

Are landlords and property owners better off with the proposed Amendment to Chapter 6?

5 December 2018 6 min read

The anticipated amendments to the Companies Act 71 of 2008 have proposed one change to Chapter 6 of the 2008 Act.

It is somewhat surprising that out of all the sections in the 2008 Act in respect of which changes could be made, that changes have only been proposed to section 135 – the section dealing with "Post-Commencement Finance" ("PCF").

Whilst section 135 certainly requires amendment, there are a myriad of other sections in Chapter 6 of the 2008 Act that remain unclear and which require further consideration by the legislature.

On the face of it, the amendment to section 135 of the 2008 Act appears to deal only with the position of landlords as post-commencement financiers. However, the amendment in fact also deals with "any owner of property" too.

Accordingly, both landlords (in respect of their immovable property) and owners of property (presumably movable property) have been elevated to the status of PCF in terms of section 135 of the 2008 Act.

The amendment reads as follows –

Section 135 of the principal Act is hereby amended –

- *by the insertion after subsection (1) of the following subsection:*
"(1A) To the extent that any amounts due by the company to any owner of the property, including a landlord, in respect of any property of such owner or landlord which is the subject of a contract with a company that is placed in business rescue is not paid to such owner or landlord during business rescue by the company from the date that the company is placed in business rescue proceedings, provided that such amounts do not exceed the aggregate of all disbursements and outgoings, including rates and taxes, electricity and water, paid by such owner or landlord to third parties during the period referred to in this section, the money must be regarded as post-commencement financing that must be paid to such owner in the order set out in subsection (3)(b)."
- *by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:*
"After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement finance, rental payment and other claims arising out of the costs of the business rescue proceedings, all claims contemplated –"; and
- *by the substitution in subsection (3)(a) for the words preceding subparagraph (i) of the following words:*
"in subsection (1) and subsection (1A) will be treated equally, but will have preference over-".

It is clear that the legislature intended to deal with landlords in the amended section in that the reference is specifically made to landlords, rental and the payment of disbursements and outgoings including rates, taxes, water and electricity.

It is not similarly clear if the legislature intended to deal with owners of property (movable property) generally, although several references are made in the proposed amendments to an "owner" of property.

The critical question though, is, for what amounts or claims are landlords and owners of property considered to be PCF creditors.

The amendment seems to elevate property owners and landlords to the position of PCF creditors for any amounts not paid to them, in respect of property which is the subject of a contract, after the commencement of business rescue proceedings provided that –

"such amounts do not exceed the aggregate of all disbursements and outgoings, including rates and taxes, electricity and water, paid by such owner or landlord to third parties during the period referred to in this section".

What does this mean? Does it mean that property owners and landlords are preferred, as PCF providers, for only the disbursements that they incur during business rescue or would it include any amount of rental not paid to a landlord, or for instance an instalment payment in respect of an owner of property (in respect of an instalment sale agreement), incurred during business rescue? If so, is this only payable if it does not exceed the aggregate amount of disbursements paid by such landlord or property owner during the business rescue proceedings to third parties?

A plain reading of the words "*any amounts due by the company...in respect of any property of such owner or landlord which is the subject of a contract...*" appears wide enough to include, for example, unpaid rental due to a landlord in terms of a lease agreement. Read together with the monetary "cap" mentioned above, however, the section seemingly implies that such unpaid rental would constitute PCF, *provided* that it does *not* exceed the amount paid by landlords to *third parties* during business rescue proceedings.

The net effect would therefore be that landlords (and property owners) are preferred as PCF providers in respect of disbursements paid to third parties in terms of any contract concluded with a company in business rescue. This is (most likely) occasioned by the landlord being able to treat as PCF any contractual amounts due to it by the company incurred during business rescue proceedings, including rental payable, subject to the "cap".

In the judgment of Van der Westhuizen AJ in the matter between *the South African Property Owners Association and the Minister of Trade and Industry & Others* (2016), the South African Property Owners Association (SAPOA) argued that both "*rental and other services rendered to property utilised by a legal entity under business rescue*" fall within the ambit of either the phrase "*post-commencement financing*" or "*costs arising out of the costs of business rescue proceedings*".

Insofar as landlords are concerned, whilst the legislature may have intended to include as PCF both rental and disbursements (i.e.: electricity, water, rates and taxes or any other amounts payable by the landlord) or at least just rental costs (i.e. disbursements) within the ambit of the amendment, it appears to have provided for disbursements to constitute PCF but only for a limited amount.

It is our respectful view that further consideration be given to the amendment to this section before it is enacted into law.

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