



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2016/11853

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| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) | <u>REVISED.</u> |

.....
DATE

.....
SIGNATURE

In the matter between –

KYTHERA COURT

APPLICANT

And

**LE RENDEZ-VOUS CAFÉ CC
t/a NEWSCAFÉ BEDFORDVIEW
(IN BUSINESS RESCUE)**

1ST RESPONDENT

THOMAS HENDRICK SAMONS NO

2ND RESPONDENT

JUDGMENT

BORUCHOWITZ J:

[1] In this application, launched as a matter of urgency on 8 April 2016, an order is sought to evict the first respondent from Shop 53, cnr Van Buuren Road and Hawley

Road, Bedfordview (the premises), on the ground that the lease agreement between the parties has been cancelled, alternatively on the basis that the lease has now expired.

[2] The applicant is a partnership trading as a property rental firm. The first respondent is Le Rendez-Vous Café CC, trading as Newscafé, Bedfordview, which close corporation was placed under supervision in terms of s 129 of the Companies Act, 71 of 2008 (the Act) on 2 December 2015. The second respondent, Thomas Hendrik Samons, is the duly appointed business rescue practitioner of the first respondent.

[3] Broadly stated, the applicant's case is premised on the following facts. The applicant alleges that the parties concluded a written lease on 30 April 2010 in terms whereof the premises were leased to the first respondent for a period of six years, commencing in May 2010 to 30 April 2016. The first respondent placed itself in business rescue after it had fallen into arrear with the payment of three monthly rentals and municipal charges. The applicant cancelled the lease agreement on 7 March 2016 but the first respondent has refused to vacate the premises. The applicant asserts that the first respondent is misusing the business rescue process by unlawfully remaining on the premises and operating its business without making any rental payments or any other charges. Moreover, the second respondent has failed to file a business rescue plan as required under the Act and has reneged on an undertaking to pay rental. The second respondent has also reneged on an undertaking to find alternative premises for the first respondent on the expiry of the lease.

[4] The first respondent opposes the application on the following grounds. First, it contends that the moratorium envisaged s 133(1) of the Act precludes the applicant from cancelling the alleged lease and launching the current application. Second, it avers that the alleged written lease is invalid as the person purporting to represent the first respondent was not authorised to bind it. The first respondent claims that it occupies the premises in terms of a tacit lease which has not expired. Third, that it has an enrichment lien as it has expended money on necessary and useful improvements to the property and that until it is compensated by the owner it is lawfully entitled to remain in occupation of the premises. Fourthly, even if the disputed lease were found to exist, the first respondent has suffered damages as a result of a misrepresentation relating to the size of the property, which off-set the arrears owing to the applicant.

[5] The first contention can be readily disposed of. Section 133(1) provides for a general statutory moratorium in favour of a company that is undergoing business rescue proceedings, and reads, in relevant part, as follows:

“During business rescue proceedings, no legal proceedings, 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.

...”

[6] The question that arises is whether leave is necessary in terms of s 133(1)(b) for the applicant to bring the eviction application.

[7] The ambit of the moratorium is a matter of interpretation. As was emphasized in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraph 18, the starting point in interpreting a statute is the language of the provision itself, read in context and having regard to its purpose. It is accepted that the purpose of the moratorium is to provide crucial breathing space to enable the financially distressed company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process without the distraction of having to deal with legal proceedings (see *Cloete Murray NNO v First Rand Bank Limited t/a Wesbank* 2015 (3) SA 438 (SCA) at 441 para 14; *Chetty t/a Nationwide Electrical v Hart & Ano NNO* 2015 (6) SA 424 (SCA) at paras 35 and 39; *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Limited v Stedone Developments (Pty) Ltd and others* 2015 (4) SA 485 (KZD) at paras 7, 9 and 11).

[8] But the moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors. Subsection 133(1)(a)-(e) lists five exceptions when legal or enforcement proceedings may be continued with or initiated. Subsection 133(1)(a) permits a creditor to initiate or continue proceedings with the written consent of the practitioner and subsection 133(1)(b) permits a creditor to seek the Court's leave to institute or continue legal proceedings in the event of a practitioner's refusal to give consent, or

even without the consent of the practitioner having been sought (see *Chetty v Hart* (*supra*) para 40).

[9] The phrase “*in relation to any property belonging to the company, or lawfully in its possession*”, which appears in s 133(1), is, in my view, a textual indication that the purpose of the moratorium is to preclude the institution or continuation of legal proceedings or enforcement action in relation to property that belongs to the company in business rescue or is lawfully in its possession. In its plain meaning, the phrase appears to limit the reach of the moratorium and renders it inapplicable to legal proceedings or enforcement action in relation to property belonging to persons or entities other than the company in business rescue or in relation to property that is unlawfully possessed by the company. Were it the intention of the drafters of the section that the moratorium apply to all actions of whatever nature there would have been no need to have introduced the italicised phrase. It is an interpretive principle that when the lawmaker uses particular words to achieve its purpose, they must be given effect. Based on these considerations I am of the view 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.

[10] I am fortified in this view by the wording of s 134(1)(c) which is cast in strikingly similar terms. The section deals with the protection of property interests, and reads:

“(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 whether the property is owned by the company, except to the extent that the practitioner consents in writing.” [My emphasis]

[11] Section 134(1)(c) conditionally proscribes the exercise of any right in respect of property in the “*lawful possession of the company*” irrespective whether the property is owned by the company. But, what it does not proscribe is the converse, namely, the exercise of a right in respect of property in the unlawful possession of the company.

[12] The justification for the introduction of the italicised phrases in the aforesaid sections is self-evident. To apply the moratorium to all legal proceedings of whatever nature, including those brought by persons who legitimately seek to vindicate or protect their property would be a drastic interference with their common law rights of ownership. When interpreting a statute, it is presumed that the lawmaker does not intend to alter the common law more than is necessary. It could not have been the intention of the legislature to frustrate the rights of property owners and render them remediless during business rescue proceedings (see, in this regard: *Barloworld South Africa and others v Blue Chip Mining & Drilling (Pty) Limited* (unreported Case No 2015/332 (NCD) para [15]; compare also *Madodza (Pty) Limited v Absa Bank Limited* 2012 JDR 1350 (GNP)).

[13] In *Cloete Murray* (para 40), it was emphasized that the legislature intended to allow the financially distressed company the necessary breathing space by placing a moratorium on legal proceedings and enforcement action, but not to interfere with the contractual rights and obligations of the parties to an agreement. It was also held (in paras 33-44) that the juristic act of cancelling the agreement does not constitute enforcement action as contemplated in s 133(1) and that it is permissible for an agreement to be cancelled in during business rescue proceedings.

[14] It is trite law that on the termination of a lease (whether by cancellation or the effluxion of time) it is the duty of the lessee to vacate the property subject only to the lessee's right to compensation for improvements. The failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier.

[15] But, in the context of business rescue proceedings, the right to cancel a lease may be affected by the provisions of s 136(2)(a) of the Act. The section provides that the business practitioner may, despite any provision of an agreement to the contrary, entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings. By invoking this section, the business practitioner may prevent a landlord from cancelling a lease and from instituting eviction proceedings (see *Cloete Murray* para 35).

[16] Based on what is set out above, there is sufficient reason to conclude that the general moratorium in s 133(1) does not encompass legal proceedings for ejectment where a lease has been validly cancelled and the company in business rescue is an unlawful occupier. In the notice of motion, the applicant seeks an order granting it leave in terms of s 133(1)(b) to bring the present proceedings. In the light of this conclusion such leave is unnecessary.

[17] I turn now to the merits of the dispute.

[18] There are essentially three issues to be determined. The first is whether or not the parties entered into the alleged written lease agreement (Annexure FA1 to the Founding Affidavit) on 30 April 2010. Second, whether the alleged lease was

cancelled or terminated on 30 April 2016; and, thirdly, whether in the light of the express provisions of the lease, a lien can exist, and damages proffered against the applicant or set off against arrear rentals and other charges.

[19] It is common cause that the lease agreement relied on by the applicant was signed by Mr Robert Lacic (Lacic) who purported to represent the first respondent. But, the deponent to the first respondent's answering affidavit, Mrs Antoinette Murray, supported by a confirmatory affidavit of her husband, Mr James Henry Murray (Murray), states that Lacic was not capable of entering into the lease agreement because he was not a member of the first respondent or authorised to contract on its behalf.

[20] The factual dispute raised in regard to Lacic's authority is clearly untenable and can be rejected on the papers. My reasons for this view are the following.

[21] In his confirmatory affidavit, Murray states that he bought the Newscafé business for his son in 2010. He negotiated the terms of the franchise agreement with the franchisor, Fournews Developments (Pty) Limited, as well as the lease agreement. He states further that he was not a member of the first respondent and could not sign any agreements on its behalf. Murray advances the specious reason that the lease agreement was signed by Lacic because his son and wife, the two members of the first respondent, were in America at the time and thus could not sign the agreement. This explanation is in itself a sufficient reason to infer that Lacic had the necessary authority to enter into the lease agreement on the first respondent's behalf.

[22] But, the following are clear indications that Lacic had the necessary authority to contractually bind the first respondent. On 30 April 2010, being the date of the execution of the agreement of lease, Murray and Lacic executed a deed of suretyship in terms whereof they bound themselves jointly and severally as sureties and co-principal debtors in favour of the applicant for the due payment by the first respondent of all moneys from whatsoever cause arising. As a probability, Lacic would not have bound himself as a surety unless he was a member of the first respondent or had a financial interest in its affairs.

[23] Lacic has filed an affidavit wherein he states that when he signed the written lease agreement he was a member of the first respondent, and in confirmation thereof attaches a Form CK2 in terms of the Close Corporation Act, 1948, as amended (marked Annexure RL2).

[24] Murray also refers in his affidavit to a copy of a franchise agreement entered into between the first respondent and the franchisor, Fournews Developments (Pty) Limited. That agreement was signed by Lacic as a representative of the first respondent and Lacic's signature is witnessed by Murray. Lacic also signed further documents relating to the franchise agreement, more particularly, a debit order instruction as well as a resolution on behalf of the members of the first respondent to enter into the franchise agreement. He also signed the registered user agreement permitting the first respondent to utilise the Newscafé trademarks. Furthermore, Lacic and Murray jointly stood surety for the obligations of the first respondent to the franchisor in terms of the franchise agreement.

[25] Mr & Mrs Murray have failed to advance a credible or probable explanation as to why Lacic was authorised to enter into the franchise agreement as well as the suretyship pertaining thereto, but not authorised to sign the written lease agreement.

[26] I am satisfied that the denial that Lacic was authorised to enter into the written lease agreement is disingenuous and can safely be rejected on the papers. The following dictum of Heher JA in *Wrightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) (at para 13) is instructive in this regard:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied ...”

[27] The evidence overwhelmingly shows that Lacic was authorised to contractually bind the first respondent. Accordingly, the applicant has established that the parties entered into the alleged written lease agreement on 30 April 2010.

[28] I am also satisfied that lease has been validly cancelled. The applicant caused breach notices to be addressed to the first respondent in terms of clause 12.1 of the

lease agreement. On 18 November 2015 the applicant sent a letter to the first respondent informing it that it was in breach of the lease as a result of the non-payment of the October 2015 and November 2015 rental and municipal account. The applicant afforded the first respondent seven days to remedy the breach from the date of receipt of the notice. The applicant sent another letter to the first respondent on 2 December 2015 informing it that it had breached the lease by not paying the rental amounts and municipal utilities for October 2015, November 2015 and December 2015. The applicant again afforded the first respondent seven days to remedy the breach. That these notices were addressed to the first respondent is not in issue, nor is it in dispute that the first respondent was in arrear with the payment of rental and other charges.

[29] On 9 December 2015, the applicant received notification that the first respondent had been placed in business rescue and that the second respondent had been appointed as the business rescue practitioner. Since that date no payments for rental or utilities have been made even though the first respondent has continued operating its business from the premises.

[30] The applicant cancelled the lease agreement on 7 March 2016 and afforded the first respondent seven days to vacate the premises but it has not done so. In the answering affidavit the first respondent does not deal with the allegations relating to the cancellation notice but disputes the applicant's entitlement to cancel the lease based on the provisions of ss 133(1) of the Act. As indicated above there is no merit in this contention as it has been finally settled that an agreement may be cancelled during business rescue proceedings (see *Murray Cloete (supra)*).

[31] It is important to note that the second respondent has not sought to invoke the provisions of s 136(2)(a) of the Act. Accordingly, the first respondent's obligation to pay monthly rentals and municipal utilities had not been suspended prior to applicant's cancellation. Had the section been invoked by the second respondent, the applicant may have been prevented from cancelling the lease agreement. On the contrary, it appears that at the first creditors' meeting held on 21 January 2016, the second respondent confirmed the existence of the lease agreement. On 1 February 2016, the applicant's legal representatives met the second respondent who undertook to give the applicant written confirmation that rental payments would commence at the end of February 2016. He also informed them the first respondent was not going to renew the lease after its expiry and would vacate the premises.

[32] The alleged claim or counterclaim for damages cannot avail the first respondent. Clause 1 of the lease agreement precludes the first respondent from setting off or deducting any amounts from the rental payable. The clause reads, in relevant part, as follows:

"1. PAYMENT OF RENTAL

The Lessee shall pay the rental on or before the 1st (first) day of each calendar month, in a manner advised by the Lessor from time to time. The rental shall be paid free of any set-off or deduction for any reason whatsoever. ..."

[33] What remains for consideration is whether the first respondent has any lawful right to remain in occupation of the premises.

[34] Murray contends that the first respondent has a lien over the premises. He alleges that the applicant orally agreed that the first respondent could effect improvements to the property and that the applicant would reimburse it for such improvements. The claim of a lien over the premises is untenable in the light of the following express provisions of the written lease. Clause 3 provides as follows:

“3. IMPROVEMENT, REPAIRS AND MAINTENANCE

3.1 The Lessee shall not erect any structures or make alterations to the leased premises save with the Lessor’s written consent which consent will only be considered on receipt by the Lessor of plans indicating the nature of the proposed structures and/or alterations, which plans shall have to be approved by the Lessor’s architect(s).

3.1.1 Any improvements erected in terms hereof shall become the Lessor’s property.

3.1.2 Notwithstanding anything to the contrary herein contained, the Lessee shall have no claim of whatsoever nature against the Lessor for the cost of any improvements and/or structures erected by them on or to the leased premises.”

[35] As is evident from the above clause, the parties chose to contractually regulate any potential claim for improvements on the premises by making provision for written consent before such improvements could be made to the premises. Further, it was agreed that no claim would exist against the applicant for such improvements.

[36] In any event, the alleged oral agreement to effect payment for improvements is at variance with the provisions of clause 19 of the written lease, which reads:

“19. WHOLE AGREEMENT

The Lease constitutes the whole agreement between the parties and no warranties or representations whether express or implied, not stated herein shall be binding on the parties. No agreement at variance with the terms and conditions of the Lease or consensual cancellation thereof shall be binding on the parties unless reduced to a written agreement signed by or on behalf of the parties.”

[37] In my judgment, there is no foundation for the first respondent’s contention that it has a lien over the premises for improvements made. In the circumstances the first respondent is not in lawful occupation of the premises and falls to be evicted.

[38] There are sufficient grounds to evict the first respondent from the premises as a matter of urgency. The first respondent appears to be misusing the business rescue process by unlawfully remaining on the premises and operating its business without making any rental payments or any other charges. The business rescue process with which the applicant has cooperated, appears to have become moribund. The creditors of the first respondent had agreed at the first respondent’s creditors’ meeting that the business rescue plan would be submitted by no later than 12 February 2016. This did not occur. At a meeting held on 1 February 2016, the second respondent undertook that rental payments would commence at the end of February 2016, but this, too, did not occur. The second respondent informed the applicant that it had not taken control of the first respondent’s bank accounts and that the first respondent was simply not willing to cooperate in that regard.

[39] The applicant is in the process of negotiating the terms of a new lease agreement with a new tenant. But the applicant will lose the potential tenant as the

first respondent refuses to vacate the premises. The on-going loss and damage suffered by the applicant appears to be irreparable and is unlikely to be recovered from the first respondent, which is in business rescue due to its financial difficulties.

[40] The applicant seeks an order that both the first and second respondents pay the costs of this application on the scale as between attorney and client. I see no reason to award costs against the second respondent, who has acted throughout the proceedings in an official capacity. Although there has been delay in the business rescue process, it appears that this was due to a lack of cooperation on the part of the first respondent and not as a result of any wrongful conduct on the part of the second respondent. Given the fact that the first respondent has appeared to misuse the business rescue process I am of the view that it should pay the costs of the application on the attorney and client scale.

[41] In the result, the following order is made.

- (a) The first respondent and all those occupying through or under it are to be evicted, within fifteen (15) days from the grant of this order, from Shop 53, corner Van Buuren Road and Hawley Road, Bedfordview (the premises).
- (b) In the event of the first respondent failing to comply with the order in paragraph (a) above, the Sheriff or his deputy is hereby authorised to evict the first respondent and those occupying through or under it from the premises, and to secure the services of a locksmith and the assistance of the South African Police Services, if necessary.

- (c) The costs of this application are to be paid by the first respondent on the scale as between attorney and client.

BORUCHOWITZ J
JUDGE OF THE HIGH COURT

DATE OF HEARING : 8 June 2016
DATE OF JUDGMENT : 22 June 2016

ON BEHALF OF
THE APPLICANT : ADVOCATE ANDRÉ GAUTCHE SC
with ADVOCATE JC BURGER

INSTRUCTED BY : STUPEL & BERMAN INC
Ref: 053992/M BERMAN

ON BEHALF OF
THE 1ST & 2ND
RESPONDENTS : ADV SJ VAN RENSBURG

INSTRUCTED BY : DLBM INC
Ref: PC LESSING