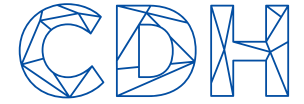


Corporate Debt, Turnaround & Restructuring

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Can companies in business rescue shield themselves from guarantee or suretyship claims by using section 133(2)?

Section 133 of the Companies Act 71 of 2008 (Act) plays a crucial role in South Africa's corporate restructuring framework by introducing a general moratorium on instituting legal proceedings against a company undergoing business rescue. Section 133(1) ensures that no legal action, including enforcement action, can be initiated against the company or its property without the written consent of the business rescue practitioners or leave of the court. The proposed rationale behind this moratorium is to provide the necessary space for the company and the business rescue practitioners to focus on stabilising the business, restructuring its affairs, and potentially saving it from liquidation.

A more specific protection is provided in section 133(2) of the Act, which states that any guarantee or suretyship which was granted by a company which is now undergoing business rescue cannot be enforced without the leave of the court, in accordance with any terms which the court finds just and equitable.

In some instances, this provision has been, in our view, incorrectly relied on in an attempt to force creditors to apply to court when relying on security provided by companies in business rescue. Consider the following:

- Company **A** is a principal debtor of Company **C**. Company **B** signed a guarantee in favour of Company **C** for Company **A**'s debt.
- Company **A** and Company **B** both go into business rescue.

- Company **C**, in addition to lodging a claim in the rescue of Company **A**, and relying on the guarantee, decides to lodge a claim in the rescue of Company **B**. The rationale being that Company **A** may not have sufficient assets to satisfy the debt owed to Company **C**.

While suretyships are generally secondary obligations owed to a creditor, most commercial suretyships include provisions where the surety agrees to stand as a co-principal debtor and waives any obligation on the creditor to pursue the main debtor first before the surety, making such agreements primary obligations. Guarantees are by their very nature primary obligations, and the guarantor can be called on to pay the creditor even if the principal debtor has not yet failed to do so. Therefore, Company **C** is perfectly entitled to lodge its claim in terms of the business rescue proceedings of Company **B** as opposed to Company **A**.

To make the security claim against Company **B** more difficult to lodge, arguments have been made in terms of section 133(2) of the Act that such a claim can only be lodged against the surety/guarantor if so authorised by the court. In other words, Company **C** can only lodge a claim against Company **B** once the court has authorised it to do so in terms of section 133(2).

In our experience, this argument has only rarely been raised and has not yet been properly tested in court either. The latter may be the case as, in our experience, the argument has rightfully been dispelled. In our view, section 133(2) does not impose any prohibition on lodging claims in terms of the business rescue proceedings without leave of the court. Instead, section 133(2) pertains to circumstances where there is any challenge to the validity of, or rights or obligations under, a suretyship or guarantee. In such a scenario, section 133(2) provides that enforcement, in other words, the institution of legal proceedings, can take place only with leave of the court.



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In our view, this reasoning is flawed as it relies on an the isolated reading of section 133(2), contrary to the accepted principles of statutory interpretation. These principles were clarified in the well-known case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA), which emphasised that interpretation is a holistic exercise that must consider the text, context and purpose of the statute. The Constitutional Court reinforced this approach in *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16, stressing the importance of purposive and contextual interpretation. Hence, section 133(2) should be understood as part of the broader goal, and under the auspices and heading, of section 133, which is to place a general moratorium on instituting legal proceedings, including enforcement, against companies in business rescue.

“Enforcement” therefore means the necessity to institute legal proceedings to secure one’s rights or claims in the rescue. In other words, read in context, should the guarantee or suretyship be challenged for whatever reason and court proceedings are necessary to secure the rights under that security then the court, and only the court, can give permission to institute those proceedings. Section 133(2) is therefore a stricter extension of section 133(1) in that the legal enforcement action can only be authorised by the court.

This seems to be supported by the only reported judgement dealing with section 133(2), that of *Investec Bank Ltd v Bruyns* [2012] JOL 28420 (WCC). In paragraph 16, the court stated that:

“Section 133(1) is a general provision and affords the company protection against legal action on claims in general, except, inter alia, with the written consent of the business rescue practitioner or (presumably failing such consent) with the leave of the court. Section 133(2) is a special provision dealing specifically with the enforcement of claims against the company based on guarantees and suretyships, and stipulates that in such cases the claims against the company may be enforced only with the leave of the court. The business rescue practitioner is not empowered to consent to the enforcement against the company of claims based on guarantees and suretyships. Section 133(2), as the special provision, would apply to the exclusion of s 133(1) insofar as claims based on guarantees and suretyships are concerned.” (emphasis added)



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On our reading of the above, the court highlights that sections 133(1) and 133(2) both place a moratorium on the institution of legal proceedings against companies in business rescue, but section 133(2) provides that in relation to the enforcement of guarantees and suretyships specifically (in other words, institution of legal proceedings pertaining to guarantees and suretyships) only the court, and not the business rescue practitioner, may provide the necessary consent to initiate these proceedings.

Accordingly, creditors retain the right to submit their claims in terms of suretyships and guarantees without leave of the court in situations where the validity of those agreements cannot legitimately be disputed or challenged. In other words, it is just a stricter extension of section 133(1) where the suretyship or guarantee is challenged in the business rescue.

Does this leave the door open to frivolous challenges of the guarantee or suretyship? In our view it does not, as it would only increase the cost of rescue and delay the finalisation of the rescue, neither of which is in the interest of any of the affected parties.

In conclusion, section 133(2) must be read in context and aligned with both section 133 and the Act's broader intent to balance the interests of creditors and the company in distress. Misinterpreting this provision not only hampers the efficiency of business rescue but unfairly obstruct creditors with legit claims from enforcing their rights.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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