



INSOLVENCY & BUSINESS RESCUE

The Porsche that got away in business rescue

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A company in business rescue may be entirely dependent on revenue streams generated by an asset that is essential to the continuation of its business. But what happens where it is established that the asset belongs to a third party and the agreement under which the company was entitled to use the asset has already been cancelled?

This issue arose in **Capitec Bank Ltd v Ubuntu Family Health Centre Grayston (Pty) Ltd** [1], concerning a Porsche 911 Carrera S. Although the make of the vehicle makes the dispute particularly memorable, the underlying principle has broader application to businesses in rescue that rely on property they do not own.

Ubuntu acquired the Porsche pursuant to an instalment sale agreement financed by Capitec. In terms of the agreement, ownership of the vehicle remained with Capitec until Ubuntu had discharged all amounts owing. Following Ubuntu's default, Capitec demanded payment of the outstanding arrears and, when those arrears remained unpaid, cancelled the agreement on 17 November 2023. Despite the cancellation, Ubuntu retained possession of the Porsche. Twelve days later, on 29 November 2023, Ubuntu adopted a resolution commencing business rescue proceedings. Capitec subsequently approached the court for the return of the vehicle.

The High Court dismissed Capitec's application. It held that Ubuntu's possession would be unlawful for purposes of the moratorium in section 133 of the Companies Act only if it involved conduct of a criminal nature, such as theft or fraud. Because Ubuntu had

originally received the Porsche in terms of a lawful agreement, the High Court found that its possession remained lawful and where any attempt to recover the vehicle was prohibited by the application of the moratorium in business rescue proceedings.

The Supreme Court of Appeal (“**SCA**”) disagreed. How Ubuntu came to possess the vehicle was only part of the enquiry. The decisive question was whether Ubuntu still had a right to possess it, after the agreement had been cancelled. The cancellation was common cause and had taken place before business rescue commenced. Capitec remained the owner, and Ubuntu had no continuing legitimate right to keep the Porsche. Capitec could therefore seek its return without the business rescue practitioner’s consent.

The SCA was also clear that this result followed established law. Earlier decisions had already recognised that the moratorium does not prevent proceedings to recover property that a company in business rescue neither owns nor lawfully possesses. The High Court was bound by those decisions.

The commercial difficulty is easy to see, and where the decision can have far reaching effect. A rescue may depend on the ongoing use and possession of vehicles, equipment or premises held under agreements with third parties. Revenue generation might be entirely dependent on the continued and undisturbed possession of these assets. Losing access to one of them could place the entire company in jeopardy. Yet the importance of maintaining possession of an asset in a rescue scenario cannot trump the company’s contractual rights. Lawful possession which is established when an asset is delivered to the company, does not guarantee a right to keep it after the agreement is lawfully terminated.

A business rescue practitioner preparing a business rescue plan needs to clearly establish from the outset, which assets the company owns, which it holds under lawful agreements, and whether those agreements remain in force, post the commencement of the rescue process. The determination of the right to continue to lawfully use an essential asset is as important to the prospects of rescue, as the company’s financial projections and will, in certain instances, directly impact on the company’s ability to continue trading.

Owners of assets should be equally careful about the reach of the decision. Capitec’s ownership and the valid cancellation of Ubuntu’s agreement were not disputed. Where cancellation or a continuing right of possession is contested, the outcome for the parties will depend on the relevant agreement and the facts. Business rescue alone neither defeats an owner’s rights nor proves that an owner is entitled to its immediate return.

The SCA ordered Ubuntu to deliver the Porsche to Capitec. The question the judgment leaves for every proposed business rescue practitioner is a practical one: does the company have the legal right to continue to lawfully use the assets on which its plan depends? This analysis needs to happen upfront, and before events transpire that severely impact the company’s ability to continue trading.

[1] (328/2025) [2026] ZASCA 123 (23 September 2026).



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