



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

12/2/2013

CASE NUMBER:- 63367/09

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED. ✓
12/2/2013
DATE
SIGNATURE

In the matter between:

ELLERINE BROTHERS (PTY) LTD

1st Applicant

McCARTHY LTD

2nd Applicant

In Re:

ELLERINE BROTHERS (PTY) LTD

Plaintiff

and

McCARTHY LTD

Defendant

JUDGMENT

DE VOS J:

- [1] This matter involves a stated case in terms of Rule 33(1). The particular issue to be determined has been separated from the other issues in the main action in terms of Rule 33(4).
- [2] The particular point of law to be determined is whether concursus creditorum prevents a party to an agreement from exercising an accrued right to cancel a lease when that right accrued prior to concursus creditorum.
- [3] The First Applicant, Ellerine Brothers (Pty) Ltd (Plaintiff) issued summons during October 2009 against the Second Applicant, McCarthy Ltd (Defendant) under Case No:- 63367/2009

(the action). In this action the First Applicant (Plaintiff) claims rent from the Second Applicant (Defendant), which pertains to the premises that the Second Applicant occupied and which premises belong to the First Applicant. The Plaintiff took cession from the liquidators of Toits Motor Group's claim against the Defendant for rental allegedly due in terms of a sublease. The Plaintiff then instituted the present action claiming payment of the same.

- [4] The aforesaid action is opposed by the Second Applicant. The Second Applicant filed a plea and the First Applicant filed a replication thereto.
- [5] It is contended by both parties acting as First and Second Applicant respectively, that under the appropriate circumstances it is imperative to determine whether a valid cancellation of the head lease agreement could occur, and did indeed occurred. This is the issue which both applicants agree should be first determined, and which overall would be convenient to all involved. In effect this would resolve the main dispute between the parties; if there was a valid cancellation, First Applicant's claim against Second Applicant must fail.
- [6] The following facts are common cause between the parties:
 - 6.1 On 14th November 2006 a head lease agreement was entered into between the First Applicant/Plaintiff (as lessor) and a company, known as Toits Motor Group (Pty) Ltd ("Toits Motor Group") (as lessee) in respect of an immovable property ("the head lease");
 - 6.2 Subsequent to entering into the head lease agreement, a sub lease agreement was entered into between Toits Motor Group (as sub-lessor) and the Second Applicant/Defendant (as sub-lessee) on 28th November 2000 in terms of which the Second Applicant/Defendant rented a portion of the immovable property from Toits Motor Group ("the sublease);
 - 6.3 Toits Motor Group failed to pay rentals in terms of the head lease agreement due to the First Applicant/Plaintiff, and was at all times during January and February 2009 in arrears vis-à-vis the First Applicant/Plaintiff;
 - 6.4 On 16th of January 2009 the First Applicant/Plaintiff placed Toits Motor Group on terms to settle payment of the arrears and informing them that if Toits Motor Group did not remedy their breach of the head lease agreement, the First Applicant would be entitled, amongst others, to cancel the head lease agreement. The head lease agreement provides that a seven day notice period is required before cancellation upon a breach occurring;
 - 6.5 Toits Motor Group did not rectify their breach within the seven day notice period and on 27th January 2009 the First Applicant "cancelled" the head lease agreement (the

word "cancelled" is put in inverted commas due to the reason as evident from what is set out below);

- 6.6 Toits was finally wound-up by means of a Court Order granted on 17th February 2009.
- 6.7 The Plaintiff took cession of Toits' claim against the Defendant for rentals allegedly due in terms of the lease. The Plaintiff then instituted the present action.
- 6.8 The cancellation is to be considered against the following:
 - 6.8.1 On 21st January 2009 an application for the liquidation of Toits Motor Group was issued out of the (then) Transvaal Provincial Division;
 - 6.8.2 On 27th January 2009 a rule nisi was issued by this Court placing Toits Motor group under provisional liquidation, and on the same date the First Applicant/Plaintiff "cancelled" the head lease agreement with Toits Motor Group;
 - 6.8.3 On 17th February 2009 the rule nisi was confirmed and Toits Motor Group was placed under final liquidation;
- 6.9 The issue is:
 - 6.9.1 Whether a valid cancellation of a lease agreement could occur, under these circumstances;
 - 6.9.2 Whether a valid cancellation of the head lease agreement indeed occurred.
- 6.8 Essentially, the First Applicant submits that a valid cancellation could not occur, and that the head lease agreement was not "validly" cancelled. The First Applicant contends, that because of the liquidation application on 21st January 2009, and the dates relevant thereto, the notice of cancellation was suspended in terms of the provisions of Section 37 of the Insolvency Act, Act 24 of 1936. The Second Applicant, however, contends otherwise - the Second Applicant (McCarthy Ltd) contends that a valid cancellation of the head lease agreement occurred.
- 6.9 Ellerines' contention is that if the lease was not validly cancelled on 27th January 2009, the sublease between Toits Motor Group and McCarthy did not end on that date. The liquidator would therefore be entitled to cede the rights of Toits Motor Group under the sublease to Ellerines. Ellerines, as cessionary, would therefore be entitled to enforce the claim for rental under the sublease as against McCarthy.

[7] The First Applicant's (Ellerines) contentions rely on two main grounds:

- 7.1 On a proper interpretation of Section 37 of the Insolvency Act 24 1936, ("the act"), a lessor cannot exercise a right of cancellation after the commencement of the liquidation.

7.2 The concursus creditorum freezes creditors rights as at date of the commencement of liquidation and accordingly a lessor cannot exercise a right of cancellation after the commencement of the concursus creditorum;

[8] In order to determine the dispute between the two applicants, it is necessary to refer to the relevant legislation applicable. Section 37 of the Insolvency Act, Act 24 of 1936 reads as follows:

"37. Effect of sequestration upon a lease – (1) A lease entered into by any person as lessee shall not be determined by sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the lessor. Provided that the lessor may claim from the estate compensation for any loss which he may have sustained by reason of the non-performance of the terms of such lease.

(2) If the trustee does not, within three (3) months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.

(3) The rent due under any such lease, from the date of the sequestration of the estate of the lessee to the determination of the cession thereof by the trustee, shall be included in the costs of sequestration.

(4) The determination of the lease by the trustee in terms of this section shall deprive the insolvent estate of any right to compensation for improvements, other than improvements made in terms of an agreement with the lessor, made on the leased property during the period of the lease.

(5) A stipulation in a lease that the lease shall terminate or be varied upon the sequestration of the estate of either party shall be null and void, but a stipulation in a lease which restricts or prohibits the transfer of any right under the lease or which provides for the termination or cancellation of the lease by reason of the death of the lessee or his successor in title, shall bind the trustee of the insolvent estate of the lessee or of his successor in title, as if he were the lessee or the said successor, or the executor in the estate of the lessee or his said successor, as the case may be".

[9] Section 37 of the Insolvency Act, Act 24 of 1936 was preceded by various preceding Insolvency Acts. First Applicant contends that in order to understand the relevant case law and its development (that will be referred to later on in this Judgement), it is necessary to refer to previous enactments prior to Act 24 of 1936 which are still in force. After becoming

the Union of South Africa in 1910, the Insolvency Act, Act 32 of 1916 was enacted, consolidating the enactments of the four provinces.

9.1 Section 36 of the Insolvency Act 32 of 1916 reads as follows:

"36. (1) No lease entered into by the insolvent as lessee shall be determined by reason merely of the sequestration of his estate but the trustee may determine the same by notice in writing to the lessor, subject to a concurrent claim by the lessor against the estate for any damages he may have sustained by reason of the non-performance of the terms of such lease.

(2) If the trustee does not within 3 (three) months of his appointment notify the lessor that he is prepared to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such 3 months.

(3) The rent due under any lease so determined, from the date of the sequestration of the estate of the lessee to the determination of the sale thereof by the trustee, shall be included in the costs of administration. The fact that a lease has been determined by the trustee shall deprive him of any right to compensation for improvements made during the period of that lease".

9.2 The 1916 Act repealed Ordonants 6 of 1843, which was then applicable in the Cape and the Insolvency law Act, Act 13 of 1895 of Zuid-Afrikaansche Republiek, Law No. 47 of 1887 in the Colony of Natal and Hoofstuk CIV van Het Wetboek van den Oranjevrystaat

[10] The position in the Cape prior to 1916

10.1 Section CIV of Ordonants 6 of 1843 (Cape) reads as follows:

"CIV. And be it enacted, that if any insolvent shall be entitled to any lease, or agreement for any lease of any immovable property, such lease or agreement for lease shall, upon the surrender or adjudication of sequestration of the estate of such insolvent, cease and determine. Provided, that nothing herein contained shall prevent the lessor or person having made such agreement, from suing the trustee or trustees in any competent court, and from recovering judgment against the insolvent estate for any rent which he shall prove to the satisfaction of such court to have been due by the insolvent prior to the surrender or adjudication of sequestration of his estate, or for any damage which he shall prove to the satisfaction of such court to have been by him sustained, in consequence of the

non-performance of the conditions of such lease or agreement for a lease during the full period of the stipulated endurance thereof, or to deprive the trustee or trustees of their legal defence against such suit; or to prevent such trustee or trustees from suing the lessor or person having made such an agreement in any competent court, for the amount of any ameliorations made on the subject, and in contemplation of such lease or agreement, by the insolvent, prior to the surrender or adjudication of sequestration of his estate, or to deprive such lessor or person of his legal defence against such suit; and provided also, that it shall be lawful for such trustee or trustees, when sued for damages for the non-fulfilment of such lease or agreement for a lease, to offer to take over and accept the same and to perform the conditions thereof, during the full period of the stipulated endurance thereof; and that it shall be lawful for such lessor or person having made such agreement, when sued for the amount of such ameliorations as aforesaid, to offer to receive the trustee or trustees, as lessors in the place of the insolvent, under the conditions and for the full period of the stipulated endurance of such lease; and if such offer shall be refused, the party who has made it shall be absolved from the suit in which it has been made, and shall be entitled to his costs”.

- 10.2 Ordinants 6 of 1843 Cape was preceded by Ordinants 64 of 1829 (Cape), and Section 80 thereof provides that:

“80. And be it enacted, That, if any insolvent shall be entitled to any Lease or Agreement for any Lease or of any immovable Property, such Lease or Agreement for Lease shall, upon the surrender or adjudication of Sequestration of the Estate of such Insolvent, cease and determine. Provided, that nothing herein contained shall prevent the Lessor, or Person having made such Agreement, from suing the Trustee or Trustees in any competent Court, and from recovering Judgement against the Insolvent Estate for any Rent, which he shall prove to the satisfaction of such Court to have been due by the Insolvent prior to the surrender or adjudication of Sequestration of his Estate, or for any damage, which he shall prove to the satisfaction of such Court to have been by him sustained, in consequence of the non-performance of the Conditions of such Lease or Agreement for a Lease during the full period of the stipulated endurance thereof nor to deprive the Trustee or Trustees,

of their legal defence against such Suit, or to prevent such Trustee or Trustees from suing the Lessor or Person having made such Agreement in any competent Court for the amount of any ameliorations made on the subject and in contemplation of such Lease or Agreement, by the Insolvent, prior to the surrender or adjudication of Sequestration of his Estate, or to deprive such Lessor or Person of his legal defence against such suit: And provided also, that it shall be lawful for such Trustee or Trustees, when sued for damages for the non-fulfilment (sic) of such Lease or Agreement for a Lease, to offer to take over and accept the same, and to perform the Conditions thereof during the full period of the stipulated endurance thereof; and that it shall be lawful for such Lessor or Person having made such Agreement when sued for the amount of such ameliorations as aforesaid, to offer to receive the Trustee or Trustees, as Lessors, in the place of the Insolvent, under the conditions and for the full period of the stipulated endurance of such Lease; and, if such offer shall be refused, the Party, who has made it, shall be absolved from the Suit in which it has been made, and shall be entitled to his Costs”.

[11] The position in the ZAR

11.1 In Z.A.R wet no.13, 1895 (Insolventievet) came into force on 1st January 1896. Section 43 thereof read as follows:

“Met het verleenen van de order tot sequestratie vervallen de huren en huurcontracten door den insolvent als huurder vóór dien tijd aangegaan niet.

De curator zal echter binnen 6 weken na de bekrachtiging van zijne verkiezing, in overleg met die crediteuren, moeten beslissen of hij die huren of huurcontracten al dan niet wil nakomen; bij gebreke waarvan zij als vervallen zullen worden beschouwd.

De verhuurder of ander persoon de zoodanig contract gemaakt heeft, kan in elk geval den curator voor eenig bevoegd Gerechtshof dagvaarden tot verhaal van de huurpenningen hem tot op dien tijd verschuldigd of van de schade, welke hij sal bewijzen door het niet nakomen van zoodanige huur of huurcontract te hebben geleden.

De curator heeft daarentegen het recht den verhuurder of anderen persoon, de zoodanig contract gemaakt heeft, voor eenig bevoegd Gerechtshof te dagvaarden tot verhaal van het bedrag der

verbeteringen, welke vóór de sequestratie aan het gehuurde zijn aangebracht”.

[12] The position in the Oranjevrijstaat

12.1 Section 23 provides that all pending actions (“alle actien hangende”) against the insolvent is stopped (“gestaakt worden”) whereupon

“en het zal den eischer in zoodanige actie vrijstaan om zijne vordering te bewijzen... en het voordeel daarvan te trekken bij de verdeling van den boedel, mits nogtans...dat alle actien hangende teen enige insolven voor... of verbreking van eenig contract door hem gepreegd, zoodanige skade onseker zijnde, of tot verhaal van enige vordering ongelikwideerd ten opzichte van deszelfs bedragen, en alle procedures daarin zullen, nadat ene order is uitgemaakt tot de sekwestratie van zijnen boedel, gestaakt worden, tot een curator zijn gekosen..., en daarop sal die eischer in sondanige actie, na den die curato te hebben gedagvaard om sodanige actie op te nemen...”.

12.2 Section 24 provides inter alia

“dat alle actien begonnen door eenigen persoon wiens boedel naderhand als insolvent onder sekwestratie sal worden gesteld voor enige skuld of vordering aan den gemelde boedel verskuldigd, en alle procedures daarin nadat de order tot zoodanige sekwestratie is uitgemaakt, zullen moeten ophanden, totdat die curator... sal beslissen of hij dezelve will voortsitten of staken, en de curator sal verplicht sijn zoodanige verkiezing te maken binne ses weken...”.

[13] The Natal Insolvency Law, Law no. 47 1887 provided in Section 25, that:

13.1 *“All actions pending against any insolvent for any debts or demand provable against his estate, and all proceedings therein shall, upon any order being made for the sequestration of such estate in virtue thereof be stayed... Provided, however, that all actions pending against any insolvent for damages... or breach of contract committed by him, such damages being uncertain, or for the recovery of any claim unliquidated as to its amount, and all proceedings therein shall upon any order being made for the sequestration of his estate, be stayed until a trustee shall be elected”.*

13.2 Section 26 provides that:

“All actions commenced by any person whose estate shall afterwards be placed under sequestration as insolvent for any debt or demand due to the said estate... upon the order for such sequestration being made, be stayed until the trustee thereafter

chosen for the administration of the said estate shall make election to prosecute or discontinue the same, and the trustee shall be bound to make such decision within six weeks after notice to that effect shall be served upon him... or otherwise shall be deemed to have abandoned the same".

In terms of the Natal Sequestration Act, the curator had no right to make an election to continue with a lease if the insolvent was the debtor. The legal positions in the Free State and Natal were therefore similar in nature; but for present purposes, it is of no assistance.

- [14] INNES CJ discussed the general rule that the provisions of one statute afford no clue to the correct interpretation of another (see *Kirkland v Romyn N.O.*, 1915 AD 327, 330) and remarked but with one exception; because the Transvaal Rule of 1895 is in effect the Old Cape Ordinance, but rearranged, abridged, and in some instances amended "that the one statute is an adaption of the other is apparent upon the most casual inspection".
- [15] It appears that the provisions of Section 36 of the 1916 Act corresponds more closely with the provisions of Section 43 of the Z.A.R wet.
- [16] First Applicant contends that it emerges from both the Cape Provisions (1834 Ordinance) that the trustee was in certain circumstances entitled to take over the lease. In particular the word "*and*" provided also that it shall be lawful for such trustee or trustees, when sued for damages for the non-fulfilment of such lease or agreement for a lease, to offer to take over and accept the same, and to perform the conditions thereof, during the full period of the stipulated endurance thereof, notwithstanding the provision that the lease comes to an end. The 1829 Ordinance was to a similar effect.
- [17] First Applicant points out that there seems to be some confusion in the latter part of section CIV of Order 6 of 1843 (Cape). It states that when the lessor is sued for improvements, the lessor can "offer to receive the trustee or trustees as lessors in the place of the insolvent". Both counsel for first and Second Applicant are at idem that it seems to them that this should read, as "lessees". However, the same wording occurs in Section 111 of the draft ordinance produced prior to the passing of Ordinance no. 6, as also in the 1829 ordinance.
- [18] First Applicant also submits that it is significant that the trustee can, in certain circumstances, adopt the lease notwithstanding its termination by law.

- [19] The Z.A.R provision allows the trustee six weeks to decide whether to give effect to the lease or not. This he must do in consultation with the creditors. First Applicant submits that it emerges from these earlier regulations that the legislator envisages circumstances where the trustee could maintain and enforce the lease. This submission accords with the often quoted passages made by INNES J in *Walker v Syfret N.O.*, 1911 (AD) 141 at 166:

"The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtors rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor much be dealt with as it existed at the issue of the order. Now, to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount. And a transaction of that nature would be of no validity as against the trustee."

- [20] Counsel for the First Applicant also referred to a report which preceded Ordinance 6. A committee was appointed to enquire into the system of Insolvent Law in the Cape. My attention was drawn to a note that appears on the report made by MENZIES J who wrote the report, making the following comment when talking about ranking of debts:

"Therefore, where it is not that the committee have stated that the English rule is, in their opinion, "founded upon a sound and equitable principle" I should have been led to conclude, that the committee proposed the adoption of the English rule in this colony, merely because it was the English rule, and without regard to the principle upon which it was founded, or whether it was founded upon any principle at all."

He concludes his remarks by suggesting that the "Law of the Colony", should remain.

- [21] The First Applicant submits that the decision in *Walker v Syfred N.O* encapsulates the principle that when insolvency commences nothing should be done to the prejudice of the general body of creditors. No creditor, including a lessor, should be able to advance his position above that of other creditors after the commencement of the winding-up. The First Applicant submits that a lease is, or could be, a valuable asset in the estate which includes any subleases entered into between the lessee. It is common cause that subsequent to the entering into the head lease agreement between the First Applicant as lessor and Toits

Motor Group (Pty) Ltd (the insolvent as lessee), the lessee (as sub-lessor) and the Second Applicant McCarthy Ltd as sub-lessee entered into a further agreement in terms of which the Second Applicant rented a portion of their movable property from Toits Motor Group. The First Applicant contends that creditors would benefit by continuation of the lease as the trustee/liquidator may wish to retain the lease in force in order to benefit the general body of creditors by collecting the income derived from the sublease.

- [22] First Applicant contends that this submission accords with the aim of the law that nothing will be done to prejudice the general body of creditors. If the lease is to be continued with a general body of contractors, it will secure an equal distribution in the best interest of all creditors. Therefore, it is concluded that liquidation does not terminate a lease. Section 37 of the Insolvency Act 24 of 1936 (as amended) in effect gives the trustee/liquidator a spatium deliberandi of three months to decide whether to maintain or cancel the lease. As trustees/liquidators are normally appointed days or even weeks after the issue of the order, the liquidator/trustee must have time to familiarise himself with the facts regarding the lease. As liquidation commences when the application is filed in court. In terms of Section 348 of the Companies Act 61 of 1973, the concursus creditorum does take place on that date and in this specific case on the 21st of January 2009. The concursus crystallises the creditors' rights in the estate. Those rights cannot subsequently be changed to the advantage or disadvantage of any creditor.
- [23] To summarise, First Applicant contends that in the present matter the lessor had no right to cancel as at 24th January 2009 the notice period had not yet expired and the right to cancel would only arise on the expiry of the notice period. The First Applicant submits that no creditor, including a lessor, should be able to advance his position above that of other creditors after the commencement of the winding-up. Why, one can ask, should a creditor/lessor, who is given notice, but not exercise the right of cancellation, be in a better position than, for instance, a mortgagee under a notarial bond who has instituted proceedings to perfect the bond but has not obtained a perfection order before the commencement of the winding-up. The First Applicant contends that the lease is, or could be, a valuable asset in the estate. On the probabilities, the creditors would benefit by their continuation of the lease. The trustee/liquidator would then presumably, in the three month period allowed, decide to retain the lease, enforcing it in order to benefit the general body of creditors. This accords with the aim of the Law to secure an equal distribution in the best interest of all creditors. Counsel for the First Applicant then referred me to a couple of examples which explains his point:
- 23.1 **Example 1:** On day 1, the lessee breaches the lease agreement by non-payment.
On day 10, the lessor sends a notice requiring payment within 10 (ten) days, failing

which cancellation will ensue. On day 15, winding-up commences. On day 20, notice of cancellation is given. On day 23, a provisional liquidator is appointed.

The Effect: The provisional liquidator:

23.1.1 has no chance of considering whether to maintain or abandon the lease;

23.1.2 has had no opportunity to seek power from the creditors, the court or the master;

23.1.3 the lease is "lost" as an asset in the estate.

23.2 **Example 2:** A property is let to a lessee for an amount of R1000 per month. The lessee sublets the said premises for an amount of R10 000 per month. The lessee fails to pay on day 1. Winding-up commences on day 7. On day 10 the lessor gives notice of cancellation (when notice period not required), delivered to the domicilium, which is in any event a vacant stand. On day 16 a provisional liquidator is appointed.

The Effect:

17.2.1 The lease is cancelled after commencement of winding-up;

17.2.2 The lease is cancelled before appointment of the trustee/liquidator;

17.2.3 An asset of R9000 per month is lost to the estate;

17.2.4 The trustee is precluded from "selling" a profitable sublease.

23.3 **Example 3:** Company A owns a property, which is let to Company B, its subsidiary or associate. Company B carries on business as a petrol filling station. B fails to pay rental. A wants, in any event, to make a new deal with another wholesale distributor, and gives B notice to rectify non-payment with a contractually prescribed notice period. B is wound up before such period expires. A cancels the contract after presentation of the winding-up application. B's business is tied up, under its retail license, to the property. B loses the property, and thereby has no business. Creditors therefore have nothing which can be sold, which, but for the cancellation, could have been sold for the benefit of the estate.

[24] The First Applicant submits that the true import of Section 37 of the Insolvency Act is that it creates a spatium deliberandi for the trustee/liquidator. This interval is necessary to allow the liquidator to:

24.1 be appointed;

24.2 familiarise himself with the estate;

24.3 consult with creditors;

24.4 obtain the necessary powers to act;

25.5 to make an informed decision.

First Applicant contends that Section 35 of the Insolvency Act creates a similar, but not identical, spatium for the trustee. The Law of Insolvency recognises this change in the situation. It is in fact a cardinal principle of the Law. Other creditors rights are stayed; why not, one may ask, also a lessor creditor. First Applicant submits that the provisions of Section 361 of the Companies Act, Act 61 of 1973, provide no real remedy. The section provides that the "property" of the company is placed under the Master's control. The Master, however, as a matter of practice, is unlikely to be able to affect payment of a rental demanded by a lessor. Likewise, the directors have ceased to have any authority. See *Secretary for Customs and Excise v Millman N.O.*, 1975(1) SA 544 (A) at 552 H.

In the interim period, between liquidation and when the property is under the Master's control, until the provisional liquidator has been appointed, there exists a hiatus in which the lessor can act, to the detriment of the estate.

- [25] The First Applicant's argument centralises about what the term *concursum creditorum* means, i.e. the "gathering of creditors". This takes place at the domicile of the insolvent – the *locus concursus*. See *Trustee of Howse, Sons and Co. v Trustees of Howse, Sons and Co.*, (3) SC 14 at 20 LORD DE VILLIERS C.J. where it was held:

"The object of the distribution of insolvency effects being perfect equality among those who have equal rights and no preferant claim, it was held that this could only be conveniently and effectually attained in one place, which was termed the locus concursus creditorum..."

In *Walker v Syfred supra* at 160 the same Judge said:

"The effect of a winding-up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of other creditors".

CANEY J said in *Magill, Grant and Nell (Pty) Ltd v Administrator, Natal*, 1968(4) SA 44 (N) at 49(C):

"Whatever rights the Plaintiff company had at the date of the liquidation order to receive payment, presently or in future, from the Defendant, fell to be fulfilled by the Defendant by payment to the liquidator, and any debts due by the company at that date fell to be established with the liquidator as claims against the company which, if amongst the concurrent claims, would rank for payment of a dividend in the distribution of the free residue of the company";

and, further down on the same page he says:

"It appears to me not to be a matter of insolvency of a principal terminating the authority of his agent so that the latter can no longer act under the

authority conferred upon him, but the answer in my opinion is that the law intervenes to assure the rights and liabilities of all persons concerned in a concursus creditorum are given effect to”;

and on 50(C):

“Likewise in the present case, it appears to me, the right which the Defendant had to pay in full the claims of certain creditors of the company and thereby to discharge his own debt to the company no longer subsisted after the liquidation order”.

- [26] The effect of the concursus was also discussed in *Ward v Barret, N.O. and Another N.O.*, 1963(2) SA 546 (AD). At 552(H) to 553(B), STEYN CJ held that the concursus precluded an action being brought for specific performance:

“At that date, the Appellant was entitled to claim registration of the notorial bond. But a concursus having supervened, she could not bring an action against the First Respondent for specific performance (see F Harris v Trustee of Buissinne, 2 Menz. 105; Lucas' Trustee vs Ismael and Ammot, 1905 TS 239 at 248) and the latter had no authority to accede to any such claim, as the interests of other creditors would inevitably have been prejudiced thereby. The Appellant's personal right to the registration of a bond could, therefore, not be converted into a jus in rem under a vested bond. Neither could such a transformation be brought about by the power of attorney, irrespective of whether or not it is a procuratuo in rem suam; even if irrevocable, the mere grant and existence of the power to effect registration could not and did not change the personal right into a real one”.

The applicant concludes his argument by stating that the concursus precludes the exercise of a right of cancellation after the coming into effect of a winding-up. See in this regard *Development Bank of Southern Africa Ltd v Van Rensburg and Others N.N.O.*, 2002(5) SA 425 (SCA); *Nedbank Ltd v Chance and Others*, 2008(4) SA 209 (D); and concluded with a reference to Marse, *The Law of Insolvency in South Africa*, where it was said:

“The concursus creditorum is regarded as one of the key concepts of the South African Law of Insolvency. The concept entails that the rights of the creditors as a group are preferred to the rights of individual creditors. For example, a single creditor can no longer by means of execution obtain full payment of his claim at the expenses of others. Neither can the creditors attach assets acquired by the debtor after sequestration. Because a debtor's capacity to act is limited until his rehabilitation, he may no longer alleviate or burden his assets”;

and at 171:

"The sequestration of a debtor's estate establishes a concursus creditorum. Thereafter nothing may be done by any of the creditors to alter the rights of the other creditors... The establishment of a concursus creditorum, and the persables? involved, affect a number of other matters, such as uncompleted contracts, liens, the right of set off, the granting of a provisional order of sequestration after another court had granted a similar application, as well as ultra vires acts and overpayment by a trustee".

- [27] The Second Applicant, Defendant in the main action, accepts that in terms of Section 348 of the Companies Act, no 61 of 1973, the winding-up of Toits must be deemed to have commenced when the application papers for the winding-up were lodged with the Registrar on 21st January 2009. Therefore, concursus creditorum must be deemed to have been brought about on this day. The issue is, however, whether the advent of concursus creditorum prevented the Plaintiff from lawfully cancelling the head lease by means of a letter dated 27th January 2009. If he did, then the sublease still exists. If he did not, then the sublease came to an end, simultaneously with the lease on 27th January 2009, and the Plaintiff has no claim against the Defendant for rentals, allegedly due in terms thereof post the cancellation of the head lease.

The winding-up of Toits began to commence when the application papers for the winding-up were lodged with the Registrar on 21st January 2009. The issue is, as said before, that whether the advent of the concursus creditorum prevented the Plaintiff from lawfully cancelling the head lease by means of a letter dated 27th January 2009. The Defendant (Second Applicant) submits that Section 37 of the Insolvency Act 24 of 1936 (the 1936 Act) "is quite clearly applicable in this matter". The Second Applicant rely on the case of **Mitchell v Sotiralis's Trustee, 1936 (TPD) at 252**; SOLOMON J made certain comments in this matter regarding Section 36 of the 1916 Act which preceded the present Section 37 of the 1934 Act, save for subsection 37 (5) of the 1936 Act (which is not applicable). The two Sections are for all intents and purposes identical. It is to be noted that the new subsection (5) introduced into Section 37 of the 1936 Insolvency Act only occurred in 1943 when Section 37 of the 1936 Insolvency Act was amended. See in this regard **Liquidators, Durban Icedromes and Another, 1965(1) SA 600 at 612 (PTC)**. Second Applicant submits that the comments made by SOLOMON J in the **Mitchell** case, regarding Section 36 of the 1916 Act applies with equal force to Section 37 of the 1936 Act.

In **Mitchell's** case, SOLOMON J held as follows:

"However, what is clear about sec. 36 is that the insolvency of the lessee does not determine the lease, but the trustee has the right to determine the lease, saving all other rights of the lessor... and it is clear that the terms of the lease are in no way affected, except in so far as the date of termination is concerned. The section does not refer to the right to cancel or to any other covenant in the lease, except its duration".

- [28] Second Applicant submits that *Mitchell's* case was followed by FRIEDMAN J in *Smith and Another v Parton N.O.*, 1980(3) SA 724 (D). This case dealt with the cancellation of a sale of a business. Neither Section 35 (which deals with sales of immovable properties), nor Section 37 of the 1936 Act were applicable to this case. FRIEDMAN J therefore applied the Common Law. He held as follows:

"Once one accepts, therefore, that the only real basic principle is that the contract survives the insolvency, then it seems to me to follow inevitably that the accrued right to cancel survives. Where the creditor decides after insolvency to exercise his right of cancellation, he is not thereby enforcing a right against the insolvent estate and in that way altering the order of things as established by the concursus; he is simply notifying the trustee of his election to exercise a right which he has and which has survived the insolvency".

- [29] Second Applicant also relied on the case of *Porteous v Strydom N.O.*, 1984(2) SA 489 (B) which dealt with a contract for the sale and purchase of immovable property. Accordingly, Section 35 of the 1936 Act was applicable. For present purposes, Sections 35 and 37 are virtually identical.

The facts of the *Porteous* case (save for the nature of the contract concerned), were identical with the facts of the present matter. Notice demanding payment had been given before concursus creditorum but the notice period expired after concursus creditorum. GALGUT J, after referring to the judgment in *Smith and Another v Parton N.O.*, *supra* (CIT) held that nothing in Section 35 nor anything else in our Law excuses a trustee from performing the insolvency obligations. If payment was not made pursuant to the notice, then the consequent cancellation was not affected by the concursus creditorum.

- [30] Second Applicant also referred to the case of *De Wet N.O. v Uys N.O. en Andere*, 1998(4) SA 694 (T), where LE ROUX J likewise had to deal with a contract for the sale of immovable property. The learned judge held albeit obiter dictum as follows:

"...waar 'n party 'n lex commissoria wou afdwing, die voorwaardes wat dit in werking stel streng nagekom moes word (see Rautenbach v Venner, 1928 (TPD) 26 op 30; North-Vaal Mineral Company Ltd v Lovasz, 1961(3) SA 604 (T) op 606). Indien daar 'n reg tot kansellasië ontstaan het voor insolvensie, het dit die concursus creditorum oorleef en kon dit na insolvensie uitgeoefen word" (see Smith and Another v Parton N.O., 1980(3) SA 724 (D) at 729).

[31] To summarise the argument of the Second Applicant, it is contended that the constant theme which runs throughout the aforementioned judgments is that concursus creditorum does not alter the party's rights and obligations, save only that a trustee has an election to end the agreement. If he elects to abide the agreement, then he is obliged to ensure that all the obligations of the insolvent are met. Concursus creditorum does not affect any accrued rights of a seller or lessor. An accrued right to cancel may, therefore, be exercised after concursus.

[32] In the present case it is not in dispute that the Second Applicant obtained the right to cancel the contract subject to prior notice been given prior to the concursus creditorum. The notice to comply with the terms of the contract was to place the insolvent in mora within a certain prescribed period. As such, the contract made provision for a time clause to expire before the lessor could cancel the contract.

A time clause; sometimes called a "dies" or "term" is not the condition of a contract, see *Venter Agentskappe (Edms.) Bpk. v De Sousa*, 1990(3) SA 203 (A) at 111 E – F; *Jurgens Eiendomsagente v Share*, 1990(4) SA 664 (A) at 674 I. See also Pothier, *Obligations*, paragraph 23 O which was approved in the *Venter Agentskappe* case at 111 E – G *supra*. In Pothier's words, a "time clause" differs from a condition inasmuch a condition suspends an engagement formed by the agreement; whereas a "time clause" does not suspend the engagement, but merely postpones the execution of it. A person who owes anything subject to a "time clause" not yet expired is a real debtor, and if he pays within the time he has no right of repetition, for he has only paid what was in effect due from him; but now he is a real debtor, he is not compellable to discharge his obligation until the expiration of "time". Pothier also stated in **paragraph 235** that if, however, the debtor goes insolvent before the time mentioned the creditor can immediately claim against the insolvent estate as a concurrent creditor.

[33] It seems to me that when a time clause for performance is incorporated in a contract within which an obligation is to be performed, the normal rule is that performance cannot be

claimed until the day after the stipulated day or the end of the period because the debtor has the whole of the last day to perform, see Christie, *The Law of Contract*, 6th edition, 457.

The Common Law however, provides that if the debtor goes insolvent before the time mentioned by the creditor, the claim becomes automatically and immediately due and payable. In my view the provisions of Section 37 of the Insolvency Act do not alter the Common Law as it refers to contracts that survive the insolvency of the debtor.

- [34] It is my view that in terms of the Common Law the First Applicant became entitled to cancel the contract immediately when the liquidation commenced on 21st January 2009. He could have exercised this right of cancellation immediately upon concursus creditorum or at the time set for the performance stated in the notice of demand. The fact that notice was only given at the date of expiry of the notice period is totally irrelevant. Ellerines would under normal circumstances and in the absence of an application to liquidate be entitled to cancel the contract on the ground that Toits Motor Group failed to comply with its commitments in terms of the contract i.e. the failure to pay rent alternatively on the basis that Toits repudiated the contract by vacating the premises occupied by themselves and its failure to pay its rent. These facts are not in dispute.
- [35] The First Applicant elected to cancel the agreement as set out in Plaintiff's attorney's letter dated 27th January 2009. The validity of the cancellation notice is therefore not challenged by the First Applicant save for the provisions of Section 37 of the Insolvency Act. HOLMES JA held in the case of *Crest Enterprises (Pty) Ltd v Rycklof (Edms) Bpk*, 1972(2) SA 863 (A) at 870 G – H that a contractual right is enforceable if, before the rescission, it was accrued, due and enforceable as a cause of action independent of any executory part of the contract. The passage referred to above was examined by the appeal court in the decision of *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*, 1988(2) SA 546 (AD) at 563 J and further. This was an appeal against a judgment given by NIENABER J and which was reported in the Law Reports under the same name with the following reference: 1986(4) SA 510 (N). After referring to the decision and various other cases BOTHA AJA referred to HOLMES JA's judgment as follows on 565 B. BOTHA AJA remarked that in the *Crest Enterprises* case HOLMES JA referred to the rule in *Walker's* case. That was a case in which the Plaintiff had for several months rendered services to the Defendant under a contract, which was then repudiated by the Defendant. The Plaintiff accepted the repudiation and sued for payment of monies which had accrued and were due under the contract before the repudiation. The passage in question, *Walker's* case, appears in 1972(2) SA at 870 G – H. BOTHA AJA then said;

"To sum up on this aspect, the rule in the Walker case supra is confined to cases where, prior to the rescission of a contract by one party's acceptance of the other's repudiation, there exists a right which is accrued, due, and enforceable as a cause of action independent of any executory part of the contract".

NIENABER J held at 516 A of his judgment (*supra*) that the principle embodied in the passage was not restricted to rescission upon liquidation, but that it applied to all forms of breach culminating in cancellation.

BOTHA AJA remarked at 564 C of the Appeal Court's decision: *"I agree, with respect. Nor was there any argument to the contrary in this Court".*

[36] The First Applicant's argument must be placed in perspective. A contract survives the insolvency only to the extent that the rights and obligations of both parties remain in existence as it is at the moment of concursus creditorum. In the present case the First Applicant made an election to cancel. Furthermore, the liquidators are bound by the insolvent's choice made before the concursus to stop paying rent and by vacating the premises; thereby repudiating the contract. The notice of cancellation merely confirms that the terms of the contract have not been complied with and that the lessor was executing his rights in terms of the contract.

[37] On the facts placed before me it is abundantly clear that the breach of the contract by the insolvent was of such a nature that it evinces an intention on the part of the insolvent that the contract should be treated as being discharged and that he is no longer to be bound by the terms of the contract for the future, see in this regard *Segal v Mazur*, 1920 (CPD) 635 at 644 – 645. The conduct of the insolvent prior to the liquidation was plainly inconsistent with an intention to enforce it. In *Smith and Another v Parton N.O.*, 1980(3) SA (D) 724 at 729 D – E FRIEDMAN J held that if:

"...the contract survives the insolvency, then it seems to me to follow inevitably that the accrued right to cancel survives. Where the creditor decides after insolvency to exercise his right of cancellation, he is not thereby enforcing a right against the insolvent estate and in that way altering the order of things as established by the concursus; he is simply notifying the trustee of his election to exercise a right which he has and which has survived the insolvency".

On 729 H he continues and says that a right accrued before insolvency flows as a legal consequence even after insolvency, "(a)nd to prevent them from exercising this right

would firstly involve the trustee acquiring rights under the contract greater than those of the insolvent whose place he is taking... and secondly would entirely negate the rights acquired by the applicants and which has survived the insolvency. What this means from a practical point of view is that if the trustee abandons the agreement ex hypothesi it is determined; if he attempts to affirm it the applicant can cancel it. On either basis and because the applicants desire to terminate the contract they can notwithstanding the insolvency inevitably achieve that result".

See also in this regard *De Wet N.O. v Uys N.O. en Andere*, 1998(4) SA 694 (T).

[38] Having regard to the aforesaid I am of the opinion that the lease contract between Toits Motor Group of companies and the lessor was lawfully cancelled and that the provisions of Section 37 of the Insolvency Act does not apply.

[39] First Applicant's claim against the Second Applicant is based on a cession agreement entered into between the First Applicant and the liquidators of Toits Motor Group. The cession involves the continuation of the sublease entered into between Toits Motor Group and the Second Applicant for the period after concursus creditorum came into effect.

It follows from my finding that a cession of the sublease is not permitted hence the cancellation of the head lease agreement. The First Applicant therefore has no cause for its claim against the Second Applicant.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. The action is dismissed with costs; which cost is to be paid by the First Applicant.
2. Such costs are to include:
 - (i) The employment of senior and junior counsel (where so employed).
 - (ii) The costs of the application in terms of Rule 33(4).



H J DE VOS

JUDGE OF THE NORTH & SOUTH
GAUTENG HIGH COURTS, PRETORIA

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