**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 2022/11271**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

**[19 APRIL 2022]** ...............................
SIGNATURE

In the matter between:

**ACTOM (PTY) LTD** **APPLICANT**

and

**ACTON REPAIR SERVICES (PTY) LTD**

(In Business Rescue) **1ST RESPONDENT**

**KANABATHY VIVIAN PILLAY NO** **2ND RESPONDENT**

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**J U D G M E N T**

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**MUDAU, J:**

[1] In this application, launched as a matter of urgency on 24 March 2022, and is divided into two parts, the applicant seeks, firstly, an order in terms of section 133(1)(b) of the Companies Act 71 of 2008 ("the Act") for such leave as may be necessary to bring this application for, *inter alia*, a declarator that

the lease has been cancelled, and, secondly, for the eviction of the first respondent from the property. In the alternative, the applicant seeks interim relief in the form of an interdictory relief to protect its proprietary rights designed to interdict and restrain the first and second respondents and or any other person acting under their direction and or control from utilizing electricity and ancillary utilities at its premises or in any way causing damage to the property. Broadly stated, the applicant's case is premised on the following facts.

[2] The applicant, Actom (Pty) Ltd, is the owner of an immovable property, Erf 1152 (Germiston Ext. 4 Ptn 182 Farm Elanfontein) at the corner of Branch & Alpha Roads, Driehoek, Germiston, Gauteng ("the property"). The first respondent, Acton Repair Services (Pty) Ltd ("ARS"), in business rescue, from about 2008 has been a lessee of the applicant. There have been several lease agreements, addendums thereto and renewal lease agreements which were entered into between the applicant and first respondent over the years. The rentals and ancillary charges were always renegotiated and adjusted accordingly by agreement between the parties. During or about May 2019, the first respondent began defaulting on its monthly rental payments as well as its utilities account (electricity, security and other ancillary costs).

[3] During or about August 2021, the applicant and first respondent entered into a new lease agreement effective from 1 August 2021 which would subsist for a period of five years until 31 July 2026. Clause 4.1 recorded that the monthly rent for the premises shall be R215 342.00 per month of the lease period, which amount (and subsequent amounts) will be increased on the first of

August of every year by an amount equal to the CPI increase in the immediately preceding year. In terms of clause 4.2 it was agreed that the first respondent shall pay the rent monthly in advance on or before the first day of every month. Clause 4.5 made provision that the first respondent shall not for any reason whatsoever withhold, defer, or make any deductions from, or set off against, any payment due to the applicant in terms of the agreement, whether or not the applicant is or the first respondent alleges that the applicant is indebted to the first respondent, from whatsoever cause arising, or in breach of any obligation to the first respondent from whatsoever cause arising.

[4] Clause 13.1 of the lease agreement reads as follows:

"Should the first respondent default in any payment due under this Agreement or be in breach of its terms in any other way and fail to remedy such default or breach within seven 7 Business Days after receiving 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 these circumstances and to cancel this agreement with immediate effect and be repossessed of the Premises with immediate effect and without further notice to the first respondent and recover from the first respondent such damages sustained as a result of the default or breach and the cancellation of this Agreement."

[5] In terms of Clause 19.4; neither party shall be regarded as having waived, or precluded in any way from exercising any right under or arising from the agreement, by reason of such party at any time granted any extension of time for, or having shown any indulgence to, the other party with reference to any payment or performance under the lease agreement, or having failed to

enforce, or delayed in the enforcement of, any right of action against the other party.

[6] The first respondent began defaulting again and failed to make regular payments since October 2021.On 5 November 2021, the first respondent was notified by way of email of the outstanding amounts due to the applicant as at that date which was the sum of R484, 460.07. No response to that email was forthcoming from the first respondent. A follow up email was sent to the first respondent again on 19 November 2021 and a further email with updated statements was sent on 25 November 2021. Again, no response was forthcoming from the first respondent.

[7] On 3 December 2021, a breach notice was served on the first respondent at its business premises formally placing the first respondent in breach of the lease agreement. On the same day, the applicant was formally notified that the first respondent has been placed under business rescue. The business rescue plans ("BRP plans") that ensued failed to disclose any form of viable solution to the financial predicament which the first respondent finds itself in. Despite the ongoing notices to the first respondent of its breach with the last formal notice being given on 3 December 2021, the first respondent however failed to rectify the breach within 7 days of receipt thereof, as is required under clause 13.1 of the lease agreement.

[8] On 23 February 2022 the applicant cancelled the lease agreement by way of written notice and afforded the first respondent an opportunity to vacate the premises within seven days of receipt thereof. As demonstrated in paragraphs

31 to 41 of the founding affidavit, a total of R1, 554,097.01 remains outstanding and payable as at 10 March 2022. It is common cause that the lease agreement was concluded prior to first respondent being placed in business rescue.

[9] On 11 March 2022, the Business Rescue Practitioner (“BRP”) advised all interested parties including the applicant that the first respondent would be placed into liquidation in terms of Section 141 (2) (b) of the Act (as amended). Consequently, an application was launched in this Court for an order discontinuing the business rescue proceedings, and for an order placing the company into liquidation. As appears from the sworn affidavit in support thereof marked "A20", the second respondent conceded in paragraph 13 thereof that there are no reasonable prospects of the first respondent being rescued.

[10] The applicant's attorneys addressed an email (“A21”) to the second respondent on 14 March 2022, in terms of which the second respondent was requested to advise when the first respondent would vacate the premises and restore the lawful possession of the premises to the applicant. The applicant took the view that it was duty bound to mitigate its continued exposure to an escalation of the first respondent's indebtedness through the first respondent's continued unlawful occupation of the premises. But the first respondent failed 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 paying any other relevant charges.

[11] The applicant contends the first respondent could now no longer continue to trade and insist that it had to remain in occupation of the premises as justification for its ability to trade since the BRP had adopted the view that the company was insolvent and could not be restored to financial health. No response was received from the BRP in reply to the correspondence addressed by the applicant's attorneys on 14 March 2022. It is common cause that, on 23 March 2022, the BRP caused an application to be issued out of this Court for the liquidation of the first respondent, under Case No. 2022/11296. The liquidation application has been set down for 30 June 2022. In sum, there is no factual dispute raised in regard to the terms of the lease, nor the default complained about.

[12] In opposing this application, the second respondent is, however, of the view that "should a committed buyer be secured, the business rescue proceedings would certainly yield a better result for creditors. The first respondent has in excess of R40 000 000.00 worth of contracts or jobs on hand and with an investor on board, there is evidence to suggest that the first respondent could achieve a successful turnaround". It is contended that the eviction of the first respondent from the applicant's premises will impede the first respondent's business contracts worth R40 000 000.00 due to it and as a result, hinder the payments of all secured and preferred creditors, the applicant being a secured creditor. This contention is clearly untenable and can be rejected on the papers. It flies in the face of an assertion made by the BRP under oath in para 13 of the affidavit in support of liquidation proceedings and the termination of BRP guided by the provisions of Section 141 (2) of the Act, wherein it is stated

that: “I have now arrived at my conclusion that there Is NO Reasonable prospect for the Company to be rescued” for numerous reasons.

[13] The respondents admit that the first respondent continues to trade restricted by the limited low cash resources, and this directly affects the potential manufacturing output and limits the turnover”. It is worth noting that the liquidation proceedings have not been withdrawn. The respondents also contend that, it would appear from the applicant's conduct by having acquiesced to the random payment terms of the first respondent, the applicant had seemingly waived its rights to effect any breach or cancellation clause. However, this contention is devoid of any merit, regard being had to Clause 19.4 referred to above at para 5.

[14] It is trite that the general moratorium in section 133(1) of the Act does not prevent a creditor from cancelling an agreement with a company in business rescue and the creditor may cancel the agreement without the permission of the court or the business rescue practitioner in terms of section 133(1)(a) and (b). Section 133 of the Act provides for a moratorium against legal proceedings including enforcement action.

[15] Section 133 reads as follows:

“(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 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;

*(c)* as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the business rescue proceedings began;

*(d)* criminal proceedings against the company or any of its directors or officers;

*(e)* proceedings concerning any property or right over which the company exercises the powers of a trustee; or

*(f)* proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner".

[16] In opposing this application, it is contended further, that, the moratorium envisaged in s 133(1) of the Act precludes the applicant from cancelling the alleged lease and launching the current application. It is largely accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the BRP, in conjunction with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process[1] but not to interfere with the contractual rights and obligations of the parties to an agreement as our law of contract provides for a unilateral cancellation in the case of a breach of contract.[2]

[17] The question that arises is whether leave is necessary in terms of s 133(1)(b) for the applicant to bring the eviction application. *Cloete Murray* is authority for the proposition that the juristic act of cancelling a lease agreement does not constitute an enforcement action as contemplated in s 133(1) and that it is permissible for an agreement to be cancelled during business rescue

[1] *Murray N.O and Another v Firstrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) at para 14.
[2] Ibid at para 40.

proceedings.[3] Accordingly, I come to the ineluctable conclusion 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 the conclusion reached, such leave is unnecessary.

[18] However, within 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. Section 136 (2) of the Act reads:

> "(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-
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> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-
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> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
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> (ii) would otherwise become due during those proceedings; or
>
> (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a)".

[19] The second respondent however, did not take any steps to suspend or cancel the lease agreement in terms of section 136 (2) of the Act. It is common cause that neither the first respondent, nor the second respondent had previously suspended or cancelled the lease agreement in terms of section 136(2). This provision was basically never invoked at all by the respondents. Consequently, the first respondent's obligation to pay monthly rentals and

[3] See generally, *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016 (6) SA 63 (GJ).

municipal utilities had not been suspended prior to the applicant's cancellation. In addition to this, the second respondent accepted on 25 February 2022 that the lease agreement was cancelled and this position was reiterated in the update report of 8 March 2022. This is a very significant consideration.

[20] The applicant has made it explicitly clear that it cannot continue to fund the first respondent by way of post commencement funding engineered through rentals and utilities, against its wishes and consent. The respondents have also been requested to confirm whether they will stop consumption of utilities in circumstances where the lease was cancelled and where such further consumption would be unlawful. They simply refused to do so and ignored the applicant's requests.

[21] Accordingly, the applicant was entitled, in the event of the first respondent's failure to pay the rental and its ongoing breach of the lease agreement, to cancel the lease agreement if the first respondent failed to rectify the said breach after 7 days' written notice, to claim all outstanding amounts in terms of the lease, and to forthwith evict the first respondent from the leased premises. 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. I am of the view that the first respondent should pay the costs of the application on the attorney and client scale in accordance with the terms of the lease.

[22] In the result, the following order is made:

(a) The applicant's non-compliance with the Rules of the above Honourable Court in regard to service and time limits is condoned and this application is permitted to be heard as one of urgency in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

(b) 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 Erf 1152 at the corner of Branch & Alpha Roads, Driehoek, Germiston, Gauteng ("the property").

(c) In the event of the first respondent failing to comply with the order in para (b) 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.

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

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T P MUDAU

Judge of the High Court

Date of Hearing: 12 April 2022

Date of Judgment: 19 April 2022

**APPEARANCES**

For the Applicant: Adv. Advocate C Bester

Instructed by: Vasco De Oliveira Inc Attorneys

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| For the respondent: | Adv Naidoo |
| Instructed by: | Harkison Mungul Inc |