the contrary, entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings. By invoking this provision, the practitioner could prevent a creditor from instituting action and repossessing or attaching property in the company's possession.
(b) Section 154(2) of the Act provides that, once a business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company prior to the beginning of the business rescue process, except to the extent permitted in the business rescue plan.

[36] It follows, in my view, that an interpretation of s 133(1) of the Act, to the effect that the cancellation of the MISA by Wesbank did not constitute 'enforcement action', would not do violence to the purpose of s 133(1).

[37] In their interpretation of s 133(1) of the Act, the liquidators placed reliance on the wording of s 128(1)*(b)*(ii) of the Act, in which a temporary moratorium on the rights of claimants against a company under business rescue or in respect of property in its possession, is envisaged. (My emphasis.) This section, it was submitted, envisages a moratorium on the rights of creditors such as the right to cancel an agreement. I do not agree. Section 128(1)*(b)*(ii) deals with the broad purpose of Chapter 6 of the Act, while s 133 has been specifically enacted to cater for the temporary moratorium. What is therefore required, is an interpretation of the specific provisions of s 133(1) and not to seek to interpret it by resorting to s 128(1)*(b)*(ii).

[38] The liquidators even attempted their hand at legislating, rather than interpreting s 133(1) of the Act. They suggested that if one were to read the last part of s 133(1) with a comma after the word 'commenced', the section is capable of being read as envisaging '. . . legal proceedings being proceeded with in any forum . . .' or '. . . enforcement action commenced with . . .', which would support the interpretation contended for by them. What this submission really demonstrates is that, if the legislature intended s 133(1) to have this meaning, it could easily have done so by adopting the approach suggested by the liquidators. The fact that the legislature did not follow this route puts paid to this submission of the liquidators.

[39] A further indication why the interpretation contended for by the liquidators is untenable, is that it would render s 136(2) of the Act superfluous. In terms of the latter section the practitioner may during business rescue proceedings entirely, partially or conditionally suspend any obligation of the company arising under an extant agreement. If, as the liquidators submit, s 133(1) already has the effect that rights and obligations are frozen upon the commencement of business rescue, there would have been no need for the legislature to incorporate s 136(2) in the Act.

[40] The liquidators' construction that, in terms of s 133(1), the cancellation of an agreement constitutes 'enforcement action' which requires the consent of the practitioner or the court, would also fundamentally change our law of contract. As explained earlier, our law of contract provides for a unilateral cancellation in the case

of a breach of contract. The way I see it, the legislature intended to allow the company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, but not to interfere with the contractual rights and obligations of the parties to an agreement. Such an intention would, in any event, be contrary to the tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights. See L C Steyn *Die Uitleg van Wette* 5 ed (1981) at 97 and 237.

[41] Support for this view is found in s 133(3) of the Act, which provides protection to third parties in respect of claims which are subject to the moratorium in that, if the commencement of proceedings or claims are subject to a time limit, it is suspended during business rescue proceedings. As emphasised by Jonathan Rushworth 'A critical analysis of the business rescue regime in the Companies Act 71 of 2008' (2010) *Acta Juridica* at 384, the wording of s 133(3) is consistent with the concept of a temporary moratorium on bringing claims, rather than a greater restriction on creditors' rights.

[42] We have been referred to some decisions of the high courts dealing with various issues relating to business rescue. Apart from the general principles, these decisions are not of much assistance, as they do not deal pertinently with the issues to be decided in this appeal. It is, however, necessary to refer to one of the decisions, namely *LA Sport 4x4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd* & others (A513/2013 [2015] ZAGPPHC 78 (26 February 2015), which concerned the provisions of s 133(3) of the Act. In the course of the judgment the learned judge opined that the cancellation of an agreement constituted 'legal process which falls under the moratorium placed on legal action against the company'. No reasons were furnished for this obiter dictum, but, in view of what is set out above, I believe that it is clearly wrong. In any event, it transpired during argument in this court that an appeal against the decision has recently been upheld by the full court of that division.

[43] Finally, I should refer to s 5(2) of the Act, which provides that '[t]o the extent appropriate, a court interpreting or applying this Act may consider foreign company law'. The liquidators referred us to corresponding provisions in foreign jurisdictions,

particularly those in England, Australia and Canada. Whilst apparently sharing the same aim and goal as Chapter 6 of the Act, the wording of the corresponding provisions in these jurisdictions, dealing with moratoriums and stay of proceedings, differ to such an extent from their South African counterpart, that no meaningful assistance would be gained by invoking them in the interpretation of s 133(1) of the Act.

[44] I therefore conclude that the court a quo correctly rejected the liquidators' interpretation of s 133(1) of the Act. It follows that the appeal falls to be dismissed. As to costs, I am of the view that the employment of two counsel was justified.

[45] In the result the following order is made:
The appeal is dismissed with costs, including the costs of two counsel.

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P B FOURIE
ACTING JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	F H Terblanche SC J Hershensohn Instructed by: Tintingers Attorneys, Pretoria Lovius Block Attorneys, Bloemfontein
For the Respondent:	C van der Spuy L Meintjes Instructed by: Lanham-Love Attorneys, Pretoria c/o Prinsloo-Van Der Linde Attorneys McIntyre & Van Der Post Attorneys, Bloemfontein