THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20323/2014

In the matter between:

SHAMLA CHETTY t/a NATIONWIDE ELECTRICAL **APPELLANT**

and

O D HART NO **FIRST RESPONDENT**

R VENGADESAN NO **SECOND RESPONDENT**

Neutral Citation: *Chetty v Hart* (20323/14) [2015] ZASCA 112 (4 September 2015)

Coram: Cachalia, Willis, Saldulker and Mathopo JJA and Gorven AJA

Heard: **24 August 2015**

Delivered: **4 September 2015**

Summary: Companies Act 71 of 2008 – business rescue proceedings – whether arbitration proceedings fall within the general moratorium on legal proceedings against a company under business rescue in s 133(1) – whether proceedings instituted or continued without business practitioner's consent a nullity – whether s 133(1) enacted for the benefit of the company under business rescue – interpretation of statute – provision capable of more than one meaning – proper approach.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Nzimande AJ sitting as court of first instance):

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

JUDGMENT

Cachalia JA (Willis, Saldulker and Mathopo JJA and Gorven AJA concurring)

[1] The parties to this dispute are Shamla Chetty, trading as Nationwide Electrical and TBP Building and Civils (Pty) Ltd (TBP). After agreeing to refer their contractual dispute to arbitration, the arbitrator made an award substantially upholding Ms Chetty's claims against TBP and also TBP's counterclaims against her. The award was made while TBP was under business rescue. In terms of the award TBP became liable to Ms Chetty for payment of an amount of R420 573.93 plus interest. But she in turn was held liable to TBP for substantially more, namely, an amount of R4 238 451.95 plus interest and costs. Dissatisfied with this outcome Ms Chetty, to whom I shall henceforth refer as the appellant, sought to invalidate the award in its entirety by seeking an order reviewing and setting it aside in the KwaZulu-Natal Local Division, Durban. When the litigation commenced, TBP was no longer under business rescue, but in liquidation. So the liquidator, to whom I shall refer as the respondent, stepped into TBP's shoes to oppose the relief sought. The arbitrator was also cited as a co-respondent but he has no interest in these proceedings.

[2] There were several matters that arose on the papers before the court a quo. But it was asked to adjudicate only one question as a point of law separately: whether the arbitration award made while TBP was under business rescue was precluded by the general moratorium on legal proceedings against companies under business rescue under s 133(1) of the Companies Act 71 of 2008 (the Act).[1]

[3] Section 133(1)*(a)*, which lies at the heart of this dispute, provides for a moratorium on any 'legal proceedings' against a company during business rescue proceedings except with the written consent of a business rescue practitioner appointed to oversee the affairs of a financially distressed company. The arbitration award was made in circumstances where the appellant, who is a creditor of TBP, was not aware of the business rescue proceedings and therefore did not seek the practitioner's consent to pursue the suit against TBP. The appellant contended in the court a quo that the arbitration was a 'legal proceeding' as envisaged in the section and that the moratorium therefore applied to her claim. Her failure to apply for consent – through no fault of her own – thus nullified both that part of the award in her favour as well as the other part arising from the counterclaim in favour of TBP. In other words, she sought to invalidate the award in its entirety. The respondent's response was that the moratorium on legal proceedings in s 133(1) applied only to court proceedings, not arbitrations, and that even if it did apply to arbitrations, the award was not a nullity.

[4] The court a quo (Nzimande AJ) rejected the appellant's principal contention – that an arbitration proceeding was a legal proceeding – holding instead in favour of the respondent that the 'ordinary meaning' of a legal proceeding was a 'lawsuit' or 'hofsaak', which excluded arbitrations from its ambit. Consequently, the court ruled, the moratorium on legal proceedings in s 133 did not apply to arbitration proceedings and the arbitration award could therefore not be impugned on this ground. The appeal against that ruling comes before us with its leave.

[1] Section 133(1) is set out fully below at para 11.

[5] To better understand the genesis of the dispute between the parties it may be helpful to briefly set out the facts. The dispute arose from a domestic sub-contract agreement between the appellant as sub-contractor and TBP as the main contractor. The contract was for an electrical installation at a hospital. The sub-contract was cancelled on 6 October 2010. The disputed cancellation led to the arbitration, which commenced on 11 December 2011 and was adjourned from time to time. It ran for several days until all the evidence for the claim and the counterclaim had been led. The proceedings were then postponed for argument to 12 October 2012.

[6] However, on 5 October 2012, TBP began business rescue proceedings by filing a resolution to place itself under business rescue. The business rescue was registered on 11 October 2012, and a business rescue practitioner duly appointed to oversee the affairs of the company. Once the business rescue proceedings began, the moratorium on legal proceedings in s 133 of the Act applied to claims against the company. This means that no legal proceedings against the company could commence or proceed except in the circumstances specified in ss 133(1)*(a) to (e)*. As mentioned earlier, s 133(1)*(a)* – the provision requiring the written consent of the practitioner for legal proceedings – is central to this dispute.

[7] On 12 October 2012, unaware that TBP was under business rescue, the arbitrator heard argument and on 23 October 2012, still unaware, delivered his award. The appellant was also not informed of TBP's changed legal status. So she neither sought, nor was given, the practitioner's written consent to continue the arbitration proceedings begun in December 2011 and which by then had almost run its course. The practitioner did nothing to bring the business rescue proceedings to the appellant's attention either. He says in his answering affidavit that he would have given his consent had he been asked, though I do not think anything turns on this.

[8] I turn to the first issue in this appeal, which concerns the interpretation of the phrase 'legal proceeding' as it is used in s 133 of the Act. It is helpful to reiterate that the method of attributing meaning to the words used in legislation involves, as a

point of departure, examining the language of the provision at issue, the language and design of the statute as a whole and its statutory purpose. So when the lawmaker uses particular words to achieve its purpose they must be given effect. In so doing a court will apply ordinary rules of grammar and syntax. It is not permissible to ignore or distort the meaning of the words to achieve its purpose. For in so doing a court will be substituting its own words for those of Parliament. But if the words used are reasonably capable of bearing more than one meaning, the consequences of the divergent interpretations must be examined so that a meaning that is likely to further rather than hinder its purpose is adopted.[2] In this regard a meaning that is more sensible and business like is to be preferred over one that has a contrary effect.[3]

[9] It may be apposite to begin this interpretive exercise by reiterating how the courts and standard textbooks have distinguished arbitration from the process of the courts. Arbitration involves a practice whereby parties voluntarily resolve disputes over their rights privately, outside of the public process of the courts. It involves the appointment of an independent arbitrator, often chosen by the parties, to rule on their dispute according to terms of reference and procedures they give him. The terms of reference confer the mandate or jurisdiction on the arbitrator to decide the dispute by making an award, which is final and binding upon them. By adopting this route the parties remove the dispute from the jurisdiction of the courts. In short, they agree on a private, non-State process.[4]

[10] Although there is a distinction between the nature of proceedings to resolve disputes over rights in the courts and those through arbitration, the courts nevertheless exercise a supervisory function over arbitration. A court will therefore intervene at the behest of the parties where an arbitrator exceeds his jurisdiction, misconducts himself or commits a gross irregularity. A court will also exercise its jurisdiction over a dispute concerning an award that is alleged to have been

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[2] Stephen Breyer *Making our Democracy Work: A Judge's View* (2010) at 92.
[3] See generally *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Bristol Airport plc & another v Powdrill & others* [1990] 2 All ER 493 at 501.
[4] See generally *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) paras 195-198.

improperly obtained. Arbitration awards are also only enforceable by the process of the courts.

[11] But the distinguishing features between court and arbitration proceedings do not answer the question posed in this case, whether both or only court proceedings are legal proceedings for purposes of s 133 of the Act. The relevant parts of the section read as follows:

'**133 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) . . .

(e) . . .

(f) . . .

(2) . . .

(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.'

[12] The phrase 'legal proceeding' is not defined in most standard dictionaries or in the Act. But it has been defined in Black's Law Dictionary as:

'Any proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy.'[5]

And in *International Arbitration Law*[6] the author notes that 'arbitration constitutes legal proceedings'. The internet also reveals that 'arbitration is a legal proceeding that results in an award that is generally binding'.[7] In England, for example, reference to 'no other proceedings' in a statute was found to mean that the proceedings were legal proceedings or quasi-legal proceedings such as arbitration.[8]

[13] So, depending on the context within which the phrase is used, it is fairly capable of covering proceedings before the courts as well as other tribunals, such as arbitration tribunals, to resolve legal disputes over rights and remedies.[9] In ordinary parlance therefore it would be incongruous not to construe proceedings in which legal disputes are resolved privately through arbitration as legal proceedings simply because they take place outside of the formalities of the court system.

[14] Of course, the courts have on occasion ascribed a meaning to the phrase as being a court proceeding. Thus, recently, in *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank*[10] in interpreting s 133(1) in a dispute over whether the cancellation of a contract constituted 'enforcement action' as envisaged in the section, this court observed – without deciding – that the phrase 'legal proceedings' usually bears the meaning of a 'lawsuit' or 'hofsaak' and that 'enforcement action' was a species of or has its origin in such legal proceedings. This conclusion, it said, was supported by the fact that the proceedings could only begin or continue in a

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[5] Bryan A Garner *Black's Law Dictionary* 9 ed.
[6] Mauro Rubino-Sammartano *International Arbitration Law* p 42.
[7] An Internet search of the phrase 'arbitration is a legal proceeding . . .' produces many hits from sites which explain the nature of arbitration: see for example the American Arbitration Association https://www.google.co.za/url?url=https://www.adr.org/cs/idcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_005023%26RevisionSelectionMethod%3DLatestReleased&rct=j&frm=1&q=&esrc=s&sa=U&ved=0CCkQFjACahUKEwi8rcyKmdHHAhVHtBQKHaAqCrw&usg=AFQjCNFJ6XXWsnfVHlKd3A3OW0W7pPLwZQ 'arbitration is a legal proceeding that results in an award that is generally final and binding'.
[8] *Bristol Airport plc & another v Powdrill & others* [1990] 2 All ER 493 at 506.
[9] Section 1 of the Arbitration Act 42 of 1965 defines 'arbitration proceedings' as proceedings conducted by an arbitration tribunal.
[10] *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank* (20104/2014) [2015] ZASCA 39; 2015 (3) SA 438 (SCA).

'forum', which usually refers to a court or tribunal. And therefore the 'forum' relates to 'formal proceedings' ancillary[11] to legal proceedings, such as the enforcement or execution of court orders by means of writs of execution or attachment orders, which the cancellation of a contract was not.[12]

[15] The respondent relies heavily on this judgment to support its contention that the phrase legal proceedings in s 133(1) relates to formal court proceedings. And at first blush the reference in the judgment to a 'lawsuit' or 'hofsaak' that relates to formal proceedings may suggest it does, particularly because the court referred to *Van Zyl v Euodia Trust (Edms) Bpk*,[13] which was followed in *Lister Garment Corporation (Pty) Ltd v Wallace NO*[14] to demonstrate that this was the 'usual meaning' of the phrase.[15] The court a quo also cited the two cases as authority for the conclusion to which it came.

[16] But none of these cases support the respondent's interpretation of the section. *Cloete Murray* was concerned not with the meaning of legal proceedings, but of 'enforcement action', which it said had its origin in 'legal proceedings'.[16] In both *Van Zyl* and *Lister Garment* the issue was whether s 13 of the 1973 Companies Act permits a court to order a company that proceeds as the plaintiff in reconvention to furnish security for costs.[17] It was held that the section applied only to the plaintiff in convention, and not to the plaintiff in reconvention. In coming to this conclusion the court said that the history of the provision was to be traced to the common law rule that *incolae* must have free access to the courts and cannot be compelled to furnish security for costs. And to the extent that s 13 made inroads into the common law the

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[11] Ibid paras 31 and 32.
[12] Ibid para 33.
[13] 1983 (3) SA 394 (T) at 399B-D.
[14] 1992 (2) SA 772 (D) at 723 H.
[15] Above fn 10.
[16] *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 32.
[17] **Security for costs in legal proceedings by companies and bodies corporate.**—
'Where a company or other body corporate is plaintiff or applicant in any legal proceedings, the Court may at any stage, if it appears by credible testimony that there is reason to believe that the company or body corporate or, if it is being wound up, the liquidator thereof, will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.'

provision ought to be restrictively interpreted so as not to include the plaintiff in reconvention. The two cases were therefore concerned with access to the courts and do not apply to the issue before us.

[17] However, in a recent unreported case involving the interpretation s 133, *Merchant West Working Capital Solutions (Pty) Limited v Advanced Technologies and Engineering Company Limited & another*,[18] which the respondent drew to our attention, the court cited the same cases (*Van Zyl and Lister Garment*) in holding that the phrase 'legal proceeding' is 'not . . . susceptible to any other meaning than (its) ordinary every-day literal one'.[19] But here too the issue was not germane to the question before us. The court was confronted with a contention that legal proceedings as envisaged in s 133(1) were concerned only with disputes over claims, not applications to court for the perfection of security. The court's conclusion was that the application fell within the moratorium on legal proceedings, and therefore required the consent of the practitioner before it could be instituted. So what the judge said about legal proceedings in that case also has no bearing on the current issue.

[18] I return to *Cloete Murray*. There the court observed that a 'forum', as the term is used in the section, usually refers to a court or *a tribunal* (emphasis added). So the 'forum' clearly does not bear a single meaning ie formal court proceeding, and I do not think that the judgment can be construed in this way either.

[19] This is why the respondent was driven to contend that the reference to a forum in s 133 (1) means a *public* forum, that is, a court of law rather than a forum that includes tribunals of all kind, public and private. But this interpretation impermissibly requires the word *public* to be added before the word 'forum' in the

[18] *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd & another* (13/12406) [2013] ZAGPJHC 109.
[19] Ibid para 63.

section,[20] when the statute is perfectly capable of being interpreted intelligibly as it stands. Had the aim of the drafters been to confine the proceedings to court proceedings, it would simply have used the word 'court' instead of 'forum'.

[20] Notwithstanding this difficulty, which was put to counsel for the respondent during the hearing, he pressed the point. In this regard he relied heavily on the judgment of the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* as authority for the proposition that a 'forum' as referred to in s 133(1) means a 'public' forum. There the court was concerned with whether s 34 of the Constitution applied to private arbitrations. It provides that:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.'

[21] The court had to decide whether an arbitrator was 'another independent and impartial tribunal or forum' as contemplated in the section.[21] In a majority judgment the court held that s 34 did not apply to private arbitrations. In coming to this conclusion, it said that the language used in the section did not apply directly to private arbitrations.[22] In other words, it applied to public tribunals and public forums, not private ones.

[22] A crucial reason for why it arrived at this conclusion was that the words 'fair *public* hearing' (emphasis added) in s 34 were held to apply to the tribunals and forums.[23] By contrast, there is no suggestion in the language employed in s 133 that the 'forums' referred to are only public forums and not private ones. So the respondent's invocation of *Lufuno Mphaphuli* to buttress its interpretation must also founder.

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[20] *Kalil NO & others v Mangaung Municipality & others* 2014 (5) SA 123 (SCA) para 20.
[21] Ibid para 201.
[22] Ibid para 218.
[23] Ibid paras 201 and 213.

[23] I have thus far attempted to give meaning to the phrase 'legal proceeding' by examining it in its immediate context ie by reading it with the other words and phrases in the section so as to give it 'colour and content'.[24] But reading words in their context often requires one to have regard to the wider context including other provisions in the same statute. One such provision that is relevant in this contextual analysis is s 142(3)*(b)*, which paradoxically both parties seek to rely upon. This section obliges directors of a company in business rescue to assist the practitioner by providing details of:

'any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company.'

[24] The appellant submits, with some persuasive force, that the specific mention of arbitration proceedings in the section instead of the general reference to legal proceedings in s 133(1), indicates that the latter is intended to encompass all those proceedings and not simply court proceedings. Section 133(1), it is submitted, therefore refers to the legal proceedings in general terms and s 142(3)*(b)* particularises the proceedings of which the practitioner must be apprised. This is fortified, so the submission continues, by the use of the words 'in any forum' as it appears in s 133(1), which is broad enough to cover courts, arbitration and administrative tribunals.

[25] The respondent counters this submission by contending that the two sections are not inconsistent. And that by specifically mentioning arbitration proceedings in s 142(3)*(b)*, but not in s 133(1), the drafters intended to exclude arbitrations from the ambit of legal proceedings in the latter.

[26] But the question the respondent is unable to answer is why the lawmaker would want the company to provide details of all proceedings, including arbitration proceedings, to a practitioner, but exclude arbitrations from the ambit of the

[24] The phrase 'colour and content' was first used by Lord Simonds said in *A G v H R H Prince Augustus* [1957] 1 All ER 49 at 53.

moratorium and the obligation to obtain a practitioner's consent in s 133(1)*(a)*. After all the outcome of an arbitration by way of award is usually that the losing party has to pay a sum of money, which is the outcome of most court actions involving commercial disputes. In my view the answer lies in properly understanding the purpose of these provisions as they apply to business rescue proceedings and the consequences that flow from the parties' contending interpretations.

[27] Section 5(1) of the Act directs that its interpretation and application must give effect to the purposes stated in s 7. Section 7*(k)* is relevant here. It says that one of these purposes is to:

'. . . provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders . . .'

[28] Section 128(1)*(b)* of the Act defines business rescue to mean proceedings that facilitate the rehabilitation of a financially distressed company by providing, amongst other things, for the temporary supervision and moratorium on the rights of claimants, and the development and implementation of a plan to rescue the company. The obvious purpose of placing a company under business rescue is to give it breathing space so that its affairs may be assessed and restructured in a manner that allows its return to financial viability. The requirement for the practitioner's consent to be obtained is to give him the opportunity, after his appointment, to consider the nature and validity of any existing or pending claim and how it is to be dealt with, for example by settling it or continuing with the litigation. In particular, the practitioner's concern is directed at assessing how the claim will impact on the well-being of the company and its ability to regain its financial health.[25] A general moratorium on the rights of creditors enforcing their rights against the company is therefore crucial to achieving this objective. And given the ubiquitous use of arbitrations to resolve commercial disputes,[26] an interpretation of s 133(1) that

[25] Compare *Umbogintwini Land & Investment Co (Pty) Ltd (In Liquidation) v Barclays National Bank Ltd & another* (205/86) [1987] ZASCA 86; 1987 (4) SA 894 (A) at 910G-I.
[26] Peter Ramsden *The Law of Arbitration: South African & International Arbitration* 2009 p 15.

excludes them from the moratorium on legal proceedings against financially distressed companies would significantly hinder its attainment.

[29] In my view once this purpose of business rescue – to give the practitioner breathing space – is properly understood, it becomes apparent that only an interpretation that includes arbitrations within, instead of excluding them from, the meaning of legal proceedings in s 133(1), allows this provision to be read harmoniously with s 142(3)*(b)*. Such a reading is in line with the well-known canon of statutory construction, which is that if by any reasonable construction the two can be made to be compatible, not contradictory, that is the interpretation that should be given. There can be no reason why s 142(3)*(b)* obliges the company to provide details of arbitrations to the practitioner other than because they are also legal proceedings – as contemplated in s 133(1) – that may have a bearing on its financial viability and of which the business rescue practitioner must be cognisant.

[30] It may sometimes assist in ascertaining the meaning of a statutory provision to examine similar language in other statutes for guidance. But travelling beyond the borders of a statute to examine other statues is an exercise that must be undertaken cautiously as their contexts and purposes differ. The parties refer to the Arbitration Act 42 of 1965 to bolster their contentions regarding the meaning of legal proceedings.

[31] The appellant points to the treatment of judicial management in the 1973 Companies Act, which, like business rescue, was also a mechanism to attempt to save financially distressed companies. The Arbitration Act provides that arbitration proceedings are to be treated as legal proceedings in winding up and ancillary proceedings of judicial management.[27] It follows, so it is submitted, that since business rescue replaced judicial management as a process for providing a

[27] Section 5 of the Arbitration Act 42 of 1965.

moratorium to allow ailing companies to be restored, it should be treated in the same way.

[32] While this submission is not without merit it does not explain why the drafters did not amend the Arbitration Act – as they did several other statutes[28] – by replacing the concept of judicial management, with business rescue. This would have been the obvious course to adopt. It may be that this omission was as a result of inattentiveness or carelessness on the part of the drafters, but a court must be slow to reach this conclusion. As I emphasised earlier, it is the language used in statute that must be examined to determine its meaning and not extraneous factors.

[33] On the other hand, the respondent contends that because the Arbitration Act expressly draws a distinction between legal proceedings and arbitration proceedings in several sections it is apposite to distinguish them in the Act.[29] Examples given where this distinction appears are s 6 – stay of legal proceedings when there is an arbitration agreement; s 20 – delivery of an opinion by a court; s 31 – the making of an award into an order of court and s 36, the awarding of costs for legal proceedings.

[34] It is unnecessary to analyse these provisions in any detail. What is clear though is that the distinction between legal proceedings (court proceedings) and arbitrations in the Arbitration Act is merely a factual recognition that both are methods for enforcing legal rights. The respondent omits to mention the important provision relied upon by the appellant – s 5 – which treats arbitration proceedings as legal proceedings for the purposes of sequestration, liquidations and judicial management. To conclude this point, therefore, I do not think that either party's reliance on the treatment of legal proceedings and arbitrations in the Arbitration Act, which has a different statutory purpose, definitively answers the question in this case.

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[28] Schedule 3 and 4 of the Act.
[29] See subsec 6.

[35] To conclude this analysis, the phrase legal proceeding may, depending on the context within which it is used, be interpreted restrictively, to mean court proceedings or more broadly, to include proceedings before other tribunals including arbitral tribunals. The language employed in s 133(1) itself suggests that a broader interpretation commends itself, an approach with which academic commentators concur.[30] Contextual indications in s 142(3)*(b)*, and the importance of reading these provisions consistently, also support this interpretation. And finally, the purpose of the provision, which is to give breathing space to the practitioner to get the company's financial affairs in order, also requires it to be construed widely because arbitrations, like court proceedings also involve diversion of resources – both time and money – that may hinder the effectiveness of business rescue proceedings. To construe it narrowly, as the court a quo did, and as the respondent contends we should, would be at odds with its language, defeat its purpose and lead to insensible and impractical consequences.

[36] This brings me to the second leg of this case, which is whether the failure by the appellant – the respondent's creditor – to seek and obtain the practitioner's consent before continuing with the arbitration was fatal to its outcome and should for this reason be invalidated. As I have mentioned there is no suggestion that the appellant was aware of the business rescue proceedings and is trying to profit from her own failure to have sought the practitioner's consent.

[37] The appellant's primary contention is that the practitioner's written consent under s 133(1)*(a)* is to be characterised as a jurisdictional fact or, put differently, a condition precedent for the arbitral proceedings to proceed or continue.[31] The

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[30] F H Cassim et al *Contemporary Company Law* 2 ed p 881 fn 99; Henochsberg *On the Companies Act 71 of 2008* Vol 1 p 478(12).

[31] A similar characterisation was adopted in *Re Taylor (a bankrupt); Davenham Trust plc (t/a Booker Montagu Leasing v CV Distribution (UK) Ltd & another* [2007] 3 All ER 638 where a Chancery Division in England was asked to decide whether a claimant's failure to obtain the leave of the court in accordance with a statutory requirement before instituting proceedings against a bankrupt debtor rendered the proceedings a nullity. In finding that it did the court said, at para 56, that such a provision controls the jurisdiction of a court or arbitrator. So that leave is not merely permission to the would-be litigant; it is a condition precedent to the jurisdiction of the court in which proceedings are then to be started or of an arbitrator. However, in the instant case the issue before us concerns s 133(1)*(a)* – the

absence of such a jurisdictional fact, it is submitted, carries with it the implication that a court or tribunal has no power or competence to determine an issue between the parties. And if it nevertheless proceeds to determine the matter notwithstanding the absence of jurisdiction the consequence is that the proceedings are void.

[38] The appellant mischaracterises the consent requirement in s 133(1)*(a)* as a jurisdictional condition. The arbitrator's jurisdiction is derived from the arbitration agreement, not from any provision in the Act. Section 133(1)*(a)* is more properly described as a statutory moratorium[32] or procedural bar to the initiation or continuation of legal proceedings. The important question is whether, in requiring this condition to be satisfied, the lawmaker sought to invalidate the proceedings brought without the condition having been met or simply to give certain procedural rights to a creditor without nullifying the proceedings when this drastic consequence is not warranted. This answer to this question calls for a closer examination of the provision.

[39] Section 133(1) was enacted to protect a company under business rescue against claims from creditors. Its object is to prevent the practitioner being inundated with legal proceedings without sufficient time within which to consider whether or not the company should resist them and to prevent the company that is financially distressed from being dragged through litigation while it tries to recover from its financial woes. Its effect is to stay legal proceedings except in those circumstances mentioned in s 133(1)*(a)* to *(e)*. The creditor may initiate or continue the proceedings in terms of s 133(1)*(a)* with the written consent of the practitioner.

[40] But s 133(1)*(a)* is not a shield behind which a company not needing the protection may take refuge to fend off legitimate claims. Thus s 133(1)*(b)*, which is to be read disjunctively with s 133(1)*(a)* because of the use of the word 'or' in

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permission provision – not the failure to obtain the leave of the court in accordance with s 133(1)*(b)*. It is in any event doubtful whether s 133(1)*(b)* can be construed as a jurisdictional requirement.

[32] *Investec Bank Ltd v Bruyns* (19449/11) [2011] ZAWCHC 423; 2012 (5) SA 430 (WCC) para 17.

exceptions *(a)* to *(e)*, permits a creditor to seek the court's imprimatur to initiate or continue legal proceedings against the company in the event of a practitioner's refusal to give consent, or directly, even without the permission of the practitioner having been sought. So s 133(1)*(a)* is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. This is a strong indication that non-compliance with the section is not to be visited with the sanction of a nullity.

[41] Moreover, there is no other indication in the section that non-compliance carries with it the implication that the proceedings are a nullity. In this regard it is of some relevance that this court recently said of s 134(1)*(c)*, which prohibits the exercise of any right over the property in possession of the company during business rescue proceedings without the practitioner's written consent, that it was directory rather than peremptory. So, non-compliance with the condition in this section does not necessarily lead to nullity.[33] Although this was said in an *obiter dictum* it was not contended before us that it was wrong and I consider it persuasive.

[42] One would therefore have expected the section to say that non-compliance with s 133(1)*(a)* renders the proceedings void – or use similar language – if that is what it sought to achieve.[34] Significantly it says so specifically in s 129(5). That section, which is also in the chapter dealing with business rescue, says in terms that any non-compliance with ss 129(3) or (4) pertaining to the publication of a company resolution to begin business rescue proceedings and appointment of a practitioner means that the resolution 'lapses and is a nullity'. But even where this consequence seemed clear this court considered that when this provision (s 129(5)) was read with s 130(1), 'lapsing and nullity arising from such non-compliance may be less than absolute'.[35] So in the treatment of two provisions in the Chapter[36] dealing with business rescue proceedings this court seems to have set itself against nullifying

[33] *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para 24.
[34] Compare Section 359 of the 1973 Companies Act.
[35] *Panamo Properties (Pty) Ltd & another v Nel NO & others* (35/2014) [2015] ZASCA 76 (27 May 2015) para 14.
[36] Chapter 6.

actions taken under business rescue proceedings in the face of non-compliance with its provisions. And, properly construed, I think that non-compliance with s 133(1)*(a)* does not in and of itself invalidate legal proceedings either.

[43] But there is more a fundamental obstacle in the way of the respondent's bid to invalidate the arbitration proceedings. Section 133(1) in general and s 133(1)*(a)* in particular, appears to have been enacted exclusively for the benefit of the company and the practitioner appointed to oversee its affairs. In this respect the practitioner's position is akin to that of a liquidator in s 359 of the 1973 Companies Act.[37] In a similar vein, the Western Cape High Court (Rogers AJ) in *Investec Bank Ltd v Bruyns*[38] characterised the defence afforded to the company by the statutory moratorium as a defence in personam – 'a personal privilege or benefit in favour of the company'.[39] Once this is accepted a creditor – a claimant against the company as described in s 128(1) – has no locus standi to rely on non-compliance with the section. Put another way, the defence is not available to the creditor. Only the practitioner may seek its protection. And only he may waive or consent to dispense with compliance therewith.[40]

[44] The appellant accepts that the moratorium operates for the practitioner's benefit. But she submits that it does not do so exclusively, to the detriment of the creditor's rights. The formal requirement in s 133(1)*(a)* for a creditor to obtain the practitioner's written consent for legal proceedings, it is submitted, balances the rights of the company with that of the creditor, in a manner that is mandated by s *7(k)*.[41] This is because, so the submission goes, the creditor has a right to be informed that the company is in business rescue so that it may apply for consent and

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[37] Compare s 359 of the 1973 Companies Act.
[38] *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC).
[39] Ibid para 18.
[40] Compare s 359(2) of the 1973 Companies Act; *Barlows Tractor Company (Pty) Ltd v Townsend* (727/93) [1996] ZASCA 3; 1996 (2) SA 869 (A) at 884F-G; Henochsberg's Commentary on the Companies Act Vol 1 p 760(3).
[41] One of the purposes of business rescue proceedings, according to s *7(k)* is to '. . . provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders . . . .'

receive a formal written communication on the outcome of the application. In this case the practitioner's failure to inform the appellant of the business rescue proceedings infringed her right to receive the information. The appellant, it is submitted, thus has a legal interest in the potential consequences that flow from the practitioner's failure to convey this information to her, which include the proceedings being rendered a nullity in the event of non-compliance with the section.

[45] While not lacking in ingenuity, this submission is entirely without merit. It is therefore hardly surprising that counsel for the appellant was not able to provide any authority to support his contention. The statutory moratorium is crafted in a manner that balances the rights and interests of the company and claimants against the company. So, as I have pointed out earlier, during the moratorium there is no absolute bar against legal proceedings. A creditor may ask for the practitioner's written consent and if refused, approach the court under s 133(1)*(b)*. In addition a creditor may approach the court directly under this provision for leave to institute legal proceedings, without having asked for the practitioner's consent. The creditor is also entitled, under s 133(1)*(c)* to set-off a claim by the company in legal proceedings commenced before or during the moratorium. Finally, s 133(3) suspends the time limits for a creditor's right to commence proceedings or otherwise assert a claim against the company during the moratorium. The exercise of a creditor's rights are therefore suspended during the moratorium, but this is balanced by the other protections afforded it in the section itself.

[46] The formal requirement for consent to be sought from the practitioner and given in writing was obviously inserted to promote legal certainty and avoid later disputes.[42] But it confers no rights on a creditor other than those specifically provided for in s 133. The appellant thus has no legal interest to challenge the award on the ground she has advanced.

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[42] Compare *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash & another* (725/13) [2014] ZASCA 178; *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash & another* 2015 (2) SA 118 (SCA) para 13.

[47] It bears mentioning that the moratorium only suspends legal proceedings *against* a company under business rescue and not *by* the company. This means that the appellant's claim against the company would be subject to the moratorium, but the counterclaim, which is an independent claim, would not.[43] So if the appellant's main contention – that the legal proceedings are void – were upheld, nullity would in principle and logic apply only to the appellant's claim against the company, but not to the counterclaim. If that occurred, the appellant would have come to court seeking to invalidate the award so that she could escape the unintended consequences of having initiated a claim against a company only to have a counterclaim whose monetary value exceeded her own claim upheld against her. And having gone to court with the hope of nullifying the award in its entirety, she would have succeeded only in nullifying her own claim, thereby making her potential loss even greater. She would have thus proverbially been hoist by her own petard.

[48] To conclude, the appellant was successful in contending that arbitration proceedings are legal proceedings for the purposes of s 133(1). But she has not been able to persuade us that non-compliance with its provisions in and of itself nullifies the legal proceedings. More fundamentally she has not shown that she has standing to invoke its provisions in order to invalidate an arbitration award on the ground that she was not informed of the business rescue proceedings and therefore deprived of a right to request and to receive written permission to continue the proceedings.

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

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

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JUDGE OF APPEAL

[43] *Marshall Timbers Ltd v Hauser & Battaglia (Pty) Ltd & another* 1976 (3) SA 437 (D) at 439D.

APPEARANCES

For Appellant:	M Pillemer SC Instructed by: Pearce, du Toit & Moodie, Durban Phatshoane Henney Attorneys, Bloemfontein
For Second Respondent:	A K Kissoon Singh SC (with him M W Collins SC) Instructed by: V Chetty Inc, La Lucia Lovius Block Attorneys, Bloemfontein