IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE: 1506/15

In the matter between:

178 STAMFORDHILL CC APPLICANT

AND

VELVET STAR ENTERTAINMENT CC RESPONDENT

JUDGMENT

THATCHER AJ:

[1] The applicant, 178 Stamfordhill CC, is the owner of an immovable property at 178 Stamfordhill Road, Morningside, Durban. The respondent, Velvet Star Entertainment CC, from about 2011 traded as the Bellagio Night Club from the property in terms of a lease. On 28 June 2013, a further contract of lease was concluded in terms of which the respondent leased the property from 1 July 2013 for 48 months at an initial rental of R55 000,00 plus VAT per month for six months, R58 000,00 plus VAT per month for a further six months, and, with effect from 1 June 2014 the rent would increase annually at 10% per annum.

[2] In terms of clauses 8.1 and 8.2, a deposit of R180 000,00 was to be paid on signature of the contract. Further material terms of the lease were the following:

(a) Clause 13 which is as follows:

"**13. Alterations, additions and improvements**

13.1 The [respondent] shall not make any alterations or additions to the Premises without the [applicant's] prior written consent ... .

13.2 If the [respondent] does alter, add to, or improve the Premises ... whether in breach of clause 13.1 or not, the [respondent] shall, if so required in writing by the [applicant], restore the Premises on the termination of this lease to their condition as it was prior to such alteration, addition or improvement having been made. ...

13.3 Save for any improvement which is removed from the Premises as required by the [applicant] in terms of clause 13.2, all improvements made to the Premises shall belong to the [applicant] and may not be removed from the Premises at any time. The [respondent] shall not, whatever the circumstances, have any claim against the [applicant] for compensation for any improvement to the Premises."

(b) Clause 18 which is as follows:

"**18. Special remedy for breach**

18.1 Should the [respondent] default in any payment due under this lease or be in breach of its terms in any other way, and fail to remedy such breach (other than payment) within 7 (seven) days after receiving a written demand that it be remedied, the [applicant] shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the [applicant] under the circumstances, to cancel this lease with immediate effect, be repossessed of the Premises, and recover from the [respondent] damages for the default or breach and the cancellation of this lease. The [applicant] shall not be obliged to give any written notice to cure non-payment of any amount due in terms of this lease."

[3] It is common cause that the respondent has been in occupation since July 2013 and that it failed to pay in full the deposit of R180 000,00 and the rentals for November 2014 to date. It is also common cause that on 25 July 2014, Loven Marimuthu, the driving force behind the respondent, executed an acknowledgment of debt in terms of which he acknowledged on behalf of the respondent that it was indebted to the applicant in an amount of R135 557,42 made up of the balance of the deposit at R97 796,32 and arrear rental of R37 761,00.

[4] On the 4 November 2014, Mr Marimuthu deposed to an affidavit putting the respondent into business rescue and on 5 November 2014 the business rescue application was delivered to the Companies and Intellectual Property Commission and accordingly the business rescue commenced.

[5] In this application, launched as a matter of urgency on the 13 February 2015, the applicant sought, firstly, an order in terms of section 133(1)(b) of the Companies Act, 2008, for such leave as may be necessary to bring this application for, *inter alia,* a declarator that the lease had been cancelled, and, secondly, for the eviction of the respondent from the property.

[6] It is helpful to set out the events from November 2014 as they unfolded.

[7] On 12 November 2014, Werner Cawood and Johan Christian Beer were appointed to oversee the respondent during the business rescue proceedings. (I shall hereinafter refer to the business rescue practitioners as "the “BRPs”.) On 19 November 2014, the applicant’s attorney addressed a letter to the BRPs advising that they would attend the meeting of creditors on the 25 November 2014 and attached to that letter the acknowledgment of debt and an updated certificate of balance stating that the respondent was indebted to the applicant in the amount of R198 014,25.

[8] On 25 November 2014, the first meeting of creditors was held. At that meeting, one of the concerns raised was the indebtedness of the respondent to the applicant.

[9] The business rescue plan was, in terms of section 150(5) of the Act, to be published by the 17 December 2014. On 11 December 2014, the BRPs requested that publication of that plan be postponed until Friday 30 January 2015, and that request was granted by creditors. The applicant declined to consent to the postponement.

[10] On 12 December 2014, the applicant's attorneys sent a letter to the BRPs:

(a) recording that R62 456,92 was outstanding in respect of the November rental and a further R135 557,42 for past arrears as recorded in the acknowledgment of debt was owing;

(b) calling upon the respondent to pay the total of R198 040,34 within seven days failing which the contract of lease would be cancelled.

[11] It would appear that on 24 November 2014, the BRPs had addressed a letter to the applicant advising that they had "suspended" the lease agreement for the duration of the business rescue. A copy of that letter does not form part of the papers. The applicant's attorneys in their letter of 12 December 2014 referred to the purported suspension set out in the letter of 24 November 2014, and demanded the return of the leased premises.

[12] On the 22 January 2015, the applicant's attorney addressed a letter to the BRPs advising that in the light of the respondent's failure to pay the arrear rentals, the applicant was cancelling the contract. The letter also called upon the respondent to vacate the premises by 30 January 2015 failing which an application would be brought for the return of the leased premises to the applicant.

[13] On 3 February 2015, the BRPs advised all affected parties, including the applicant, that they had concluded that "there no longer remains any prospect in continuing with the business rescue proceedings" for the respondent and that they would "now take the necessary steps in terms of section 141(1)" of the Act.

[14] On 4 February 2015, and unbeknown to the applicant, the winding up application was launched. On 5 February 2015, the applicant's attorneys, in writing, confirmed that they had cancelled the contract.

[15] This application was launched on 13 February 2015. The BRPs were advised of this on that date and on 14 February 2015, the application papers were emailed to the BRP's. On 16 February 2015, the BRPs acknowledged receipt of the application papers and advised that they have been sent to their attorneys. On 19 February 2015, the applicant was advised of the liquidation application.

Urgency

[16] The first point raised by Mr *van der Merwe*, who appeared for the respondents, was that the matter was not urgent. He submitted that since July 2014 the applicant had been in possession of an acknowledgment of debt in its favour and the applicant could have instituted proceedings based upon that acknowledgement of debt. In addition, there was a suretyship in place so that the applicant could have sued the surety for any sum owed by the respondent. He argued in the alternative that any element of urgency was as a result of the applicant's own conduct.

[17] Mr *Kemp SC*, who appeared for the applicant, argued that the matter was urgent. He summarised how events had unfolded, culminating in the bringing of the application. The payment program set out in the acknowledgment of debt signed in July 2014 provided for the arrears to be made up in four instalments, payable on the last days of the month of December 2014, March, June and September 2015. The repayment structure was to afford the respondent the opportunity of capitalising on

the anticipated improved business over the festive season at the end of the year. Rentals were paid in the months after July 2014, but then at the beginning of November 2014 the respondent was placed in business rescue and no rental for November paid. The applicant anticipated the business rescue plan being published by 17 December 2014 and not unreasonably presumed that in the business rescue plan provision would be made for the payment of rentals. However the publication of the business rescue plan was then postponed until the end of January 2015. With no rental being paid and the anticipated busy festive trading imminent, in an endeavour to obtain payment of rental, the letter of demand dated 12 December 2014 was sent. That letter met with no response. By 22 January 2015, still no rental had been paid whereupon the applicant sent the notice cancelling the lease agreement. At the end of January 2015, no business rescue plan was published and shortly thereafter, on 3 February 2015, the applicant received the notice from the BRPs that they had concluded that there was no merit in continuing with the business rescue proceedings and that "the practitioners will now take the necessary steps in terms of section 141(1) of [the Act] and all affected parties will receive the prescribed notice for such further steps". Thus having received no rent and no proposal in terms of the business rescue plan for the payment of any rent, and having heard nothing further, by 13 February 2015, this application for the respondent's ejectment was launched. (At that stage the applicant had not been informed that in fact on 4 February 2015 the BRPs had instituted an application in the Gauteng High Court for the winding up of the respondent.)

[18] It is clear from the way in which events unfolded since July 2014 that the applicant, not unreasonably, anticipated that, firstly, the arrears would begin to be paid off at the end of 2014, and, secondly, that the business rescue would provide payment of at least some rental. Thus the applicant cannot be faulted for waiting until December before taking any steps to recover the arrear rental owed to it. When at the beginning of February 2015 the applicant was advised that business rescue was to end and it was clear that the respondent was going to continue trading without paying a cent to the applicant for its occupation of the premises, the applicant launched this application.

[19] The applicant was, according to Ms *Charles*, the managing member of the applicant, financially embarrassed as it was incurring monthly expenses of R12 000.00 per month for the property for levies, rates, lights and water and insurances with no rental being paid. There is therefore an element of urgency in this application which entitled the applicant to move the application in the manner in which it did. The respondent was afforded sufficient opportunity to respond to the application and to place all the evidence it wished to place before the court. It delivered both a preliminary answering affidavit and a more comprehensive answering affidavit. Mr *van der Merwe*, correctly, did not submit that the respondent was in any way prejudiced because of the manner in which the application had been brought. In the circumstances of this case, I find that there is no merit in the respondent's contention that the matter was not urgent.

The status of the contract of lease

[20] It is common cause that at the commencement of the business rescue proceedings, the amount of the acknowledgment of debt (comprising arrear rental due before the business rescue proceedings commenced and a portion of the unpaid deposit as at 25 July 2014) had not been paid. In terms of clause 18 of the lease, the applicant could summarily cancel the lease without notice to remedy that breach. Clause 18 can be interpreted in no other way. Despite not being required to do so by clause 18, written notice was sent to the respondent on 12 December demanding payment within seven days of the amount of acknowledgement of debt as well as the November rental of R62 456,92. There was no response to that letter and accordingly on 22 January 2015, the applicant, in writing, sent an email to the BRPs cancelling the lease and calling upon them to vacate the premises by 30 January 2015, failing which proceedings would be brought to regain possession of the premises.

[21] Mr *van der Merwe's* argument was, as I understand it, the following. On 25 May 2014, the BRPs suspended the lease. No legal proceedings could be brought against the respondent in relation to its possession of the property without the leave of the court. The court should not grant leave because if it ordered the

ejectment of the respondent from the property and, as was contemplated by the BRPs, the business rescue proceedings were converted to liquidation proceedings, the liquidation would be deemed to commence on 5 November 2014 (the date of the commencement of business rescue proceedings). That being the case, if the respondent was ejected from the premises, it would be compelled to leave on the premises its movable property as well as the improvements it made to the property. The applicant would as the deponent to the answering affidavit expressed it, "hijack" the assets of the respondent for its own benefit, and elevate itself above other creditors in the liquidation, to the detriment of those other creditors.

[22] The first question to be dealt with is whether the applicant was entitled to cancel the lease after the business rescue proceedings had commenced.

[23] Mr *Kemp* submitted that the applicant was entitled to do so because the grounds upon which it relied subsisted prior to the commencement of business rescue, a situation permitted by section 136(2) of the Act. In support of this, Mr *Kemp* referred to section 136(2) prior to its amendment in 2011. Initially section 136(2) read as follows:-

> "(2) Subject to sections 35A and 35B of the Insolvency Act, 1936 ... despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment."

[24] The draconian effect this had on third parties who had concluded contracts with the company before the business rescue proceedings commenced led in 2011 to section 136(2) being amended so that today it reads as follows:-

> "(2) Subject to subsection (2A) … during business rescue proceedings, the practitioner may –

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that :-

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings…"

[25] Section 136(2) as it now is means that the rentals due by the respondent for the months after the business rescue proceedings commenced cannot be claimed, but that the claim for rental due when the business rescue proceedings commenced were unaffected by the business rescue and could be claimed.

[26] The question which then arises is whether the applicant could, during the subsistence of the business rescue proceedings, cancel the lease. Mr *van der Merwe* argued that the applicant could not do so because the BRPs had suspended the contract.

[27] Mr *Kemp* submitted that it was competent for the applicant to cancel the lease and seek the ejectment of the respondent. The position of the BRPs vis-à-vis the contract is akin to that of a liquidator of a company in liquidation or a trustee in insolvency. On the authority of *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) and *Porteous v Strydom NO* 1984 (2) SA 489 (D), notwithstanding the establishment of a *concursus creditorum*, a contract with the respondent can be cancelled. The lease survives the *concursus creditorum* and the rights and obligations of both parties to the contract remain in existence, and insofar as the obligations of the insolvent in terms of the contract are concerned, the trustee steps into the insolvent's shoes. The trustee is obliged to perform whatever is required of the insolvent in terms of the contract, including unfulfilled past obligations of the insolvent. The contract is neither terminated nor modified nor in any way altered by

the insolvency of one of the parties, except in one respect, and that is because of the supervening *concursus*, the trustee cannot be compelled by the other party to perform the contract. The so-called suspension of the lease cannot amount to anything more than the BRPs' right not to be compelled to perform in terms of the contract. Mr *Kemp* submitted that this did not permit the BRPs to remain in occupation of the property, for the respondent to continue trading, as it apparently was in February 2015, and not honour its obligation to pay rent. It had to honour its obligations in terms of the contract incurred prior to the business rescue proceedings commencing, and as it had not done so, the applicant was entitled to cancel the contract. I agree with Mr *Kemp's* submissions in this regard.

[28] The second question is whether the lease has been validly cancelled. Notwithstanding clause 18, on 12 December 2014, the BRPs were called upon to pay the arrears, and when that evoked no response, on 22 January 2015, the BRPs were notified in writing of the cancellation of the lease. The lease has therefore been properly cancelled.

[29] Mr *Kemp* submitted that as the lease had been lawfully cancelled, the property was not lawfully in the possession of the respondent, and accordingly it was unnecessary to seek the leave of the court in terms of section 131(1)(b) for leave to bring these proceedings for the ejectment of the respondent from the applicant's premises. He submitted in the alternative that if the leave of the court is required, the court should grant such leave. He submitted the court should do so for the following reason. The purpose of the general moratorium on legal proceedings against the company provided for in section 133 was to procure the situation that the prospect of a successful business rescue should not be jeopardised or destroyed by creditors being able to institute legal proceedings whilst the business rescue proceedings were still in operation. However, given that on 3 February 2015, prior to the launching of this application, the BRPs had notified the creditors, including the applicant, that the business rescue was not going to be successful and was not going to proceed, the necessity for the moratorium on legal proceedings had fallen away and the applicant ought to be able to exercise its right to obtain repossession

of the property consequent upon the cancellation of the lease. There was no longer a concern that the business rescue would be endangered or frustrated by legal proceedings because the business rescue was not going to proceed.

[30] I do not propose to determine whether Mr *Kemp's* submission that the court's leave to bring these proceedings is not required, since I am of the view that if it was required, this is a case where the court should grant leave. It should do so not only for the cogent reason provided by Mr *Kemp* I have set out above, but also because it would be in the interests of all the creditors of the respondent if its occupation of the premises ceased as soon as possible so that the quantum of the claim against the respondent by the applicant is limited and does not increase as a result of the respondent continuing to occupy the leased premises.

[31] Accordingly, insofar as is necessary, leave is given to the applicant to bring these proceedings. For the reasons I have set out above, the applicant is entitled to an order for the ejectment of the respondent from the premises.

Movables and Improvements

[32] Mr *van der Merwe* argued that the security enjoyed by the respondent with regard to the assets (both the movables and the improvements to the premises) would be lost if the court ordered the ejectment of the respondent from the premises. It appears from the replying affidavit of the applicant that the BRPs' attorneys had on 6 March 2015 instructed Park Village Auctioneers to conduct an inventory of the movable property on the premises and to remove any movables for safe keeping pending the liquidation proceedings. In order to meet the respondent's argument that the ejectment from the premises of the respondent would elevate the ranking of the applicant's claim against the respondent above the ranking of the claims of the respondent's other creditors, in its replying affidavit the applicant proposed the granting of an amended order which provided for Park Village Auctioneers to take an inventory of the movable on the premises and to remove them pending the liquidation proceedings. That draft order also provided for a declarator that the

applicant had perfected its landlord's hypothec over all those movables. However at the hearing, Mr *Kemp* stated that the applicant would be content with the draft order including a paragraph that the removal by Park Village Auctioneers of the movables from the premises would be without prejudice to the applicant's right to contend that it had perfected its landlord's hypothec in respect of those movables.

[33] With regard to the improvements to the property, Mr *Kemp* submitted that what would remain after Park Village Auctioneers removed the movables would be the fixtures and fittings which were not movable. He submitted that these fell to be dealt with in terms of clause 13 of the lease which I have set out earlier in this judgment. He submitted that the respondent had not placed in evidence any facts which rendered inapplicable clause 13. The respondent could not exercise any right of retention over those improvements because a right of retention only arises when one has a claim to those improvements. The respondent had not set out any facts in support of the proposition that despite the terms of clause 13, those improvements were owned by the respondent or that it had a valid claim to them. Accordingly, Mr *Kemp* submitted, no right of retention with regard to those improvements could exist. Indeed the terms of the lease specifically provided otherwise. In those circumstances the respondent has no right of retention as it cannot point to any right which entitles it to a claim for those improvements. I agree.

[34] Notwithstanding this, at the hearing, I invited Mr *van der Merwe* to frame an order safeguarding the respondent's right to make any claim against the applicant arising from those improvements and the following day he provided me with a proposed order on this aspect. I do not believe that such an order is necessary as it would be open to the liquidator in any event to make a claim based upon those improvements against the applicant should he be of the view that such a claim is of merit. I agree with Mr *Kemp* however that on the evidence before me, no such claim is made out. Notwithstanding this, and in the light of the applicant not opposing the suggested order on this aspect by Mr *van der Merwe*, I propose to include in the order a paragraph safeguarding the respondent's right to make a claim against the applicant arising from those improvements.

Costs

[35] The applicant sought an order for costs against the respondent. Mr *van der Merwe* contended that the respondent was entitled to oppose the application, because, he maintained, the application was not brought so much as with the object of obtaining the ejectment of the respondent from the premises but rather was brought to improve the position of the applicant as against the respondent's other creditors vis-à-vis the movables and improvements. Evidence of this, he submitted was, the terms of the amended order now sought by the applicant in its replying affidavit.

[36] I disagree. The primary object of the application was the ejectment of the respondent from the premises. Furthermore, the respondent never at any stage tendered to vacate the premises, either in the opposing affidavits or at the hearing. Indeed, as Mr *Kemp* submitted, one of the BRPs himself in the answering affidavit stated at page 168 that “the suspension of the agreement between the parties goes to the heart of the current application". The BRPs throughout the application sedulously persisted in the notion that the respondent was entitled to remain on the premises. As a result, the respondent remained on the premises, and continued to trade therefrom, but without paying a cent to the applicant for its occupation. The applicant has achieved substantial success and I see no reason why the costs should not follow the result. Furthermore, the issues raised in the application were not uncomplicated and justified the retention of senior counsel.

[37] Accordingly I make an order in the following terms:-

1. Park Village Auctioneers, on behalf of the respondent’s business rescue practitioners (Messrs Cawood and De Beer) shall enter the premises at 178 Stamfordhill Road (“the premises”) and shall take a detailed inventory of all the moveables on the premises.

2. Park Village Auctioneers shall then remove and safeguard the moveables on the inventory on behalf of the aforementioned business rescue practitioners pending the outcome of the liquidation application in the North Gauteng High Court under case number 8280/2015.

3. The removal from the premises of the moveables as set out above shall be without prejudice to the applicant's right to contend that it has perfected its landlord's hypothec in respect of those moveables.

4. Should any liquidator be appointed pursuant to an order under case number 8280/2015, the movables shall then be delivered to the trustee subject to the retention of the applicant's rights under section 47 of Act no.24 of 1936.

5. If the liquidation application referred to is dismissed, the item shall forthwith be returned to the applicant's possession.

6. The respondent is directed to vacate the premises within seven days of the grant of this order and to restore to the applicant vacant and unrestricted access to the premises.

7. In the event of the respondent failing to do so within the aforesaid period of seven days, the sheriff or his deputy is authorised to eject the respondent from the premises and to hand to the applicant vacant and unrestricted access to them.

8. The respondent's vacation of the premises shall be without prejudice to its right to contend that it has a claim or claims against the applicant in relation to any alleged improvements to the premises and any security the respondent may have for such claim arising from its possession of the premises shall not be prejudiced by the respondent vacating the premises.

9. The respondent is ordered to pay the applicant's costs of the application including the costs consequent upon the employment by the applicant of senior counsel.

Date of Hearing	:	25 March 2015
Date of Judgment	:	1 April 2015
Counsel for Applicant	:	Adv. K J Kemp SC
Instructed by	:	Jodi Halkier & Associates 031-5636723
Counsel for Respondent	:	Adv. L K van der Merwe
Instructed by	:	Koster Attorneys 031-3044212