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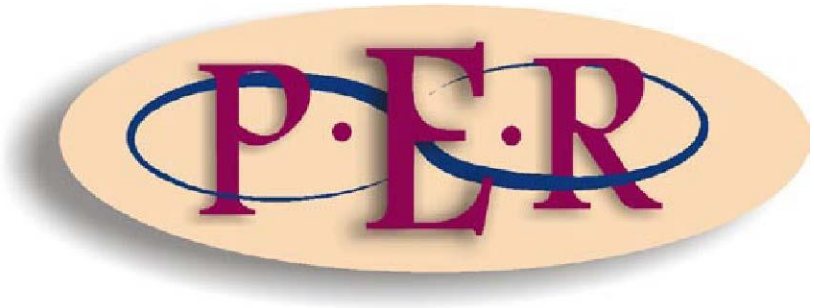

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CLOETE MURRAY AND ANOTHER v FIRSTRAND BANK LTD T/A WESBANK [2015] ZASCA 39

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1 Interpretation of section 133 of the *Companies Act* of 2008

1.1 Introduction

The interpretation of section 133(1) of the *Companies Act* 71 of 2008 (hereafter the Act) was recently in the spotlight when the Supreme Court of Appeal decided a matter between Cloete Murray (First Appellant), Mabutho Louis Mhlongo (Second Appellant) and the Respondent FirstRand Bank Ltd t/a Wesbank (hereafter Cloete). The matter once again underlined the critical role language and interpretation play when it comes to the interpretation of statutes. The court reiterated the fact that when interpreting statutes the language of the provision itself must be used as the point of departure, together with reading the said statute in context and having a regard to the purpose of the provision and the background to the preparation and the production of the document. The court also specifically stressed that section 39(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) compels an interpretation of legislative provisions in the light of the values enshrined in the Bill of Rights, but this can be done only in a manner that does not unduly strain the language of the statute. The aim of the following discussion is thus to apply these principles of interpretation in practice.

1.2 The facts

On 22 July 2010 the Respondent, FirstRand Bank Ltd t/a Wesbank, concluded a Master Instalment Sale Agreement (hereafter MISA) with Skyline Crane Hire (Pty) Ltd (hereafter Skyline). According to this agreement, Wesbank sold and delivered movable

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goods to Skyline, with Wesbank retaining ownership in the goods until the purchase price had been paid in full.[1]

On 29 May 2012 the board of Skyline voluntarily agreed to place Skyline under business rescue in terms of the provisions of section 129 of the Act, and this was filed on the next day, 30 May, with the Companies and Intellectual Property Commission in terms of section 132(1)(a)(i) of the Act, with 30 May the date on which the business rescue proceedings started.[2] At this time Skyline had already fallen behind with regard to its monthly payments in terms of the MISA.

On the same date, 30 May 2012, Wesbank sent a letter to Skyline, cancelling the MISA due to Skyline's failure to pay the monthly instalments in terms of the agreement. The letter reached Skyline three days later on 3 June 2012.[3] In the letter it was stated that the agreement was cancelled with immediate effect, and that Wesbank reserved the right to:

(a) repossess the goods, value and sell same,
(b) to credit the proceeds to the relevant accounts and
(c) to claim damages.[4]

An important incident occurred during July 2012 while the business rescue proceedings were still in progress, when the business rescue practitioner (hereafter called the practitioner) consented to Wesbank repossessing and selling the goods as stated in the MISA. The proceeds from the sale of these goods were sufficient to discharge the debt owed to Wesbank, as well as leaving a surplus of R800 000 which Wesbank retained, apparently as set-off in respect of other amounts allegedly owed to it by Skyline.[5]

The practitioner subsequently obtained an order from the North Gauteng High Court on 17 July 2012 which placed Skyline in provisional liquidation and the final order of

1 *Cloete Murray v FirstRand Bank Ltd t/a Wesbank* [2015 ZASCA 39] (26 March 2015) (hereafter *Cloete*) para 2.
2 *Cloete* para 3.
3 *Cloete* para 4.
4 *Cloete* para 5.
5 *Cloete* para 6.

liquidation was granted on 10 September 2012. The appellants were then appointed by the Master of the High Court as the co-liquidators (hereafter called the liquidators) of Skyline.[6]

The liquidators then approached the North Gauteng High Court and requested the court to declare Wesbank's cancellation of the MISA of no force or effect since it was contrary to the provisions of section 133(1) of the Act. The liquidators were of the opinion that the full proceeds of the sale should be paid over to them to be dealt with in terms of sections 83 and 84 of the *Insolvency Act* 24 of 1936 (hereafter the *Insolvency Act*), which state that the claims of creditors with regard to instalment sale transactions are to be dealt with at sequestration or liquidation.[7]

Wesbank argued that they had acted lawfully, and specifically denied that section 133(1) of the Act precluded them from cancelling the MISA and dealing with the goods in the manner that they had done.[8]

The liquidators claimed that the MISA had to be administered in terms of the provisions of sections 83 and 84 of the *Insolvency Act*, which meant that Wesbank had to pay over the full proceeds of the sale of the goods to them.[9] Wesbank opposed this application and the application was subsequently dismissed by the North Gauteng High Court, but leave to appeal to the SCA was granted.[10]

2 The aim and purpose of business rescue proceedings

The SCA first considered the purpose of the Act when it comes to the provision of the efficient rescue and recovery of financially distressed companies. The court stated that section 7(k) of the Act indicates that this process should be done in a manner that balances the rights and interests of the relevant stakeholders and that section 128(1)(b) defines "business rescue" as "proceedings to facilitate the rehabilitation of a company that is financially distressed". These proceedings provide for the temporary

6 *Cloete* para 7.
7 *Cloete* para 8.
8 *Cloete* para 9.
9 *Cloete* para 10.
10 Cloete para 11.

supervision of the company as well as a temporary moratorium on the rights of the claimants against the company or in respect of property of their possessions. The section also refers to the development and implementation of a plan of rescue for the business. This temporary moratorium is explained in section 128(1)(b)(ii) of the Act.

The court acceded to the fact that generally a moratorium on legal proceedings against a company under business rescue is of vital importance since it provides essential breathing space or respite, at least periodically, to enable the company (in conjunction with the practitioner) to restructure its affairs, in order to formulate a business rescue plan designed to achieve the purpose of the process. Furthermore, the court also referred to sections 134(1)(c) and 136(2) of the Act. These sections state that during business rescue proceedings no person may exercise any right in respect of any property in the lawful possession of the company, unless the practitioner consents to this in writing. Section 136(2) makes it clear that a contract that has been concluded prior to the commencement of the business rescue proceedings is not suspended or cancelled by virtue of the business rescue. However, the practitioner may suspend, or apply to the court, to cancel any obligation of the company under the contract.[11]

3 The role of the practitioner in business rescue practice

The importance of the role of the practitioner, who deals with business rescue proceedings, is clearly highlighted here. The Act endows the practitioner with a wide range of powers and duties, which includes full management control of the company in the place of the management and board of the business.[12] The practitioner is seen as an officer of the court during the business rescue process and has to report to the court in accordance with the applicable rules or orders made by the court (section 140(3)(a) of the Act).

This is placed into further context when one considers section 134(1)(c). This section grants the practitioner the power, the right (and the discretion, one could add) to consent to the exercising of any right in respect of any property in the lawful

11 *Cloete* para 14-15.
12 Rushworth 2010 *Acta Juridica* 392.

possession of the company during the business rescue proceedings, whether or not the property is owned by the company. According to this section, the practitioner and the court may grant such permission – which again demonstrates the extent of the power, discretion and responsibility the Act gives to practitioners involved in business rescue. In a sense, one can argue that it places the business rescue practitioner on a par with the court in certain aspects.[13]

4 The argument

The court then evaluated the submissions of each party and commented that the liquidators had clearly relied on section 133(1) of the Act in their notice of motion. In the latter they sought an order which would declare Wesbank's letter of cancellation as contrary to the provisions of section 133(1) of the Act and as such invalid. Their founding papers also claimed that the cancellation of the MISA constituted "enforcement action" as meant in section 133(1) of the Act and was, therefore, effected without the consent of the practitioner or the leave of the court.

They based the aforesaid submission on the determination of the proper meaning of section 133(1) of the Act, and particularly the interpretation of the meaning of the term "no legal proceeding, including enforcement action, against a company under business rescue may be commenced".

They did not, however, rely on section 134(1)(c) of the Act as the basis for their contention that Wesbank's letter of cancellation was invalid, until one court day before the hearing of the appeal. On this day they submitted supplementary heads that stated that the cancellation of the MISA by Wesbank was invalid in terms of sections 133 and/or 134(1)(c) of the *Companies Act.*

The court discussed the acceptability of such a submission. It noted that there was an issue of lateness, and more importantly, the liquidators had not relied on section 134 as their cause of action in their submission to the court below, and the parties had not had the opportunity to deal with it in their papers or in argument. In addition, it

13 *Cloete* para 21.

pointed out that the court *a quo* had not been called upon to deal with section 134(1)(c) as the foundation of the liquidators' case.

The liquidators relied on the decision in *Barkhuizen v Napier* 2007 5 SA 323 (CC) in which the well-known principle that the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings and its consideration on appeal involves no unfairness to the other party, a court of appeal may in the exercise of its discretion consider the same.

The court, however, felt that there were certain mitigating considerations to consider in this specific case, such as the following:

> (a) The section 134(1)(c) argument had not been raised in the pleadings before the court *a quo.*
> (b) The reliance on section 134(1)(c) did not merely raise a discreet point. On the contrary, it would involve the determination of factual issues.
> (c) The consideration on appeal of a cause of action based on section 134(1)(c) would prejudice Wesbank, since it had had no opportunity to address it in its pleadings, or to consider evidence which might counter it.
> (d) This would mean, if the principle was applied during the appeal, that the court had to consider a cause based on section 134(1)(c) which had not been pleaded and without the factual basis required for its determination.
>
> The above-mentioned considerations by the court led to their decision to reject the appellants' argument to consider section 134(1)(c) as part of the foundation of their case.

Interestingly enough, the court then explained that had the liquidators sought relief in terms of section 134(1)(c) on the papers before the court *a qu*o, the matter would have been decided on the facts as stated by Wesbank, which would inevitably have resulted in the dismissal of the application. However, the court determined that in its judgment based on the reasons provided, the liquidators were not permitted at this late stage to base their case on section 134(1)(c) of the Act.[14]

[14] *Cloete* para 16-27.

5 Interpretation of section 133(1) of the *Companies Act* 71 of 2008

The court then considered section 133(1) of the Act,[15] which formed the basis of the liquidators' argument. The liquidators felt that Wesbank's cancellation of the MISA constituted "enforcement action" as meant in the subsection, and absented the consent of the practitioner or the leave of the court and was thus of no force or effect. Wesbank claimed that its action did not constitute "enforcement action" as envisaged by section 133(1) of the Act, which meant that the consent of the practitioner or the leave of the court was not required to effect a lawful cancellation of the MISA.

The court remarked that an interpretation of section 133 of the Act was called for, with the crisp issue being whether the cancellation of section 133 of the MISA by Wesbank by means of its cancellation letter of 30 May 2012 constituted "enforcement action" as meant in section 133(1) of the Act.

The court pointed out that the *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) case (hereafter *Natal Joint Municipal Fund*) clearly showed the way as to the interpretation of a statute, which entails the following process:

(a) 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.
(b) Added to that, it must also be kept in mind that if the words of the relevant provision are unable to bear the meaning contended for, then that meaning is impermissible.
(c) Thirdly, section 39(2) of the *Constitution*, which compels an interpretation of legislative provisions in the light of the values enshrined in the Bill of Rights, applies only where the language of the statute is not unduly strained.

Section 133(1) places a moratorium on "legal proceeding, including enforcement action", and although the Act does not contain a definition of these terms, the court

[15] *Cloete* para 28-33.

explained that the term "legal proceeding" is well-known in South African legal idiom and usually refers to a lawsuit. The court thus agreed that the cancellation of an agreement does not constitute a "legal proceeding" as envisaged in section 133(1) of the Act.

Van Heerden and Boraine[16] had also dealt with this matter specifically with regard to the *National Credit Act* 34 of 2005 (hereafter the NCA). Section 88(3) of the NCA deals with the very same issue (the exercising and enforcement of credit providers' rights in many ways similar to section 133 of the *Companies Act*) and stipulates that a credit provider "may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement".[17]

The latter, rightly so, indicates that the interpretation of these concepts, just as is the case with the *Companies Act*, is of utmost importance. They indicate that the word "litigation", according to them, "usually refers to legal proceedings instituted in a court of law". They submit that the term "other judicial process" which section 88(3) of the NCA also refers to, deals with judicial proceedings that do not "formally occur in a court"[18]. One would think of a process such as arbitration, for example.

The court in the Cloete matter had in a similar vein and fashion to interpret the meaning of "legal proceeding", and specifically had to determine if the cancellation of an agreement can be considered as part of legal proceedings, since that formed a fundamental part of the argument of the appellants. The court decided that it cannot be seen as such.

Interestingly enough Van Heerden and Boraine[19] had also pointed out that the word "enforce" in the context of the NCA is not defined or clarified and that this could lead to some confusion. They state that the term "enforce" is a term that was introduced by the NCA but that the act omits to define the term, which, of course, causes uncertainty as to its exact meaning.[20] They contend that the ordinary meaning in legal

16 Van Heerden and Boraine 2009 *PELJ* 22-63.
17 Van Heerden and Boraine 2009 *PELJ* 22-63.
18 Van Heerden and Boraine 2009 *PELJ* 22-63
19 Van Heerden and Boraine 2009 *PELJ* 22-63.
20 Van Heerden and Boraine 2009 *PELJ* 22-63

parlance would be "enforcement of payment or of another obligation", but it could also, within the context of the NCA, refer to enforcement in the sense of the credit provider's using any of its remedies.[21]

In the Cloete matter the court had to address the interpretation of an "enforcement action" as well. It explained that the meaning of the phrase "enforcement action" had been correctly submitted by Wesbank and that "enforce" or "enforcement" usually refers to the enforcement of obligations. Like Van Heerden and Boraine,[22] the court also considered the context of the provision as found in the Act, and concluded that in the Act "enforcement action" is grouped under the generic phrase "legal proceeding", which, according to the court, seems to indicate that "enforcement action" is considered to be a species of "legal proceeding", or at least is meant to have its origin in legal proceedings. It pointed out that this is further strengthened by the fact that section 133(1) provides that no legal proceeding, including "enforcement action", may be commenced or proceeded with in any forum.[23]

The court then considered the context of the word "forum" as used in this Act. It indicated that the term "forum" is usually defined as a court or tribunal, and its usage in section 133(1) conveys the notion that "enforcement action" relates to formal proceedings ancillary to legal proceedings, such as the execution of court orders by means of writ of execution.[24]

The court explained that the concepts "enforcement" and "cancellation" are traditionally regarded as mutually exclusive, with the term "cancellation" referring to the termination of obligations between parties to an agreement. The liquidators, however, wanted to attribute a wider meaning to the expression "enforcement action" to include the cancellation of an agreement, but the court held that such an action would be doing violence to the wording of section 133(1) of the Act.

21 Otto *National Credit Act Explained*.
22 Van Heerden and Boraine 2009 *PELJ* 22-63.
23 *Cloete* para 32.
24 *Cloete* para 32.

The court stressed that cancellation is a unilateral act and does not occur in or by means of any process associated with any form or forum. It agreed with Wesbank that it did not make any linguistic sense to speak of "cancellation" as having been "commenced or proceeded with" in any forum, as envisaged by section 133(1). The context seemed to indicate that linguistically the phrase "enforcement action" in section 133(1) is unable to bear the meaning of the cancellation of an agreement and contextually it (enforcement action) must be understood to refer to enforcement by way of legal proceedings.[25]

The court held that the cancellation of the agreement by Wesbank was lawful (as it did not constitute a "legal proceeding") and indeed did not require the consent of the court or the practitioner, as such a cancellation did not constitute an "enforcement action" as stated in section 133(1) of the Act. It indicated that the terms "enforcement" and "cancellation" are mutually exclusive, and not interpreting them as such would be contrary to the language, context, provision and purpose of section 133(1) of the Act.[26]

The court stated that it regarded this to be the end of the matter, but that it felt obliged to deal with the remainder of the reasons for the decision.

6 Other relevant principles considered by the court[27]

Firstly, the court touched on the issue of a moratorium as envisaged in the Act, and granted that the intention of the moratorium is to cast the net of the application of the moratorium as wide as possible in order to include any conceivable type of action against the company. Consequently the liquidators could feel that it would result in an inevitable demise of business rescue proceedings if any creditor were allowed to cancel any contract with a company under business rescue, and, therefore, their argument that section 133(1) of the Act should be cast so wide as to include a moratorium against a creditor cancelling an agreement with a financially distressed company under business rescue was understandable but misplaced.

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25 *Cloete* para 33.
26 *Cloete* para 33-34.
27 *Cloete* para 34-43.

The court indicated that Chapter 6 of the Act offered sufficient safeguards in this regard and helped to prevent the result envisaged by the liquidators. The court specifically referred to section 136(2)(a), which enables the practitioner to prevent a creditor from instituting action and repossessing or attaching property in the company's possession. Section 154(2) of the Act is also relevant in this regard as it states that once a business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company prior to the beginning of the business rescue process, except to the extent permitted in the business rescue plan.

The liquidators also relied on the wording of section 128(1)(b)(ii) of the Act, in which a temporary moratorium on the rights of claimants against a company under business rescue or in respect of property in its possession is envisaged. It was submitted that this section envisages a moratorium on the rights of creditors such as the right to cancel an agreement. The court disagreed with this contention, since section 128 deals with the broad purpose of Chapter 6 of the Act, while section 133 has been specifically enacted to cater for the temporary moratorium. Because of this an interpretation of the specific provisions of section 133(1) was required, and not an "indirect" interpretation of section 133 by resorting to section 128(1)(b)(ii).

The liquidators even seemed to try their hand at legislating, the court remarked, rather than interpreting section 133(1) of the Act. They suggested that if the last part of section 133(1) was to be read with a comma after the word "commenced", the section was capable of being read as envisaging "... legal proceedings being proceeded with in any forum …" or "... enforcement action commenced with …", which would then support their contention. The court pointed out that the legislator could easily have adopted such an approach if it wanted to, but it remarked that the legislator chose not to do this and neither should the liquidators.

Added to this, the court indicated that if the liquidators' interpretation was accepted it would render section 136(2) of the Act superfluous. If, as the liquidators contended, section 133(1) already has the effect that the rights and obligations are frozen upon

the commencement of business rescue, there would then have been no need for the legislature to incorporate section 136(2) of the Act.

The court went further and explained that the liquidators' claim that the cancellation of an agreement constitutes "enforcement action" which requires the consent of the practitioner or the court, would, if accepted, fundamentally change our law of contract. The law of contract accepts a unilateral cancellation of a contract in the case of breach of contract. The court conceded that the legislature wanted to allow the company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, but indicated that the idea was not to interfere with the contractual rights and obligations of the parties to an agreement, and by accepting the liquidators' argument it would have done just that. Added to that, the tenet of our law is that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights, which the court felt it would have done if it had granted the appeal in this specific matter.

The court added that the wording of section 133(3) is consistent with the concept of a temporary moratorium on bringing claims, rather than a greater restriction on creditors' rights. It also referred to other decisions, such as *LA Sport 4x4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd* [2015] ZAGPPHC 78 (26 February 2015) (hereafter *LA Sport*), which decided that the cancellation of an agreement constituted "legal process which falls under the moratorium placed on legal action against the company", but pointed out that it did not agree with the decision, and that the judgment in *LA Sport* had recently been overturned by the full court of that division in any case.

Lastly, the court referred to section 5(2) of the Act, which provides for the consideration of foreign company law, since the liquidators specifically referred to foreign jurisdictions such as England, Australia and Canada. The court indicated that the wording of the corresponding provisions in these jurisdictions dealing with moratoriums and stay of proceedings differ to such an extent from their South African counterpart that they offered no meaningful assistance in the interpretation of section 133(1) of the Act.

Thus the court concluded that the court *a quo* correctly rejected the liquidators' interpretation of section 133(1) of the Act, and thus dismissed the appeal.

7 Comment

It is submitted that the value of this decision lies in the fact that the court practically applied the principles of the interpretation of statutes. Botha[28] states that the interpretation of statutes is not "a predetermined mechanical process" that has "mutually exclusive steps which are founded on aspects such as the clarity of the text" and the like. Botha[29] advocates a practical, sensible and theoretically correct alternative, which is rooted in practical interrelated techniques that can be used for constitutional interpretation. Botha[30] is of the opinion that such an approach is practical, inclusive, complementary and interrelated, all of which augurs well for sound interpretation.

Botha[31] lists the following five components that form part of this approach to the interpretation of statutes, namely:

(a) the language of the text (words and phrases);
(b) structure and meaning – this refers to clarification of the meaning of a specific legislative provision in relation to the legislative text as a whole;
(c) teleological interpretation (the value-based aspect) – which focuses on fundamental constitutional values;
(d) historical aspect – which refers to the historical context of the legislation;
(e) comparative aspect – which deals with the process where the court (if it is necessary and possible) considers the interpretation of similar legislation by foreign courts, as well as international law.

Did the court in this matter follow an approach of this nature?

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28 Botha *Statutory Interpretation* 105.
29 Botha *Statutory Interpretation* 105.
30 Botha *Statutory Interpretation* 107.
31 Botha *Statutory Interpretation* 107-108.

in this case the court used the approach advocated in *Natal Joint Municipal Pension Fund* regarding the interpretation of statutes. This approach uses the language of the provision itself, read in context and having regard for the purpose of the provision and the background to the preparation and production of the document, as the point of departure. Furthermore, if the words of the relevant provision are unable to bear the meaning contended for, then that meaning is impermissible, and the interpretation must enhance the values of the *Constitution* as found in section 39.

How does this measure up to Botha's proposed method?

The court definitely considered the language of the legislation as well as the structure and the meaning (the first two components). The court's interpretation of s 133(1) of the Act – which formed the thrust of the appellants' argument – reflected that firstly, the cancellation of an argument cannot be seen as part of "legal proceedings". Furthermore, the appellants' argument that "enforcement action" and "cancellation" are to be seen as similar in this case was found not to be acceptable. The language of the Act, the context in which the Act was written, and its purpose did not support such an interpretation of section 133(1).

In addition, as also stated in *Natal Joint Municipal Pension Fund*, if the words of the relevant provision were unable to bear the meaning contended for, then that meaning was impermissible. It was clear that the liquidators' argument which attributed a wider meaning to the expression "enforcement action" to include the cancellation of an agreement would be in violation of the wording of section 133(1) of the Act, thus causing such an interpretation to be impermissible.

Lastly, the court acknowledged that section 39(2) of the *Constitution* compelled an interpretation of legislative provisions in the light of the values enshrined in the Bill of Rights, but only if and where the language of the statute was not unduly strained. The court indicated that if it had accepted the arguments of the liquidators it would have unduly strained the language of the Act, and specifically section 133(1), the meaning of which would have been contrary to the interpretation that should be followed. This is where the teleological interpretation (the value-based aspect) comes in, since the court stated that to interpret section 133(1) in the way proposed by the appellants

would not enhance the values of the *Constitution* as indicated in section 39 of the *Constitution*.

But does this decision by the court help to achieve the balancing of the rights and interests of the relevant stakeholders as envisaged in section 7(k) of the Act? The sections that deal with business rescue have specifically been introduced, as section 128(1)(b) states, "to facilitate the rehabilitation of a company that is financially distressed", because that is what business rescue is per definition. The legislation regarding business rescue has been promulgated specifically in order to facilitate this process while balancing the rights of all of the relevant parties.

The appellants argued along these lines when they stated that that if the court accepted Wesbank's argument this would inevitably open the door to the demise of business rescue proceedings, since any creditor would then be allowed to cancel a contract with a company under business rescue, which was not what the Act envisaged. The court, however, argued that enough safeguards were provided by sections 136 and 154 of the Act for this not to happen.

It seems as if the court felt that the interpretation that the appellants attached to section 133 cannot be accepted. The respondent's argument as to how the section should be interpreted is closer aligned with the language and the context of section 133 (and the Act in general) and adhered to the constitutional values envisaged, and should therefore be accepted. The fact that the court rapped the appellants over the knuckles about their attempt to try their hand at the drafting of legislation clearly underlines this point.

The court also considered the appellants' argument that the court may use foreign company law to interpret this Act (as stated by section 39 of the *Constitution*), but felt that the examples of foreign company law that the appellants cited were too far removed from the South African counterpart and thus not applicable. This touched upon the comparative aspect of interpretation that Botha[32] (*Statutory interpretation* 108) refers to.

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[32] Botha *Statutory Interpretation* 108.

The case also highlighted the reluctance of the court to interfere with the contractual rights and obligations of the parties to an agreement. This reluctance accords with the entrenched principle of our law that the legislature should not intend to change the existing law more than is necessary, particularly if it takes away existing rights. This, of course, could be linked to another aspect of Botha's method of interpretation – the historical perspective.[33] The court felt that historically this reticence on the part of the legislature has been the norm, and that the norm should be respected in this case.

The court realised the wide range of powers, discretion and duties that the practitioner carries in business rescue proceedings, as was evident from this case. The court honoured the position that the practitioner holds, and its decision emphasised that it wold not unduly interfere with the execution of this role by the practitioner as stipulated by the Act.

This of course, places the practitioner in a powerful yet very responsible position, not totally dissimilar from that of the court. Some of the actions of the practitioner, such as those stated in section 133(1)(a) and section 134(1)(c), place the practitioner and court on even terms – the practitioner has the power to consent to legal proceedings to be taken against the company, just as the court can (which is exactly what happened *in casu)*. Therefore, the role of the practitioner in business rescue proceedings cannot be underestimated – it comes with a great deal of power and responsibility. The way the court interpreted the statute in this matter also reinforces this principle.

33 Botha *Statutory Interpretation* 108.

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LIST OF ABBREVIATIONS

MISA	Master Instalment Sale Agreement
NCA	National Credit Act
PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal

CLOETE MURRAY AND ANOTHER v FIRSTRAND BANK LTD T/A WESBANK [2015] ZASCA 39

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OPSOMMING

In die appèlsaak *Cloete Murray and another v FirstRand Bank Ltd* wat onlangs deur die Appèlhof beslis is, het die benadering tot die interpretasie van wetgewing weereens in die kollig beland. Die hof in hierdie aangeleentheid het benadruk dat die beginpunt as dit kom by die interpretasie van wetgewing, behoort altyd die taal van die spesifieke wetgewing, ordonnansie of bepaling wees. Dit moet gebruik word te same met die konteks waarbinne die wetgewing geskep en gevorm is, asook die doel van die bepaling en die agtergrond waarbinne die bepaling geskep is. Indien die taal van die spesifieke bepaling 'n onvermoë toon om die betekenis te ondersteun waarvoor geargumenteer word, behoort laasgenoemde nie aanvaar te word nie. Artikel 39(2) van die *Grondwet* kan ook net gebruik word om die waardes van die Grondwet te ondersteun gedurende wetsuitleg indien dit nie in die proses die taal van die spesifieke bepaling onnodig belas nie. Op grond hiervan het die hof die appellante se argumente vir 'n wyer interpretasie van artikel 133(1) van die *Maatskappywet* 71 van 2008 verwerp en beslis ten gunste van die Respondent.

SUMMARY

The approach to the interpretation of statutes once again received attention in the recent case *Cloete Murray and another v FirstRand Bank Ltd* which was decided in the Supreme Court of Appeal. The court , in this matter, emphasized the fact that when it comes to the interpretation of statutes, the starting point should always be the specific language of the statute, ordinance or section. This should be used together with the context within which the statute, ordinance or section has been created , as well as the purpose or objective of the statute, ordinance or section , and the background within which the statute, ordinance or section has been created.

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If the language of the specific statute, ordinance or section reflects an inability to support the specific meaning that is being argued, the latter should not be accepted. Section 39 (2) of the *Constitution* can also only be used to support and foster the values of the Constitution during interpretation if in the process of interpretation it does not unnecessarily burden the language of the specific statute or section. Based on this approach the court rejected the appellants' appeal for a wider interpretation of section 133 (1) of the *Companies Ac*t 71 of 2008 , and therefore found in favour of the Respondent.

KEYWORDS: language of provision as departure point in interpretation of statutes, together with context and purpose of provision; section 39(2) of *Constitution*; interpretation of section 133(1) of *Companies Act*; enforcement action and cancellation of an agreement; legal proceedings during business rescue practice.