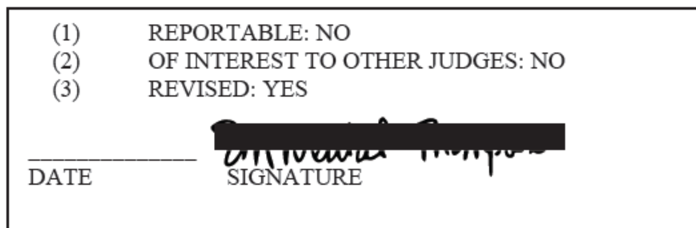
REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2026-115960


(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED First Applicant

MAN FINANCIAL SERVICES (S.A.) (RF) (PTY) LTD. Second Applicant

and

TUBE-MECH SERVICES (PTY) LTD Respondent

JUDGMENT

WENTZEL -THOMPSON J

Introduction

[1] This urgent application concerns the return of a substantial fleet of commercial vehicles and related assets presently in the possession of the respondent.

[2] The first applicant, ABSA Bank Limited ("ABSA"), and the second applicant, MAN Financial Services (S.A.) (RF) (Pty) Ltd ("MFS"), financed the respondent's acquisition and use of the vehicles under three categories of agreement. The respondent, Tube-Mech Services (Pty) Ltd, is admittedly in financial distress and in arrears. After cancelling the agreements, and shortly after the respondent launched business rescue proceedings, the applicants approached this court on an urgent basis for the delivery up and/or respossession of the vehicles, alternatively for an order authorising the Sheriff to take possession of them, together with such leave under s 133(1)(b) of the Act as may be necessary.

[3] The respondent resists immediate repossession, principally on the basis that it has launched business rescue proceedings which means that the statutory moratorium contained in section 133 of the Companies Act 71 of 2008 ("the Act") precludes the applicants from recovering the vehicles without the Court's leave. The matter before me raises the question whether business rescue may be invoked to retain possession of property which a company does not own and whose contractual right of possession was lost before the commencement of business rescue by cancellation of the suite of finance. agreements.

[4] The applicants seek an order, to the extent necessary, granting leave under section 133(1)(b) of the Companies Act to proceed with the application, and directing the respondent to deliver the vehicles and assets identified in the schedules to the notice of motion. In the alternative they seek authority for their representatives or the Sheriff to take possession of the vehicles wherever they may be found.

[5] The respondent opposes the application and brings, in the alternative, a counter-application seeking that the matter be stayed or postponed pending the

determination of its business rescue application on protective terms that it tenders. In opposing the application, the respondent contends that the matter is not urgent and that the applicants have not complied with this Division's practice directive governing urgent applications; that the s 133(1) moratorium bars the relief because the vehicles are "lawfully in its possession" irrespective of the cancellations; that the applicants have in any event failed to establish the requisites of a final interdict; and that the balance of convenience, and in particular the position of more than 130 employees, favours the respondent.

[6] The essence the respondent's case is that the vehicles sought to be repossessed form the operational backbone of its logistics and haulage business, that more than 130 employees depend upon that business, and that immediate repossession would destroy any prospect of business rescue before the rescue application can be determined. It tenders interim undertakings not to sell, transfer, encumber or dispose of the vehicles and to preserve them pending the outcome of the business rescue application.

[7] In countering this argument the applicants contend that the respondent is seeking to use business rescue as a shield against the consequences of the cancelled credit agreements. They contend that the respondent's possession is no longer lawful, that section 133 does not apply to property neither belonging to the company nor lawfully in its possession, and that, in any event, leave should be granted by the Court under section 133(1)(b) because continued retention and use of their vehicles without payment exposes them to daily depreciation, insurance risk and erosion of their proprietary rights.

[8] The fundamental issue to be decided is one on which the High Court in this division is divided, namely the meaning of the words "lawfully in its possession" in s 133(1) of the Act. The answer to this question is two-fold: It determines whether or not the moratorium applies and if so, whether the Court should in any event grant leave to the applicants to continue with its repossession application, framed in argument, not as a standard repossession application premised upon their rights arising from the various finance agreements, but rather as a *rei vindicatio* brought to assert their self-standing rights as the owners of the vehicles in the respondent's possession.

The factual matrix

[9] The material facts are, for the most part, common cause or not seriously disputed on the papers. The respondent conducts a haulage and logistics business operating a fleet of commercial vehicles. Over time it acquired and financed 109 vehicles under three categories of agreement:

a. thirty-six instalment sale agreements concluded with ABSA, under which the outstanding balance reflected on the certificates of balance is R36 604 346.96;

b. twenty lease agreements originally concluded with an entity referred to as Route Quest, the rights under which were ceded to ABSA pursuant to a discounting agreement, in respect of which the outstanding balance is R14 385 016.29; and

c. fifty-three instalment sale agreements concluded with MFS, in respect of which the outstanding balance is R26 261 965.24.

[10] On the certificates of balance the aggregate indebtedness exceeds R77 million, and on the applicants' calculation, inclusive of interest and costs, approaches some R92 million.[1] The applicants are, on any view, the respondent's main creditors. The validity of the cession of the Route Quest rights to ABSA is not, in my view, open to serious doubt: a cession of personal rights, whether out-and-out or in *securitatem debiti*, is effective to transfer the ceded rights to the cessionary, and nothing on these papers impugns the cession.[2]

[11] The respondent fell into substantial arrears causing the applicants to cancel the agreements. It is common cause that:

a. the MAN (MFS) instalment sale agreements were cancelled on 12 March 2026;

---

[1] Affidavit of L Graham (founding affidavit) and the certificates of balance annexed thereto; the indebtedness is not seriously disputed.

[2] *Sasfin Bank Ltd v Fitness Holdings (Pty) Ltd* 2023 JDR 0042 (GJ) at para 20, on the validity and effect of a cession in *securitatem debiti* and an out-and-out cession.

b. the Route Quest lease agreements (the rights to which had been ceded to ABSA) were cancelled on 17 March 2026; and

c. the ABSA instalment sale agreements were cancelled with effect from 30 April 2026.

[12] The respondent launched its business rescue proceedings on or about 23 April 2026. The resolution was filed with the Companies and Intellectual Property Commission on 28 April 2026, and the business rescue documents were served on the applicants on 7 May 2026. It is common cause that the general moratorium under s 133(1) thereupon came into operation.

[13] The applicants have not accepted the respondent's recourse to rescue. They have launched, in the Pretoria seat of this Division, an application to intervene in and to set aside the business rescue proceedings under s 131(4)(a) under case number 2026-096047, alternatively to wind up the respondent, and they have stated unequivocally that they will vote against any business rescue plan that seeks to make use of their assets.

[14] The cancellation of the MFS agreements (on 12 March 2026) and of the Route Quest agreements (on 17 March 2026) plainly preceded the commencement of the business rescue and the onset of the moratorium. The cancellation of the ABSA instalment sale agreements, on the other hand, took effect on 30 April 2026 - that is, after the resolution had been filed on 28 April 2026. The respondent contends that in respect of the ABSA vehicles the moratorium was already operative when the cancellation purported to take effect.[3] I will deal with the legal significance of this distinction below.

[15] The remaining facts may be shortly stated. The respondent admits that it concluded the agreements, that it is financially distressed and in arrears, that it received the cancellation correspondence, and that it remains in possession of all 109 vehicles. Its sole executive director at the time the agreements were concluded is Mr Joao Manuel Vicente Da Encarnacao, who deposed to the answering affidavit and who is said to be receiving medical treatment abroad; a

[3] Answering affidavit, paras 48, 78 and 105; respondent's heads of argument para 2.13.

second director, Mr Farouq Umar Scheepers, was appointed on 4 March 2026. The respondent says that it employs in excess of 130 persons whose livelihoods depend on the success of the business rescue proceedings and thus the continued operation of the fleet of vehicles it acknowledges are owned by the applicants.

The issues

[16] The following issues fall to be determined:

a. Whether the application is urgent and whether it should be entertained notwithstanding the respondent's complaints of non-compliance with the DJP Directive;

b. Whether, and to what extent, the s 133(1) moratorium applies to the vehicles - which turns on the meaning of "lawfully in its possession" and on whether cancellation constitutes an "enforcement action" or a "legal proceeding;"

c. Whether the applicants have established their entitlement to the return of the vehicles (either by satisfying the requisites of a final interdict or its cause of action based upon the *rei vindicatio*);

d. Whether there is a genuine and *bona fide* dispute of fact precluding final relief on the papers;

e. Whether the respondent's tendered undertakings, or the balance of convenience, warrant the refusal of relief; and

f. Whether the conditional counter-application for a stay should be granted.

Urgency and the DJP Directive

[17] The respondent contended that the application should be struck from the roll for want of urgency and for non-compliance with the practice directive issued by the Deputy Judge President on 4 October 2021,[4] and that any urgency was in any

[4]Practice Directive issued by the Deputy Judge President of this Division (Sutherland DJP) on 4 October 2021 regulating the enrolment and conduct of urgent applications (*the DJP Directive*).

event self-created. It submitted that substantial redress is available to the applicants in due course, whether in the ordinary course or through the business rescue process and the pending Pretoria proceedings.

[18] The test for urgency is well settled: An applicant must set out explicitly the circumstances rendering the matter urgent and the reasons why it cannot be afforded substantial redress at a hearing in due course.[5] Urgency is a matter of degree, and the abridgement of the ordinary periods must be commensurate with the degree of urgency demonstrated. The court will not countenance the manufacture of urgency, nor the self-created variety that flows from an applicant's own delay.[6] Whether substantial redress is available in due course is the most crucial requirement, not the mere existence of some manner alternative relief at some future time.[7] In addition, more recently this Court has reaffirmed that commercial prejudice may found urgency where substantial redress in due course will not be available.[8]

[19] Applying those principles, I am satisfied that the application is urgent. The subject matter is a fleet of 109 commercial vehicles that are depreciating and, on the applicants' uncontradicted evidence, in several instance, are uninsured. The respondent is admittedly in financial distress, and the very purpose of the business rescue on which it relies is to continue trading using those vehicles. The risk to the applicants' security is concrete and ongoing; the longer the vehicles remain in the respondent's operational use, the greater the deterioration in their value and the greater the prospect of dissipation. In those circumstances a hearing in the ordinary course, many months hence, would not afford the applicants substantial redress.[9]

---

[5] *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F–H; East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2012 JDR 1832 (GSJ) atpara 6

[6] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 (23 September 2011) para 6; *Avis Southern Africa (Pty) Ltd v Porteous* 2024 (2) SA 386 (GJ) at paras 8–11.

[7] *East Rock Trading* at para 6.

[8] *Avis Southern Africa (Pty) Ltd and Others v Porteous and Another* 2024 (2) SA 386 (GJ)

[9] supra at para 11; *Moyane v Ramaphosa and Others* [2018] ZAGPPHC 835; [2019] 1 All SA 718 (GP) at para 33.

[20] I am also satisfied that the urgency was not self-created in any sense that should defeat the application. The applicants moved with reasonable expedition once the business rescue proceedings were served on them on 7 May 2026 and the practical consequences of the moratorium became apparent.

[21] As to the alleged non-compliance with the DJP Directive, the Directive exists to ensure the orderly management of the urgent roll and to protect respondents against being ambushed; it is not a charter for technical points to be taken in order to defeat a meritorious application that a respondent has, in fact, been able fully to meet. The respondent delivered a comprehensive answering affidavit and full heads of argument, and argued the matter on the merits without any demonstrable prejudice. To the extent that there was non-compliance, it was not material and I condone it. I thus find that the matter is properly before me in the urgent court.

The section 133(1) moratorium: The meaning of "legal proceeding", "enforcement action" and "lawful possession"

[22] I now turn to the heart of the dispute and that is the meaning to be ascribed to the wording in section 133(1) of the Act. This provides that 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; …*"

[23] Three phrases require construction; "legal proceeding," "enforcement action" and "lawfully in its possession". They are to be construed in accordance with the now-familiar unitary approach to interpretation, having regard to text, context and purpose simultaneously.[10]

[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni*) at paras 18-19.

[24] "Legal proceeding" and "enforcement action": On the first two phrases there is little controversy. A "legal proceeding" bears its ordinary meaning of a lawsuit prosecuted in a forum; the word "including" before "enforcement action" is a term of extension, not of limitation. An application for the return of the vehicles - whether framed as a *rei vindicatio* or as a final interdict - is therefore a "legal proceeding". As to "enforcement action", the Supreme Court of Appeal held in *Cloete Murray* [11]that the phrase connotes the enforcement of an obligation by formal action and is the antithesis of cancellation; the cancellation of an agreement is accordingly *not* a "legal proceeding" and *not* "enforcement action", and requires neither the practitioner's consent nor the leave of the court.[12]

[25] On this basis on the facts before me, the applicants' cancellations of the agreements were not steps taken in any forum and were not enforcement action; they were unilateral juristic acts terminating the contracts for breach. The cancellations of the MFS and Route Quest agreements, effected on 12 and 17 March 2026 respectively, in any event preceded the moratorium entirely; and even the ABSA cancellation, if it constituted no more than the exercise of a contractual right to cancel, was not a step that the moratorium prohibited.[13] The real question before me, therefore, is the meaning of "lawful possession."

[26] The moratorium protects "property belonging to the company, or lawfully in its possession".[14] If the vehicles are *not* lawfully in the respondent's possession, the moratorium does not apply, and no question of consent or leave arises.

[27] The respondent's case stands or falls on the proposition that, notwithstanding the valid cancellation of the agreements, the vehicles remain "lawfully in its possession" for so long as it has not acquired them by some criminal means. For this proposition it relies on the recent decision of Van der Walt AJ in this division

---

[11]*Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) (*Cloete Murray*).
[12] At paras 30-33
[13]*Cloete Murray* para 33. See also *Kythera Court v Le Rendez-Vous Café CC and Another* 2016 (6) SA 63 (GJ) (*Kythera*) at paras 9 and 16.
[14]Section 133(1), which protects "property belonging to the company, or lawfully in its possession".

in the matter of *Capitec Bank Ltd v Ubuntu Family Health Centre Grayston (Pty) Ltd* [15]

[28] Hitherto, the weight of authority in the High Court has been in favour of the narrower "civil" construction that has found possession is "lawful" only where the possessor holds a *jus possidendi*, that is a right justifying possession as against the party claiming the property. On this approach, once the underlying contract has been validly cancelled, the respondent's right to possess falls away, the possession is no longer lawful, and the moratorium ceases to protect it. This is the construction adopted in *JVJ Logistics* in the Durban High Court,[16] *Southern Value* in the Western Cape High Court[17] and *Madodza* in the Pretoria High Court,[18] as well as *Kythera* in the Johannesburg High Court.[19]The courts' reasoning in these cases is that the Legislature cannot have intended a company to restructure its affairs during business rescue by deploying assets to which it has no lawful claim.

[29] On the broader "criminal", construction, adopted by this Division in *Capitec*,[20] possession is "lawful" unless it is criminally unlawful - that is, unless it was acquired by force, stealth, fraud, theft or robbery. On this approach, a claimant who seeks to displace the moratorium must identify the specific common-law crime or statutory offence that renders the company's possession unlawful; absent such identification, the property is "lawfully in its possession" notwithstanding a valid cancellation.[21]

[30] The rationale for this approach is that without being able to utilise leased property from which a company in business rescue operates, and/or without being able to continue to use its financed tools of trade, such as factory equipment and machinery, or, like in this case, the fleet of vehicles, the business rescue will be doomed to failure and the "breathing space" that Chapter 6 of the Act is intended

---

[15] [2025] ZAGPJHC 126 (10 February 2025) (*Capitec*).
[16] *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD) (*JVJ Logistics*) at 458E-F, 460G-H.
[17] *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) (*Southern Value*) at 508A-B
[18] *Madodza (Pty) Ltd v ABSA Bank Ltd* (38906/2012) [2012] ZAGPPHC 165 (15 August 2012)
[19] *supra*

[21]*Capitec (supra)* paras 23–27.

to provide a company in financial distress, will be thwarted, contrary to the clear objectives sought to be achieved in business rescue proceedings.

[31] I was informed by the applicants' counsel that Capitec has been taken on appeal and is awaiting adjudication by the Supreme Court of Appeal and urged to follow the two cases mentioned above in the Gauteng division. I was not, however, referred to the subsequent decision in the Supreme Court of Appeal in *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd*;[22] and nor did Van der Walt AJ consider this decision. Unless and until the Supreme Court of Appeal upholds *Capitec*, I remain bound by *Timasani*.

[32] In *Timasani*, the Supreme Court of Appeal construed "lawful possession" and held that the words "in relation to any property belonging to the company, or lawfully in its possession" *limit* the reach of the moratorium, so that it does not extend to legal proceedings in relation to property belonging to a person other than the company, or to property unlawfully possessed by the company. The court reasoned that common sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent the recovery of property not belonging to it or unlawfully in its possession, and that no purpose connected with business rescue is served by protecting a company against proceedings to recover property that it neither owns nor lawfully possesses.

[33] Critically, the Supreme Court of Appeal in *Timasani* found the company's possession of the relevant property to be unlawful simply because the contractual foundation for its retention had fallen away; it did *not* require the claimant to identify any crime or statutory offence. *Timasani* is therefore an unequivocal endorsement of the narrower, "civil" construction of "lawful possession" by the Supreme Court of Appeal, and a rejection of the very test of "criminal unlawfulness" that was later adopted in *Capitec*.

[34] Applying *Timasani* to the facts before me, the conclusion is clear. The MFS agreements and the Route Quest agreements were validly cancelled on 12 and

[22] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (91/2020) [2021] ZASCA 43; [2021] 3 All SA 843 (SCA) (13 April 2021) (*Timasani*) at paras 30-33.

17 March 2026 respectively, before the business rescue commenced. From the date of those cancellations the respondent held no *jus possidendi* in respect of the 20 Route Quest vehicles or the 53 MFS vehicles. Its possession of those 73 vehicles was, on the binding construction, not lawful. It follows that the s 133(1) moratorium never attached to them, that the applicants required no leave to recover them, and that the moratorium presents no obstacle to the relief sought in respect of those vehicles.

[35] The position of the 36 ABSA instalment-sale vehicles requires separate consideration because the ABSA cancellation took effect on 30 April 2026, after the business rescue resolution was filed on 28 April 2026. The respondent argued that, because the moratorium was by then operative, the cancellation was prohibited. That argument cannot succeed. As I have held, cancellation is neither a "legal proceeding" nor "enforcement action", and the moratorium does not prohibit the exercise of a contractual right to cancel for breach. The respondent's breach of the ABSA agreements predated the moratorium, the right to cancel had accrued, and the moratorium did not freeze ABSA's contractual rights or convert an unlawful retention into a lawful one. Once the ABSA agreements were lawfully cancelled - whether on 30 April 2026 or, on ABSA's case, with effect from that date pursuant to a notice already given - the respondent's *jus possidendi* in respect of the ABSA vehicles likewise fell away.

[36] In any event, the business rescue proceedings did not commence prior to service of the proceedings on the applicants. This only occurred on 7 May 2026, after the ABSA agreements had been cancelled.

When are business rescue proceedings deemed to commence

[37] The respondent's argument presupposes that business rescue proceedings had already commenced before the applicants sought repossession. The question therefore arises when business rescue proceedings begin for purposes of sections 132 and 133 of the Act. Section 132(1)(b) provides that business rescue proceedings commence when "an affected person applies to the court for an order placing the company under supervision in terms of section 131(1)." The section draws a deliberate distinction between the commencement of business

rescue proceedings and the subsequent placing of a company under supervision. The former occurs upon the making of the application; the latter occurs only if the court ultimately grants the order. The statutory moratorium in section 133(1) is linked to the former event rather than the latter.

[38] The Supreme Court of Appeal has, however, made clear that a section 131 application is not "made" merely because it has been issued by the Registrar. In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*,[23] the Court emphasised the importance of compliance with section 131(2), which requires service upon the company and notification of affected persons. Similarly, in *Panamo Properties (Pty) Ltd v Nel NNO and Others*,[24] the Court recognised that the statutory consequences of a section 131 application arise only once a properly constituted application has been brought before the court in accordance with the Act and the Rules. The moratorium therefore does not arise upon the mere issue of an application; it arises once a properly constituted section 131 application has been launched and served in accordance with the statutory requirements.

[39] Nevertheless, out of an abundance of caution, however, I consider it prudent to grant the applicants leave under s 133(1)(b) to the extent that such leave may be necessary in respect of those vehicles. There is good cause for such leave; the respondent has no lawful claim to the vehicles, the indebtedness is large, and the respondent's continued retention and use of the vehicles will necessarily cause their further deterioration and depreciation, as well as subject them to the risk of theft where the applicant has no control over the payment of the insurance premiums owing in respect of these vehicles- some of which have not been insured at all.

The requisites for final relief

[40] Final relief on motion requires the applicants to establish a clear right, an injury actually committed or reasonably apprehended, and the absence of any other satisfactory remedy.[25] The applicants' entitlement may equally be understood as

---

[23] 2013 (6) SA 141 (SCA)
[24] 2015 (5) SA 63 (SCA)
[25] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

a *rei vindicatio* (ABSA and MFS, as owners under the instalment sale agreements, being entitled to possession of their property upon cancellation) and, in respect of the ceded Route Quest rights, as the enforcement of the rights vesting in ABSA as cessionary. On either footing the requisites are met.

[41] Following the decision of the Supreme Court of Appeal in *Cloete Murray*, the cancellation of an instalment sale agreement and the assertion of ownership rights flowing therefrom must be distinguished from the enforcement of contractual obligations. Once the agreement has been lawfully cancelled, the credit provider no longer seeks performance of the contract but the return of property of which it remains the owner. A claim for repossession is therefore fundamentally vindicatory rather than contractual in character. Whilst proceedings instituted to obtain such relief constitute "legal proceedings" for purposes of s 133(1), they do not comfortably fall within the notion of "enforcement action" as used in the section, which is directed principally at the enforcement of obligations against the company rather than the recovery of property belonging to another.

[42] Clear right: The applicants are the owners, alternatively the holders of the relevant real and personal rights, in respect of the vehicles. Under an instalment sale agreement ownership remains with the credit grantor until the last instalment is paid; upon cancellation for breach the grantor is entitled to the return of its property. The respondent's admissions - that it concluded the agreements, that it is in arrears, that it received the cancellations, and that it remains in possession - establish the applicants' clear right. The respondent's attempts to dispute the quantum of the indebtedness by reference to unspecified reconciliations do not detract from the existence of the right to possession, which does not depend on the precise quantum owing.

[43] Injury: The continued retention and operational use of depreciating, mobile and partly uninsured assets by a company in financial distress constitutes an ongoing injury to the applicants' proprietary interests. The respondent's tendered undertakings do not neutralise that injury, for reasons set out below.

[44] No alternative satisfactory remedy: The respondent suggested that an expedited business rescue, or a claim in due course, constitutes an adequate alternative remedy; it does not. A money claim against an admittedly distressed company, in which the applicants are the dominant creditors and have undertaken to vote against any plan deploying their assets, is no substitute for the recovery of the applicants' own property. The business rescue process is not a remedy for the applicants at all; it is the very mechanism by which the respondent seeks to retain the use of assets to which it has no lawful claim.

No genuine dispute of fact

[45] Where final relief is sought on motion, it may be granted if the facts averred by the applicant and admitted by the respondent, together with the facts alleged by the respondent, justify the order, unless the respondent's version is so far-fetched or clearly untenable that the court is justified in rejecting it on the papers.[26] A respondent who seeks to raise a genuine dispute of fact must do more than offer a bare denial; it must engage with the facts and demonstrate that it has a real, *bona fide* and substantial dispute.[27]

[46] Measured against that standard, the respondent has raised no genuine dispute that defeats final relief; its denials of the quantum of indebtedness are unsupported by any reconciliation, schedule or competing calculation; they are precisely the kind of bald and evasive denials that *Wightman*[28] holds may be rejected on the papers.

[47] The respondent admits the agreements, the arrears, the cancellations and its continued possession; far from contradicting the applicants' case, the respondent's own conduct corroborates it. Indeed, an acknowledgement of debt in the sum of R34 243 590, signed on 24 April 2025, is annexed to the replying affidavit and is not satisfactorily explained.[29] On the *Plascon-Evans* approach,

[26] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (*Plascon-Evans*) at 634E-635C.
[27] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) (*Wightman*) at para 13.
[28] *supra*
[29] Replying affidavit and annexure RA2 (acknowledgement of debt dated 24 April 2025 in the sum of R34 243 590).

the applicants' entitlement to the vehicles is established and there is no genuine dispute requiring the matter to go to trial or to oral evidence.

The tendered undertakings and the balance of convenience

[48] The respondent tendered a suite of undertakings, including that it would not sell, transfer, encumber, deregister, refinance, dispose of, pledge, alienate, remove from South Africa or surrender any vehicle without consent or a court order; that it would preserve and maintain the vehicles; that it would deliver a verified asset schedule within 48 hours; that it would furnish GPS tracking access or weekly location reports; that it would permit inspections on 24 hours' notice; that it would maintain comprehensive insurance with the applicants noted as first loss payees; and that it would engage within 48 hours on an adequate-protection payment.

[49] These undertakings, though carefully formulated, do not avail the respondent. Once it is held that the respondent has no lawful claim to the vehicles and that the moratorium does not protect them, the question is not how the company's continued possession might be made more palatable to the owners, but whether the owners are entitled to their property. They are; a defendant in possession of another's property cannot defeat the owner's *rei vindicatio* by undertaking to safeguard the applicants' property.

[50] Moreover, the undertakings are in material respects hollow; the offer of "adequate protection", names no amount and commits the respondent to nothing more than an undertaking to *engage* on the subject; the insurance undertaking is undermined by the uncontradicted evidence that several of the vehicles are presently uninsured; and the undertaking not to remove the vehicles from South Africa is of limited comfort given that the respondent's cross-border operations are said to have ceased in May 2025.

[51] However, I do not trivialise the human cost should the rescue fail and it cannot be disputed that without the use of the vehicles the rescue will inevitably fail. The livelihoods of more than 130 employees are a matter of serious concern, and I am alive to the fact that I should be slow to make an order that may imperil them.

[52] But the balance of convenience does not arise as an independent discretionary bar where final relief has been established as of right. The applicants are the owners of the vehicles; their proprietary entitlement cannot be displaced by the consideration that the respondent's business, and its employees, depend on the continued use of assets that belong to others. To hold otherwise would be to permit a distressed company to expropriate its financiers' security for the duration of a rescue, which is precisely the outcome that *Timasani* holds the moratorium was never intended to produce. This is particularly so where there are no reasonable prospects of rescue and the liquidation of the respondent seems inevitable. Thus whether or not the respondent is entitled to utilise the applicants' fleet of vehicles in business rescue efforts, the inevitable consequence will be that the respondent will be wound up and the 130 employees will lose their jobs.

No reasonable prospect of rescue

[53] Although it is not strictly necessary to decide the point, the weakness of the respondent's rescue reinforces the conclusions above. Business rescue is available only where there is a reasonable prospect of rescuing the company.[30] On the papers before me there is no business rescue practitioner nominated; the cross-border operations on which the haulage business depended ceased in May 2025; there is no committed client base or funder identified; and the applicants, who are the dominant creditors, have committed to voting against any plan that deploys their assets. In those circumstances the prospect of a successful rescue - the very premise of the moratorium on which the respondent relies - is, at best, remote.[31]

The conditional counter-application

[54] The respondent's conditional counter-application seeks a stay or postponement of this application pending the determination of the business rescue, on the protective terms already canvassed. A stay would serve no legitimate purpose. Having held that the vehicles are not lawfully in the respondent's possession and that the applicants are entitled to their return, a stay would do no more than

---

[30] *Panamo Properties (Pty) Ltd and Another v Nel and Others NNO* 2015 (5) SA 63 (SCA) at paras 27-28.

[31] Sections 7(k), 128(1)(b) and 131(4)(a) of the Act.

perpetuate the respondent's unlawful retention of the applicants' property under judicial sanction.

[55] Insofar as the counter-application invites the court to fashion an equitable interim regime preserving the respondent's use of the vehicles, it must be refused for the further reason that this court does not exercise a unbridled equitable jurisdiction to withhold from an owner the relief to which it is entitled in law. As the Supreme Court of Appeal observed in *Clipsal*, [32] the court does not have a general discretion to refuse to enforce a clear right on grounds of abstract fairness. In our law there is no system of equity that would empower a court to disregard the substantive rights of an owner of property, [33] save for in highly circumscribed circumstances.

[56] The respondent's legitimate interests, and those of its practitioner once appointed, are protected by the express mechanisms of the Act - the practitioner may, where property is in fact lawfully held and required for the rescue, invoke the protections of the moratorium and seek the consent or leave the Act contemplates.[34] But those mechanisms do not arise where, as here, the company has no lawful claim to the property at all.

Postscript: The reasons why this court does not follow Capitec

[57] I have already said that I am bound by *Timasani*. But as a postscript, I provide the reasons why I would, in any event, not have followed *Capitec*.[35] In that matter Capitec sought, by *rei vindicatio*, the return of a motor vehicle from a company in business rescue, having sought neither the practitioner's consent nor the leave of the court. The court dismissed the application, holding that the s 133(1) moratorium applied and that, in the absence of consent or leave, the proceeding could not be entertained. In reaching that conclusion the court adopted the broad, "criminal-unlawfulness" construction of "lawfully in its possession" and found that possession is lawful unless acquired by force, stealth, fraud, theft or robbery, and

---

[32] *Clipsal Australia (Pty) Ltd v GAP Distributors and Others* 2010 (2) SA 289 (SCA) (*Clipsal*) at para 22.
[33] *Kent v Transvaalsche Bank* 1907 TS 765 at 773–774.
[34] Section 134(3) of the Act.
[35] *Capitec* supra.

a claimant who would displace the moratorium must establish the crime that renders the company's possession unlawful.[36]

[58] There can be little doubt that the reasoning in *Capitec* is attractive and intellectually sound, with its rationale based squarely on a purposive interpretation of the phrase "lawful possession" with reference to the explicit purpose of Chapter 6 of the Act.

[59] The moratorium is enacted for the benefit of the company and its practitioner; it is temporary; and the Act establishes a mechanism through which competing stakeholder interests may be weighed during the rescue rather than at the threshold. The broader construction also avoids the apparent anomaly that a creditor might unilaterally strip a company of the moratorium's protection by simply dispatching a notice of cancellation.

[60] Section 7(k) records that a purpose 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 all relevant stakeholders, and the interpretive injunctions of *Endumeni*[37] and *Chetty*[38] direct a court, where a provision is reasonably capable of more than one meaning, to prefer the meaning that best promotes the apparent purpose of the legislation. The academic writing relied upon in *Capitec* makes the valid point that continued possession of leased premises, hired equipment or vehicles may, and indeed, would generally be indispensable to a successful rescue, so that permitting repossession upon cancellation could defeat the very breathing space the moratorium is designed to secure.[39]

[61] However, there are three reasons that fortify my conclusion that I should not follow *Capitec*.

---

[36] *Capitec* paras 23-27.

[37] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

[38] *Chetty t/a Nationwide Electrical v Hart and Another NNO* 2015 (6) SA 424 (SCA) 437E.

[39] MF Cassim "The effect of the moratorium on property owners during business rescue" (2017) 29 *SA Merc LJ* 419 at 422-423.

a. First, the "identify-a-crime" test imposes upon a *bona fide* owner a burden that *JVJ Logistics* itself rejected as too onerous. This is because an owner whose validly cancelled contract leaves the company with no right to possess will seldom be able to allege theft, fraud or robbery, yet on the broader construction it would be denied recovery of its own property unless it could do so.

b. Second, the broader construction tends to collapse the textual distinction that s 133(1) itself draws between property "belonging to" the company and property "lawfully in its possession" - a distinction that *Timasani* treated as deliberate and as serving to *limit* the moratorium's reach.

c. Third, the reasoning in *Cloete Murray* that cancellation is the antithesis of enforcement favours the owner and is not against protecting ownership; if the creditor's cancellation is itself lawful and lies outside the moratorium, then the company's post-cancellation retention of the property is, on *Timasani*'s logic, no longer lawful possession, and a proceeding to recover it is not struck by s 133(1).

[62] I am, of course, alive to the policy considerations that motivated the court in *Capitec*, and to the real risk that an unduly mechanical application of the narrower construction could, in a different case, frustrate a viable rescue by permitting the precipitate withdrawal of assets genuinely required to keep a company trading. But the answer to that concern lies in the hands of the Legislature, or of the Supreme Court of Appeal, and not in the adoption by a court of first instance of a construction that the Supreme Court of Appeal has already rejected.

[63] The principal answer offered in *Capitec* - that the company suffers no prejudice because the owner may always seek consent or leave - is, with respect, an incomplete answer to the question of construction as it presupposes that the moratorium *applies*, whereas *Timasani* determines that, in respect of property not lawfully possessed, it does not apply at all. The question is not whether the consent-and-leave machinery is benign, but whether it is engaged; it need not be engaged where an owner asserts its rights of ownership.

[64] For these reasons, in so far as *Capitec* holds that property validly removed from a company's lawful possession by a pre-rescue cancellation nonetheless remains "lawfully in its possession" unless the owner can identify a crime, I respectfully decline to follow it. I am, nevertheless bound by *Timasani*, and I apply it. It follows that the respondent's reliance on *Capitec* cannot avail it, and that the moratorium presents no bar to the relief sought.

Costs

[65] The applicants sought costs on the attorney-and-client scale. Costs ordinarily follow the result, and the scale is a matter for the court's discretion. Several of the agreements provide for costs on the attorney-and-client scale. The applicants argue that respondent's persistence in retaining the applicants' property, while raising bare denials of quantum and tendering undertakings of limited substance, justifies a punitive order.

[66] In my view, however, the somewhat novel and genuinely arguable nature of the point raised in respect of the ABSA vehicles, and the conflicting authority in *Capitec* must be taken into account; particularly as Capitec is authority directly in point favouring the respondent's stance that is now headed to the Supreme Court of Appeal. I thus do not consider that a costs order on the attorney and client scale is warranted. Costs on scale C are appropriate and I intend to order such costs.

Order

[67] In the result, I make the following order:

1. The forms and service provided for in the rules are dispensed with and the application is heard as one of urgency in terms of Uniform Rule 6(12).

2. To the extent necessary, the applicants are granted leave in terms of s 133(1)(b) of the Companies Act 71 of 2008 to commence and proceed with this application.

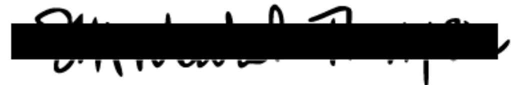
3. The respondent is directed, within ten (10) days of the date of this order, to deliver to the first applicant the vehicles described in Annexures A and

B to the notice of motion, and to deliver to the second applicant the vehicles described in Annexure C to the notice of motion.

4. Failing delivery as aforesaid, the Sheriff of this Court, or his or her lawfully appointed deputy, is authorised and directed to take possession of the said vehicles and to deliver them to the first and second applicants respectively.

5. The respondent's conditional counter-application is dismissed.

6. The respondent is to pay the costs of the application and of the counter-application on Scale C.



WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances:

For the applicants: Mr M De Oliveira
Instructed by: Lowndes Dlamini Attorneys (Ms A Wright)
For the respondent: Mr DB Maritz
Instructed by: Heckroodt & Associates, Pretoria

Date of hearing: 2 June 2026
Date of judgment: 8 June 2026