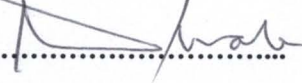


REPUBLIC OF SOUTH AFRICA



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

CASE: 49352/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
22/02/18	
Date	ML TWALA

In the matter between:

**LE-SEL RESEARCH (RF) PROPERTIES
LIMITED** (in business rescue)

FIRST APPLICANT

MKHOMBO PHAHLANI N.O

SECOND APPLICANT

AND

JOHANNESBURG WATER (SOC) LIMITED

RESPONDENT

JUDGMENT

TWALA J

- [1] In this application the applicants seek an order interdicting the respondent from disconnecting the water supply or service to the first applicant's property until such time as the first applicant may be able to effect payment of the services/water to the respondent. The respondent has filed its opposing papers in this case and a counter application seeking permission to terminate the agreement between itself and the first applicant.
- [2] At the commencement of the hearing of this case, counsel for the applicants alluded to the fact that this matter was postponed from the urgent Court and placed on the roll of the opposed motion Court. The parties agreed and obtained a postponement order which also provided that the respondent shall not terminate the supply of water to the first applicant's property pending the adjudication of this case on the 13th February 2018. Counsel agreed that the matter could proceed for hearing in the opposed interlocutory court instead of postponing it to the opposed motion court roll.
- [3] It is common cause that as at the 24th of July 2017, the first applicant owed the respondent a sum of R3 660 154 for the water supply. The first applicant had entered into an arrangement with the respondent to settle the debt over a period of six months in monthly instalments of R610 000 commencing on the 10th of August 2017. It is further not in dispute that the first applicant breached the terms of the arrangement. On the 15th of December 2017 the first applicant applied for business rescue and the second applicant was appointed the business rescue manager.

- [4] Due to the failure of the applicants to meet the terms of the arrangement, the respondent indicated its intention to terminate the agreement to supply water to the premises of the first applicant. This is what galvanised the applicants in bringing this action to interdict the respondent from terminating the water supply into its premises since it is under business rescue.
- [5] It is contended by counsel for the applicants that since the first applicant is under business rescue, the respondent is precluded from terminating the agreement for its water supply because that amounts to be an enforcement action on the applicants. Put differently, the respondent is withholding its performance in terms of the agreement to force the first applicant to perform its part of the agreement. This, it is argued by counsel for the applicants, is contrary to the provisions of the section 133 of the Companies Act, Act 71 of 2008 ("The Act").
- [6] Water is an essential commodity in the business of the first applicant which employs more than 600 people. If the respondent were to be allowed to terminate the water supply, so the argument goes, the more than 600 employees of the first applicant will suffer irreparable harm as they will lose their jobs since the first applicant will be forced to shut down. The termination of the agreement to supply water would not give the business rescue process the opportunity to resuscitate the business of the first applicant.
- [7] The termination of the water supply, so contended counsel for the respondent, is not an enforcement action as envisaged in section 133 but a juristic act to cancel or terminate an agreement between the first applicant and the respondent. The respondent has not started legal proceedings to recover the outstanding debt but wishes to terminate the agreement to supply the first applicant with water.

[8] It is submitted by counsel for the respondent that, should the Court find that the termination of the agreement is in contravention of section 133 of the Act, there is no reasonable justification that the supply of water to the first applicant's property be extended beyond the period of three months as provided for in section 132 of the Companies Act. Business rescue proceedings started on the 15th of December 2017 and are to run for three months which is until the 15th of March 2018 unless the business rescue manager applies to Court for an extension of time. The respondent is owed a substantial amount of money by the first applicant and it will be prejudiced if it were to continue to supply water without any payment. The respondent is a State owned enterprise and therefore acts in a fiduciary capacity and should exercise some care in handling public funds.

[9] It is well established that the purpose for business rescue proceedings is to provide the company with essential breathing space in order to allow its financial affairs to be reconstructed such that it can afford to continue to operate as a successful concern. The question to be determined in this case is whether the cancellation of a contract between the parties is an enforcement action as envisaged in section 133 (1) of the Act.

[10] Section 133 of the Companies Act provides as follows:

“General moratorium on legal proceedings against company:

(1) During business rescue proceedings, no legal proceeding, 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 form, 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;*
- c)*

- [11] Henochsberg on the Companies Act 71 of 2008 Vol. 1 at 482(33) states the following:

“If it is accepted that a juristic act, such as a notice in terms of the contract to cancel the contract due to eg. malperformance by the company under business rescue, is not a ‘legal proceeding’, and therefore a valid termination of the contract, there will not, it is submitted, be any bar to a provision in a contract that stipulates that the contract will be terminated if the company goes into business rescue.”

- [12] In the case of **Cloete Murray and Another NNO v FirstRand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA)** the Supreme Court of Appeal stated the following:

“.....the concepts ‘enforcement’ and ‘cancellation’ are traditionally regarded as mutually exclusive. The term ‘cancellation’ connotes the termination of obligations between parties to an agreement. However, the liquidators contended for a wider meaning to be attributed to the expression ‘enforcement action’ to include the cancellation of an agreement. In so doing, I believe that they are doing violence to the wording of s 133(1) of the Act. Cancellation is a unilateral act of a party to an agreement and save, for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form of forum. In any event, as pointed out on behalf of Wesbank, it also does not make linguistic sense to speak of cancellation as having ‘commenced or proceeded with’ in any forum, as envisaged by s 133(1). It therefore seems to me that, linguistically, the phrase ‘enforcement action’ in s 133(1) is unable to bear the meaning of the cancellation of an agreement, as contended for by the liquidators. Contextually it must be understood to refer to enforcement by way of legal proceedings.”

- [13] I am unable to agree with counsel for the applicants that cancellation of the agreement between the first applicant and the respondent amounts to an enforcement action. I am not persuaded by counsel's submission that by cancelling the agreement to supply water to the first applicant, the respondent is withholding its performance in terms of the agreement solely to force the applicants to pay its debt or water account. Cancellation of the agreement is, in my view, a unilateral act by a party to an agreement which is not performed in a forum as envisaged in section 133 (1) of the Act. It is therefore my respectful view that the applicants' application falls to be dismissed on this point.
- [14] I have considered the issue that water is an essential service and is needed for a company of the magnitude of the first applicant. However, I cannot agree that there is a duty on government institutions such as the respondent to fund or supply private business without any payment. As contended by counsel for the respondent, the respondent has a fiduciary duty to handle public funds with the utmost care.
- [15] I now turn to deal with the respondent's counter application seeking an order to be permitted to terminate the supply of water to the first applicant's property. There is no merit in this application. The respondent has failed to show why the legal proceedings against the first applicant are necessary and appropriate.
- [16] In the case of **Arendse and Others v Van der Merwe NO and Another 2016 (6) SA 490 (GJ)** the Court stated the following:
- “what needs to be fully set out in any application for leave are the reasons why legal proceedings against the company in business rescue are necessary and appropriate. “*

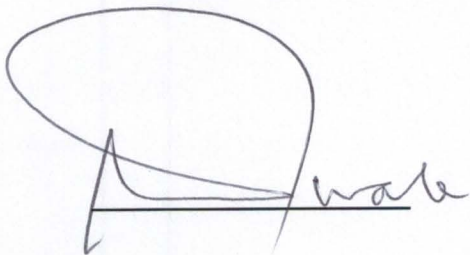
[17] It is my considered view that it was absolutely unnecessary for the respondent to bring this counter application because it did not add anything more than it stated in its answering affidavit to the applicants' application. Therefore the counter application falls to be dismissed.

[18] There is an issue about costs which were reserved when the matter served before the urgent Court on the 22nd of December 2017. It is trite that the costs follow the result. I am therefore of the view that the respondent was successful in its opposition of this application and therefore is entitled to a costs order.

[19] In the circumstance, I make the following order:

A. The application for an interdict is dismissed with costs;

B. The counter application is dismissed with costs.

A handwritten signature in blue ink, appearing to read 'Twala', is written over a horizontal line. Above the signature is a large, loopy, oval-shaped flourish.

TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 13 February 2018

Date of Judgment: 22 February 2018

For the Applicant:

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