

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: 2023/127918

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
<u>25.02.10</u>	
DATE	SIGNATURE

In the matter between:

CAPITEC BANK LIMITED

Applicant

and

**UBUNTU FAMILY HEALTH CENTRE GRAYSTON
(PTY) LTD**

Respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 10 February 2025.

JUDGMENT

VAN DER WALT AJ

- [1] This is a judgment about an application to take possession of property from a company in business rescue. The applicant is Capitec Bank Limited. The respondent is Ubuntu Family Health Centre Grayston (Pty) Limited. The thing in question is a Porsche 911. Capitec initially asked also for an order allowing it to exercise its rights in terms of a notarial bond, but made its persistence in that regard conditional upon a finding that the business rescue proceedings are invalid. As I find that they are indeed valid, I proceed only to set out the facts relevant to the vehicle.
- [2] In September 2022, Capitec and Ubuntu concluded an instalment sale agreement to finance, in part, the purchase of the Porsche. Capitec retained ownership in the vehicle until Ubuntu paid all that was required in accordance with the agreement. By October 2023, Ubuntu was substantially in arrears. As a result, Capitec, in October 2023, sent to it a letter of demand. Payment of the arrears was to be made by 6 November 2023. Mr Adams, Ubuntu's sole director and the deponent to its answering affidavit in these proceedings, arranged a meeting with a Mr Klopper, an employee of Capitec, for 8 November 2023. They met. What exactly transpired at the meeting and its consequences are, at least at first blush, a matter of some controversy. Suffice it to say here that, according to Mr Adams, he and Mr Klopper concluded an agreement verbally and according to it Capitec "withdrew the letter of demand". Mr Adams calls it the "Klopper agreement". So will I.
- [3] In an email dated 16 November 2023, Mr Klopper reminded Mr Adams about his undertaking to make a substantial payment to Capitec by midday, the next day. If he did, said Mr Klopper, the parties could engage constructively to "manage the way forward". Mr Adams did not oblige. On the 17th, the applicant's attorney, Mr Brooks, therefore attended the premises of Ubuntu with a cancellation notice. According to the notice, the agreement was cancelled with immediate effect and Capitec reserved its rights to recover all the

outstanding amounts owed in respect of it. It was further said that Capitec asserted its right to take possession of the vehicle and required Ubuntu to give its cooperation in that regard. If it did not do so, Capitec warned, it would institute legal proceedings. Mr Adams refused to give his cooperation.

- [4] On 21 November 2023, again at the request of Mr Adams, yet a further meeting was held at Capitec's offices to discuss how Ubuntu was going to settle its indebtedness to Capitec. At the meeting, Mr Adams undertook, on Ubuntu's behalf, to pay to Capitec the sum of R500 000 by 28 November 2023. The payment would settle some of the arrears and facilitate further discussions about Ubuntu's indebtedness. According to Mr Adams, he was also given a "second letter of termination" at the meeting.
- [5] 28 November came and went. No payment was forthcoming. As a result, on 1 December 2023, Capitec's representatives, including an auctioneer, attended Ubuntu's premises. They were again denied access. Later in the day, Mr Brooks wrote to Mr Adams recording the events of earlier that day and advised that should Ubuntu persist in denying Capitec access to the premises, he held instructions to approach the court on an urgent basis for possession of, among other things, the Porsche. On 4 December, Capitec therefore approached this court on an urgent basis.
- [6] Ubuntu's answering affidavit was filed on 12 December 2023. Mr Adams said that Ubuntu's board had resolved on 29 November 2023 that it is to file for business rescue in terms of the Companies Act.¹ An application to that end was made at the Companies and Intellectual Property Commission on the same day. In the event, said Mr Adams, Capitec could not have commenced or proceeded with its application. He also argued that, because of the Klopper agreement, the cancellation of the instalment sale agreement was invalid. On 13 December 2023, Capitec filed its replying affidavit. In view of the allegations

¹ Act 71 of 2008.

about the Klopper agreement and out of an abundance of caution, said Capitec, it sought to cancel the instalment sale agreement again. On 14 December 2023, the application was struck off the roll for a lack of urgency.

- [7] Three main issues arise for determination before me. The first is whether the instalment sale agreement was properly cancelled. The second is whether the business rescue is in force and its general moratorium against legal proceedings is in place. The third is, if the moratorium is indeed in place, whether it prohibits Capitec from obtaining the relief it seeks in this court.

The cancellation of the instalment sale agreement

- [8] The Klopper agreement is the basis for Ubuntu's argument about the validity of the cancellation on 17 November 2023. It argues that there is a dispute about the Klopper agreement that cannot be resolved on the papers. It further argues (at best, tentatively) that the Klopper agreement amounted to a novation of the instalment sale agreement. These arguments cannot be sustained. Firstly, even on the facts deposed to by Mr Adams, the arguments do not assist Ubuntu. Secondly, the terms of the instalment sale agreement render the facts deposed to by Mr Adams irrelevant. Thirdly, there is good reason why Mr Adams' version is fanciful and to be rejected.

- [9] As for its argument about a dispute, even if it is accepted as real, it is inconsequential. The instalment sale agreement requires the fulfilment of only two preconditions for Capitec to cancel the agreement, take possession of the vehicle, retain all payments already made, and claim as liquid damages payment of the difference between the amount outstanding and the payments already made. The first pre-condition is non-payment. Its fulfilment is, and at all relevant times was, beyond dispute. The second precondition is "[d]ue demand". "[D]ue demand" is defined in the instalment agreement as simply "immediately on demand". Even accepting as true all the allegations made by

Mr Adams, Mr Klopper's email of the 16th of November itself gave Ubuntu "due demand". Ubuntu failed to perform in accordance also with that demand and the agreement was therefore properly cancelled on the 17th.

[10] The instalment sale agreement in any event renders the facts deposed to by Mr Adams irrelevant. It does not allow for preconditions to the enforcement of Capitec's rights, once fulfilled, to be withdrawn informally and verbally. To the contrary, the agreement speaks of an intention to avoid exactly this kind of situation: where one of the bank's debtors can air some or other informal oral agreement which prevents the bank from asserting its rights under the formal written contract originally concluded.

[11] Mr Adam's version is in any event fanciful and to be rejected. The context of the 8 November meeting was Ubuntu's failure to perform according to the initial letter of demand. There was simply no reason for Mr Klopper, apparently an experienced banker, to do anything that would compromise Capitec's right to enforcement. Capitec could enforce its rights at any time after due demand had been made. The 8 November meeting was held on Mr Adams's request: Ubuntu sought an indulgence. It offered Capitec nothing other than verbal undertakings in return. Mr Klopper made an affidavit. He says that the meeting was about Ubuntu's arrears, how it had not been servicing its accounts, Ubuntu's financial woes generally and how the debt owed to Capitec would be made good. He says there was no agreement, verbally or otherwise, that the "letter of demand would be withdrawn". As I have said, Mr Klopper wrote an email to Mr Adams on 16 November 2023. It casts light on the events of 8 November. It's the only relevant contemporaneous document before me. It bears out Mr Klopper's version of events.

[12] It must also be said that Mr Adams was less than honest about the notices he received from Capitec on the 21st of November. He says under oath that they were further letters of termination. That is, however, patently not so. Mr Adams

was handed two letters. One addressed to him, as Ubuntu's surety, and one addressed to Ubuntu, as the primary debtor. The letters were not letters of termination. They were letters of confirmation. They confirmed the cancellation on the 17th. It is not difficult to see why Mr Adams was less than truthful in filing his affidavit before the urgent court: he wanted to create the impression that even Capitec viewed the cancellation of the 17th as assailable. While the fib is not directly relevant to the events of the 8th of November, it certainly is relevant to whether Mr Adams' self-serving allegations about the meeting can be accepted. They are at odds from those made by Mr Klopper. Mr Klopper's version is supported by contemporaneous correspondence. I reject Mr Adams' allegations about the Klopper agreement.

[13] The instalment sale agreement was cancelled on 17 November 2023.

The status of the business rescue

[14] Capitec argues that the business rescue proceedings "have not been properly initiated" due to Ubuntu's failure to comply with sections 129(3)(a) and 129(4)(b) of the Act due to "its failure to publish the necessary documents to the applicant, as an affected person, within the time period provided in those sections." It submits that the resolution to begin business rescue proceedings lapsed and is a nullity through the operation of section 129(5)(a). According to the argument, there is in fact no moratorium that presents an obstacle to the relief it seeks.

[15] Section 129(3)(a) requires the publication of a notice of the resolution and its effective date. Included in the publication must be a sworn statement of the facts relevant to the grounds for the resolution. Section 129(4)(b) requires the company to publish a copy of the notice of appointment of the business rescue practitioner to each affected person. Section 129(5)(a) provides that, if a company fails to comply with any provision of subsection (3) or (4) "its resolution

to begin business rescue proceedings and place the company under supervision lapses and is a nullity”.

- [16] Section 129(5)(a) on its face suggests that Capitec’s argument has merit. However, when it is given its literal meaning it gives rise to anomalous results in the broader business rescue statutory regime. In *Panamo Properties (Pty) Ltd v Nel* the Supreme Court of Appeal therefore determined that non-compliance with subsections (3) and (4) does not automatically terminate business rescue proceedings through section 129(5)(a), but causes merely the resolution to lapse and become a nullity.² Only if a court sets aside the resolution, does the business rescue terminate.³ It is readily apparent from the papers that there was some degree of non-compliance with subsections (3) and (4). The business rescue is however valid and in force until a court, asked for the relief, sets it aside.

Business rescue and the moratorium

- [17] Capitec argues that its claim to take possession of the Porsche is not excluded by the general moratorium on legal proceedings against companies in business rescue. Section 133(1) in relevant part provides:

“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 of the court considers suitable;
- (c) as 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;

² *Panamo Properties (Pty) Ltd and Another v Nel and Others* NNO 2015 (5) SA 63 (SCA) (*Panamo*) 73D – 74D.

³ *Panamo* 74D – 75C.

- (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”.

[18] The success of the argument depends on an interpretation of the phrases “legal proceeding” and “lawfully in its possession” in section 133(1). In *Natal Municipal Pension Fund v Endumeni Municipality*⁴ Wallis JA set out the proper approach to the interpretation of documents, including legislation, as follows:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure 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.”

In addition, interpretation is not about the intention of the legislature. The enquiry is directed to the meaning of the language of the provision itself.⁵ These principles have been applied also in interpreting the business rescue provisions in the Act. In *Chetty t/a Nationwide Electrical v Hart and Another NNO*,⁶ Cachalia JA held that, where a word or phrase is open to more than one

⁴ 2012 (4) SA 593 (SCA) (*Endumeni*) 603F – 604D.

⁵ *Endumeni* 605C – D.

⁶ 2015 (6) SA 424 (SCA) (*Chetty*) 427I – 428C.

meaning, the consequences of the divergent interpretations must be examined so that a meaning that is likely to further rather than hinder the purpose of business rescue proceedings is adopted.⁷

[19] One of the Act's objectives is provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.⁸ There are at least five groups of stakeholders that are potentially affected by the rescue of a financially distressed company: shareholders, creditors, employees, directors and the local community.⁹ The statutory moratorium on legal proceedings is one facet of that larger process. It is a central part of the business rescue regime.¹⁰ Without it, the rescue of distressed companies will simply not be possible.¹¹ As soon as business rescue proceedings commence, there is therefore an automatic stay on or suspension of legal proceedings by creditors against the company, its property and things in its possession.¹²

[20] What the moratorium envisions is a "temporary prohibition".¹³ The right to commence or proceed with legal proceedings is not taken away, it is merely suspended. The general moratorium, properly interpreted, is not only temporary in the sense that the larger business rescue endeavour is temporary. It is also temporary in the sense that it applies automatically only until such time as the business rescue practitioner or the court has made a determination in terms of respectively subsection (a) or (b). In other words, the general moratorium makes even less of an intrusion into a claimant's right to commence or proceed with legal proceedings as would have been the case if the

⁷ *Chetty* 427I – 428C.

⁸ Section 7(k) of the Act.

⁹ Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste Joanne Shev, Jacqueline Yeats, *The Law of Business Structures* (2nd edn Juta, 2021) 546.

¹⁰ Maleka Femida Cassim, 'The effect of the moratorium on property owners during business rescue' (2017) 29 SA Merc LJ 419 (Cassim 2017) 422.

¹¹ Cassim 2017 422.

¹² Section 128(1)(b) of the Act. Cf. Cassim 2017 422.

¹³ Section 128(1)(b)(ii) of the Act.

moratorium applied without the possibility of an intervention of the business rescue practitioner or the court.

- [21] The requirement that the practitioner's consent is to be obtained is to give her the opportunity, after her 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 or continuing with the litigation.¹⁴ She is given time to assess how the claim will impact on the wellbeing of the company and its ability to retain its financial health.¹⁵ This, as opposed to simply expecting of the practitioner, from the very moment she is appointed, to direct what may be many legal proceedings against the company. Section 133(1) in general, and section 133(1)(a), in particular, were enacted exclusively for the benefit of the company and the practitioner appointed to oversee its affairs.¹⁶ This provision in favour of the company and the business rescue practitioner does not operate only in respect of claims with little or no prospects of success. Or only in respect of claims where claimants are asserting "lesser" rights. The prospects of success, or the importance of the right asserted by way of the legal proceedings, are irrelevant for the purposes of the stay brought about by moratorium. It is therefore irrelevant that a claim in process when the company enters business rescue has great prospects of success or that the claimant is the owner of the thing the claim is directed against. The moratorium operates regardless. One might then ask, but what of the balancing act? The answer is the legislature could not possibly give equal recognition to each of the stakeholders' interests at each juncture of the business rescue process. The balancing act it sought to perform is one done over the course of the business rescue process.

- [22] Capitec has sought neither the court's leave nor the practitioner's consent to proceed with its *rei vindicatio*. It relies on numerous judgments of the high courts, including this court, that would allow it to do so. They are *Kythera Court*

¹⁴ Chetty 433F.

¹⁵ Chetty 433G.

¹⁶ Chetty 437E.

*v Le Rendez-vous Café CC and Another*¹⁷; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others*,¹⁸ *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others*,¹⁹ and *Thallos CC t/a Alfa Tool and Equipment (in business rescue) v Toyota Financial Services (South Africa) Ltd*.²⁰ It also relies on *178 Stamford Hill CC v Velvet Star Entertainment CC*,²¹ but it can immediately be said that in that case the court's leave in terms of section 133(1)(b) was sought and granted.²² It is therefore distinguishable on a material point and is of no assistance to Capitec. As for the remainder of the judgments, as Capitec's argument turns on the meanings of the phrases "legal proceedings" and "lawfully in its possession", I will deal with them under those heads.

No legal proceeding, including enforcement action . . . may be commenced or proceeded with in any forum

[23] The prohibition contained in section 133(1), leaving aside its additions and the exceptions, is against legal proceedings in any forum. The term "legal proceeding", as used in the section, is to be given a broad definition.²³ The word "including" is a word of addition, not limitation.²⁴ I therefore cannot see how the rei vindicatio (necessarily employed in legal proceedings in a forum) is excluded from the operation of the moratorium. In *Kythera* the court said that "persons who legitimately seek to vindicate or protect their property" are not stopped from doing so by the moratorium,²⁵ but this statement is irreconcilable

¹⁷ 2016 (6) SA 63 (GJ).

¹⁸ 2016 (6) SA 448 (KZD).

¹⁹ 2016 (6) SA 501 (WCC) (*Southern Value*).

²⁰ (7035/2019) [2021] Limpopo Division, Polokwane (2 June 2021) par. 36.

²¹ (1506/15) [2015] ZAKZDHC (1 April 2015).

²² Pars. 5 and 31.

²³ *Chetty* 439E.

²⁴ Cf. *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1924 AD 430.

²⁵ *Kythera Court v Le Rendez-Vous Café CC and Another* 2016 (6) SA 63 (GJ) par.12.

with the clear language of section 133(1) and the purpose which the moratorium is intended to fulfil.

Lawfully in its possession

- [24] A useful starting point to the interpretation of this phrase and the judgments Capitec rely on for its submission that the Porsche is not lawfully in Ubuntu's possession, is the judgment in *JVJ Logistics Ltd v Standard Bank of South Africa Ltd and Others*.²⁶ The court reasoned that there are two possible meanings to be ascribed to the term "lawfully" in section 133(1) of the Act. The first regards possession as unlawful when the possessor has no right, vis-à-vis a claimant, that justifies its possession. This is the narrower type of lawfulness, which is relatively limiting of the situations in which a thing would be lawfully in possession of a company in business rescue. The court called its inverse "civil unlawfulness".²⁷ The second regards possession as unlawful if it is acquired by force or stealth, or which could properly be described as possession obtained or maintained through fraud, theft or robbery. This is the broader type of lawfulness, which would allow for more situations in which a company in business rescue would lawfully be in possession of a thing. The court called its inverse "criminal unlawfulness".²⁸ It concluded:

"[I]f the requirement for the operation of the moratorium is merely that the company's possession should not be criminally unlawful, the potential for a substantial period of operation of the moratorium imposed by section 133(1) of the Act suggests that the burden it would impose on the owner of the property is too great to meet the requirement that there should be a balance of rights and interests as contemplated by section 7(k) of the Act."²⁹

- [25] In the remainder of the judgments relied upon by Capitec, the approach is similar. I.e., that a company in business rescue has a thing "lawfully in its

²⁶ 2016 (6) SA 448 (KZD) (*JVJ Logistics*).

²⁷ *JVJ Logistics* 458E.

²⁸ *JVJ Logistics* 458E – F.

²⁹ *JVJ Logistics* 460G – H.

possession” only when its possession is not tainted by, what was described in *JVJ Logistics* as, “civil unlawfulness.” Where, for instance, a contractual right to possession has ended because of the cancellation of the relevant contract, the company in business rescue does not have the relevant thing “lawfully in its possession”.³⁰ The court in *Southern Value* added also that it “could not have been the legislature’s intention that the company in business rescue would restructure its affairs by utilising assets to which it has no lawful claim.”³¹

- [26] The quoted parts of *JVJ Logistics* and *Southern Value* perhaps lose sight of the fact that section 133(1) and 133(1)(a) were enacted exclusively for the benefit of the company and the business rescue practitioner,³² that the moratorium is temporary and that the envisioned balancing act is done over the course of the business rescue proceedings. *Southern Value* also attributes an intention to the legislature that is not evident in the language used in section 133(1). More importantly, as it is accepted that there are two possible meanings to be attributed to “lawfully in its possession”, the consequences of the divergent interpretations must be examined so that a meaning that is likely to further rather than hinder the purpose of business rescue proceedings is adopted.³³ According to Professor Maleka Femida Cassim, there are good reasons why the legislature sought to protect possession, albeit for the limited time the general moratorium operates. Companies in business rescue require possession to allow for their successful rescue. She stresses that it should be borne in mind that the “company’s continued occupation of leased premises or its ongoing possession of hired equipment or motor vehicles, may be key components of its business, and may be critical to the success of the rescue.”³⁴ Ending the company’s possession of these things, prior to asking for the business rescue practitioner’s consent or the court’s leave, would end any chance of success a business rescue might have. There can be no doubt that

³⁰ See for instance *Kythera* 67J. Also see *Madodza (Pty) Ltd v ABSA Bank Ltd* (38906/2012) ZAGPPHC 165 (15 August 2012).

³¹ *Southern Value* 508A – B.

³² *Chetty* 437E.

³³ *Chetty* 427I – 428C.

³⁴ Cassim 2017 422 - 423.

the broader definition of “lawfully in its possession” (meaning the absence of criminal unlawfulness) furthers the objective of business rescue proceedings.

- [27] There are further reasons why this is the correct interpretation of section 133(1). The subsection recognises that the company stands in relationships to not only private parties, but also public authorities. This is evident in subsections (d) and (f), and in the use of the term “enforcement action” in the main part of the subsection 133(1). “Enforcement action” is a regulatory term of art that means action taken by a regulator to enforce the legislation, regulations or rules falling within its regulatory sphere. The Supreme Court of Appeal has held that it connotes the enforcement of obligations and that it (as opposed to specific performance) is the opposite of cancellation.³⁵ I find it necessary to suggest the other meaning of “enforcement action” as I believe it unlocks some of the meaning of the section. The business rescue provisions will be applied to many companies operating in many spheres of business, subject to various regulatory regimes. Companies are of course also subject to criminal law generally. Possession is an element of various crimes and statutory offences. The meaning to be assigned to the phrase “lawfully in its possession” will therefore depend on the common law crime or statutory prohibition relevant to the specific company in business rescue and the things in its possession. The content of the concept “possession”, or for that matter “lawfully in its possession”, will be determined with reference to the relevant crime or legislation.³⁶ It follows that the phrase “lawfully in its possession” or parts of it, cannot be given a fixed meaning in the Act according to the common law principles of the law of property that are normally used to determine who has the right to possession in disputes between private parties. It further follows that for a claimant to show that something is unlawfully in possession of the company in business rescue, it would have to, as a first step, identify the crime or statutory offence that

³⁵ *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) 445G – 446C.

³⁶ *S v Brick* 1973 (2) SA 571 (A) 579H.

renders it so. Capitec has not done so. I therefore find that the Porsche is lawfully in Ubuntu's possession.

- [28] One final matter deserves attention before I turn to costs. Capitec asserted that it is "manifest" that the Porsche is not required to rescue Ubuntu's business and that it is most probably being used for private purposes. Of course, there is appeal in simply giving effect to what seems apparent from nature of the thing in question. However, questions such as whether continued possession of the vehicle would further the rescue of the business are relevant only when the business rescue practitioner's consent is sought under section 133(1)(a) (or, for that matter, section 134(1)(c)) or the court's leave is sought in terms of section 133(1)(b). Capitec does not rely on those sections and the facts they render relevant have not been addressed beyond what is, supposedly, manifest. That is simply a consequence of how the matter arose, the notice of motion and the founding affidavit. The business rescue practitioner, the person best placed to say whether the thing in question would further the rescue effort, is not even a party to the proceedings. Even if I could make a finding about the Porsche's relevance to the rescue effort, I am in no position properly to do so.

Costs

- [29] The instalment sale agreement provides that legal costs incurred in connection with any amount due from Ubuntu to Capitec, and all costs, fees, and charges of a like nature, shall be payable on the attorney and client scale by Ubuntu to Capitec. The clauses do not distinguish between whether or not Capitec is successful in the proceedings it institutes. Rather, they make clear simply that Capitec is not to be out of pocket when it incurs legal costs in asserting its rights in terms of the instalment sale agreement.
- [30] There is nothing inherently objectionable about the clause. As the court exercises its discretion on costs judicially, not capriciously, it would therefore

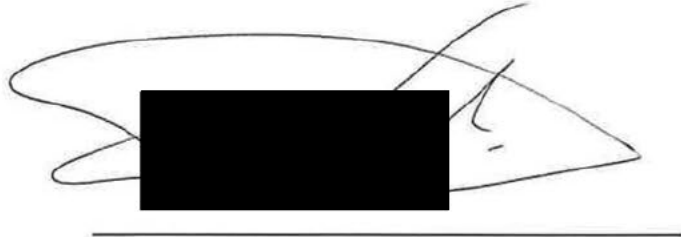
normally be bound to recognise the parties' freedom to contract and to give effect to any agreement reached also in relation to costs. Good grounds may, however, exist, depending upon the circumstances, for following a different course. This might result, on a proper exercise of the discretion, in a party being deprived of agreed costs, or being awarded something less than that agreed upon.³⁷ Typically this would be done in a case where an award would be inappropriate or undeserved.³⁸

- [31] Accordingly, the discretion most probably would be exercised against a litigant who is contractually entitled to costs on the attorney and client scale, but commences legal proceedings with no prospects of success, that ultimately proves unsuccessful for that reason. That is, however, not the situation in the instant case. Capitec's notice of motion issued when it did not know of the business rescue. It pursued a case that otherwise had excellent prospects of success on the merits. It abandoned part of its application conditionally when it came to know of the business rescue proceedings. The part it proceeded with unconditionally, was pursued on the basis of precedent that predicted a successful outcome. Ubuntu's conduct, on the other hand, was not a model of propriety. Mr Adams at all relevant times knew that Capitec's approach to court was imminent. At no point did he inform Capitec of his intention to have Ubuntu enter business rescue, rather insisting that a large payment would be made to Capitec. He maintained his silence regarding the business rescue proceedings after the resolution and the application for business rescue were made on 29 November 2023, and even during the meeting with Capitec's representatives on 1 December 2023. He also was not truthful in his allegations about the letters he and Ubuntu received on 21 November 2023.

- [32] In the event, I make the following order:

³⁷ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) 1055I – J.
³⁸ *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) 14E.

1. The application is dismissed.
2. The respondent is to pay the applicant's costs on the attorney and client scale.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Heard: 24 April 2024

Judgment: 10 February 2025

Appearances:

For the applicant

Mr W.G. Pretorius

Instructed by Brooks & Braatvedt Inc.

For the respondents

No appearance for the respondent

Heads of argument drafted by Mr Z. Khan

Instructed by Muhammed Vally Attorneys Inc. t/a MViP Attorneys