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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 328/2025

In the matter between:

CAPITEC BANK LIMITED **APPELLANT**

and

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

Neutral citation: *Capitec v Ubuntu Family Health Centre Grayston (Pty) Ltd* (328/2025) [2026] ZASCA 123 (23 September 2026)

Coram: KATHREE-SETILOANE, NORMAN, PETSE and DLODLO JJA and MOOKI AJA

Heard: 28 August 2026

Delivered: 23 September 2026

Summary: Company law – general moratorium in s 133 of the Companies Act 71 of 2008 (the Act) – no application to vindicatory proceedings – for return of property – in unlawful possession of a company in business rescue.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Van der Walt AJ, sitting as court of first instance):

1 The appeal is upheld with costs.

2 Paragraph 1 of the order of the high court is set aside and replaced with the following order:

'1. The respondent is ordered to forthwith deliver to the applicant a 2020 Porche 911 Carrera S Coupe motor vehicle with chassis number W[...] and engine number D[...].'

JUDGMENT

Kathree-Setiloane JA (Norman, Petse and Dlodlo JJA and Mooki AJA concurring)

[1] This appeal turns on whether the moratorium in s 133 of the Companies Act 71 of 2008 (the Act) [1] extends to vindicatory proceedings. The dispute arose when

[1] Section 133 of the Act provides:
'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) in criminal proceedings against the company or any of its directors or officers;
(e) in proceedings concerning any property or right over which the company exercises the powers of a trustee; or

Capitec Bank Ltd (Capitec), having financed a motor vehicle, sought its recovery from Ubuntu Family Health Centre Grayston (Pty) Ltd (Ubuntu), which remained in its possession. Van der Walt AJ, sitting in the Gauteng Division of the High Court, Pretoria (the high court), held that the general moratorium in s 133 of the Act did indeed apply.

[2] The respondent, Ubuntu, concluded an instalment sale agreement with the appellant, Capitec, in terms of which the latter agreed to advance R2 115 000.00 to Ubuntu to finance the purchase of a 2020 Porsche 911 Carrera S motor vehicle (the Porsche) for a purchase price of R2 350 000.00 (the agreement). In terms of the agreement, Ubuntu was required to repay the principal debt, together with interest calculated over a period of 60 months, in 59 equal monthly instalments of R31 638.68. In addition to the monthly instalments, Ubuntu would pay R634 500.00 on or before the last month of the 60-month period. Ownership of the vehicle remained vested in Capitec until Ubuntu paid all amounts due to Capitec in terms of the agreement.

[3] Capitec duly performed in terms of the agreement and Ubuntu obtained possession of the vehicle. It, however, breached the agreement by defaulting on its payment obligations. On 26 October 2023, Capitec sent a letter of demand to Ubuntu which indicated that failure to settle the arrears within seven days would result in cancellation of the agreement. In response, Ubuntu undertook to settle the arrears by

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(f) in proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

13h00 on Friday, 17 November 2023, but failed to do so. On that date, Capitec issued a written notice to Ubuntu cancelling the agreement with immediate effect and reserving its right to recover all outstanding amounts.

[4] Later that day, Capitec's attorney, Mr Dwaine Brooks (Mr Brooks) accompanied by representatives of Capitec, went to Ubuntu's premises with the cancellation notice to enforce termination of the agreement and to take possession of the Porsche. Ubuntu's director, Mr Ridwaan Adams (Mr Adams), who had made a payment of R100 000.00 as payment towards the arrears, refused to allow them to remove the Porsche. He also declined to disclose its whereabouts. After a discussion with Mr Adams, Capitec granted Ubuntu an indulgence until Tuesday, 21 November 2023, to raise funds and present a settlement proposal.

[5] At Mr Adams's request, a meeting was convened at Capitec's offices on 21 November 2023 to discuss settlement of Ubuntu's indebtedness under the agreement. At the meeting, Mr Adams proposed to pay R500 000.00 by 28 November 2023 to settle the arrears, with further discussions to follow regarding settlement of the remaining debt over six months. Ubuntu also agreed to arrange a viewing of the Porsche. None of these undertakings were fulfilled.

[6] On 1 December 2023, Capitec's appointed agent, WH Auctioneers, went to Ubuntu's premises to take possession of the Porsche. Mr Adams refused access, insisting that a court order was required. Mr Brooks subsequently sent a letter to Ubuntu and Mr Adams recording the events of 1 December 2023 and advising that, unless unrestricted access was granted by 16h00 that day, Capitec would approach the high court on an urgent basis for the return of the Porsche. Ubuntu failed to furnish a response, and access was consequently denied.

[7] On 4 December 2023, Capitec approached the high court for, inter alia, the return of the Porsche. The high court dismissed the application but ordered Ubuntu to pay the costs on the attorney and client scale. The appeal is before this Court with leave of the high court. It is limited to the dismissal of the application.

[8] On 29 November 2023, shortly before the urgent application was launched in the high court, Ubuntu adopted a resolution to commence business rescue proceedings and appoint a business rescue practitioner. Capitec was only notified of this four days after launching its urgent application. The urgent application in the high court was heard on 24 April 2024. A month later, on 24 May 2024, Ubuntu was liquidated. The high court handed down judgment on 10 February 2025.

[9] The high court found that Ubuntu was in lawful possession of the Porsche and that the moratorium in s 133 of the Act applied. On the meaning of the term 'lawfully in possession' in s 133 of the Act, the high court held that possession will be unlawful for purposes of s 133 when it is acquired 'by force or stealth' or is 'obtained or maintained through fraud, theft or robbery'. In other words, there must be 'criminal unlawfulness' as opposed to 'civil unlawfulness', i.e. when the possessor has no right vis-à-vis the claimant that justifies its possession.

[10] The high court considered this to be the preferred interpretation of the term 'unlawfully in possession' in s 133 of the Act as, according to it, it 'furthers the objective of business rescue proceedings'. It held 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 renders it so. Capitec has not done so'. The high court therefore found that the Porsche was lawfully in Ubuntu's possession and dismissed Capitec's application for its return.

It granted Capitec leave to appeal its order to this Court. Ubuntu abides the decision of this Court on appeal.

[11] Section 133 of the Act places a moratorium on legal proceedings against a company that is in business rescue. Once business rescue proceedings commence, no one may commence or proceed with legal proceedings including enforcement action against a company or against property it owns or lawfully possesses, except with the written consent of the business rescue practitioner, and failing that, with the leave of the court. Whether s 133 of the Act applies to the *rei vindication* was determined by this Court in *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* (*Timasani*).[2] In relation to the interpretation of the phrase 'property belonging to the company or unlawfully in its possession' in s 133(1), this Court stated:

'The plain language of the words, 'no legal proceedings in relation to any property belonging to the company or lawfully in its possession may be commenced or proceeded with', limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue, or property unlawfully possessed by the company.[3] Property 'belonging to the company' in s 133(1), sensibly construed, can only mean property belonging in a legally valid sense, such as property owned by the company,[4] which in s 133(1) is expressly distinguished from property 'lawfully in its possession'. Common sense dictates that it could never have been intended that the restructuring of the affairs of a company during business rescue should prevent recovery of property not belonging to it or unlawfully in its possession.[5]

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[2] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* [2021] ZASCA 43; [2021] 3 All SA 843 (SCA) paras 26-34.
[3] *Timasani* at para 31, citing *Kythera Court v Le Rendez-Vous Café and Another* 2016 (6) SA 63 (GJ) para 9 at fn 17.
[4] *Timasani* at para 31, citing *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC) para 30 at fn 18 (*Southern Value Consortium*).
[5] *Timasani* para 31, citing *Southern Value Consortium* para 35 at fn 19.

[12] This Court found contextual support for its interpretation of s 133 in s 134(1)(*c*) of the Act.[6] The latter provision prohibits the exercise of any rights 'in respect of property in the lawful possession of the company during business rescue proceedings, irrespective of whether the property is owned by the company, unless the business rescue practitioner consents in writing.[7] It held that s 134(1)(*c*) 'does not prohibit the exercise of a right in relation to property in the *unlawful* possession of the company'.[8]

[13] The Court in *Timasani* furthermore held that 'no purpose connected to the process of business rescue warrants the company under business rescue being protected against proceedings to recover property that it neither owns, nor lawfully possesses'.[9] It did not confine the meaning of 'lawfully in possession' in ss 133 and 134(1)(*c*) of the Act to 'criminal unlawfulness,' as the high court did in the judgment under appeal. It reaffirmed its holding in *Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank*[10] that, although the moratorium in s 133(1) of the Act affords a company breathing space, the legislature did not intend to interfere with the contractual rights and obligations of parties to an agreement. *Cloete Murray*

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[6] *Timasani* at para 32.
[7] Section 134 provides:
'Protection of property interests
(1) Subject to subsections (2) and (3), during a company's business rescue proceedings-
(a) the company may dispose, or agree to dispose, of property only-
(i) in the ordinary course of its business;
(ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner; or
(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;
(b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and
(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.'
[8] *Timasani* at para 32
[9] *Timasani* at para 29.
[10] *Timasani* at para 34; *Cloete Murray and Another v FirstRand Bank t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 paras 9, 14 and 15 (*Cloete Murray*).

concerned whether a creditor's cancellation of a sale agreement rendered unlawful a company in business rescue's continued possession of the goods described in the agreement. The Court held that it did because the cancellation of an agreement does not constitute 'legal proceedings' or 'enforcement action' within the meaning of s 133 of the Act.[11]

[14] In *Timasani,* this Court also confirmed the holding of the high court in *Kythera Court v Le Rendez-Vous Café CC* (*Kythera Court*) that: 'vindicatory proceedings or proceedings for the repossession or attachment of property in the unlawful possession of a company in business rescue would be permissible'.[12] The proceedings in *Kythera Court* concerned the ejectment of a company in business rescue which, following the cancellation of its lease agreement, was an unlawful occupier.[13]

[15] It follows that continued possession of property belonging to persons or entities other than the company in business rescue becomes unlawful for purposes of s 133 of the Act once the right to possession has been validly cancelled. The authorities referenced above, predate the judgment of the high court under appeal. They make clear that the moratorium in s 133 does not extend to vindicatory proceedings.[14] By virtue of the doctrine of precedent, the high court was bound by these decisions.

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[11] *Cloete Murray* at paras 31 and 33.
[12] *Timasani* at para 34; *Kythera Court v Le Rendez-Vous Café and Another* 2016 (6) SA 63 (GJ) para 9.
[13] *Timasani* at para 34; *Kythera Court* at para 1.
[14] See also *Madodza (Pty) Ltd v Absa Bank Limited and Others* [2012] ZAGPPHC 165; *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd and Others* 2016 (6) SA 448 (KZD); *Southern Value Consortium v Tresso Trading 102 (Pty) Ltd and Others* 2016 (6) SA 501 (WCC); *Thallos CC t/a Alfa Tool and Equipment (in business rescue) v Toyota Financial Services (South Africa) Ltd* (7035/2019) [2021] Limpopo Division, Polokwane (2 June 2021)(*Thallos*); *Clark NO v Sibanye Gold Ltd* 2021 JDR 0765 (GJ), *Actom (Pty) Ltd v Acton Repair Services (Pty) Ltd and Another* 2022 JDR 1084 (GJ); *BAIC Automobile SA (Proprietary) Limited v Samaritan Car Cover*

[16] It is common cause that, owing to Ubuntu's breach, the agreement was validly cancelled on 17 November 2023; prior to the commencement of business rescue. Ubuntu was thus in unlawful possession of the Porsche, entitling Capitec to institute vindicatory proceedings for its return. The consent of the business rescue practitioner was not required to launch this application,[15] nor was it necessary to join the practitioner as a party.[16] In any event, the business rescue practitioner was aware of the urgent application but elected to remain supine. The high court accordingly erred in dismissing Capitec's application for recovery of the Porsche.

[17] On 25 April 2025, Ubuntu gave notice to abide this Court's decision in the appeal. It did not abandon or concede the judgment and order under appeal, necessitating Capitec's approach to this Court to have the order set aside. In these circumstances, costs must follow the result.[17]

[18] In the result, the following order is made:

1 The appeal is upheld with costs.

2 Paragraph 1 of the order of the high court is set aside and replaced with the following order:

'1. The respondent is ordered to forthwith deliver to the applicant a 2020 Porche 911 Carrera S Coupe motor vehicle with chassis number W[...] and engine number D[...].'

(Proprietary) Limited and Another 2024 JDR 0066 (GJ); *ABSA Bank Ltd and Another v Tube-Mech Services (Pty) Ltd* 2026 JDR 2622 (GJ).

[15] *Chetty t/a Nationwide Electrical v Hart and Another* NNO [2015] ZASCA 112; 2015 (6) SA 424 (SCA) para 43.

[16] *Thallos* at paras 37, 38 and 40.

[17] *Kobusch and Others v Whitehead* [2025] ZASCA 24; 2025 (3) SA 403 (SCA) para 24.

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F KATHREE-SETILOANE

JUDGE OF APPEAL

Appearances

For appellant:	WG Pretorius
Instructed by:	Brooks & Braatvedt Inc. Attorneys, Johannesburg
	Honey & Partners Incorporated, Bloemfontein
For respondent:	No Appearance
Instructed by:	DLBM Incorporated Attorneys, Pretoria.