

Are companies in business rescue protected from eviction?

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3 Feb 2017

This article examines the case of *Kythera Court v Le Rendez-Vous Cafe CC and Another* 2016, which deals with the eviction of a close corporation undergoing business rescue proceedings in terms of s129 of the Companies Act, 71 of 2008 (the Act).



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The Respondent is Le Rendez-Vous Café CC, trading as Newscafé, Bedfordview, who was placed under supervision in terms of the Act on 2 December 2015. The Applicant is a property rental firm. The Respondent was renting a business premises from the Applicant.

In order for the court to make its judgement it examined various questions and aspects with regard to section 133(1) of the Act.

Protection from legal proceedings

Section 133(1) of the Act places a general suspension of any legal proceedings against a company undergoing business rescue proceedings. It provides that during business rescue proceedings, no legal proceedings may be commenced or proceeded with in any forum, against the company or in relation to any property belonging to the company or lawfully in its possession.

The court stated that the purpose of section 133(1) is to give a company some space or 'breathing room' when undergoing business rescue. By suspending legal action against a company in financial crises, that company is provided with an opportunity to restructure its affairs and avoid liquidation. The business rescue practitioner is then able to formulate a business rescue plan, to the benefit of creditors, without the distraction of having to deal with legal proceedings against the company.

Lawful possession?

The Act specifically includes the provision that section 133(1) only applies to property lawfully in the possession of the company under administration. The court placed an emphasis on the fact that if the company was in unlawful possession (or occupation) of property, they would not be protected from legal proceedings for the recovery of that property.

The court then turned their attention to whether the Respondent was in unlawful occupation of the property in question.

If the Applicant had validly cancelled the lease with the Respondent, then the Respondent would be in unlawful occupation of the property.

Valid cancellation of the lease?

The court stated that if the Respondent had invoked section 136(2)(a) of the Act, the Applicant would have been prevented from cancelling the lease and instituting eviction proceedings. Section 136(2)(a) provides that the business rescue practitioner may suspend any obligation arising out of any agreement to which the company under supervision was a party to. The business rescue practitioner did not suspend the Respondents obligations in terms of the lease agreement and in fact confirmed the existence of the lease agreement and undertook to give the Applicant written confirmation that rental payments would be made.

The court stated that even after being placed under supervision the Respondent had an obligation to make payment in terms of the lease agreement. In breach of the lease agreement and the business practitioner's abovementioned confirmation, the Respondent did not make any rental payments from October 2015 to March 2016. Despite numerous notices from the Applicant and many opportunities to rectify its breach, the Respondent did not do so.

Due to the abovementioned breach, the court held that the Applicant had validly cancelled the lease with the Respondent during March 2016 and from this date the Respondent continued to occupy the premises unlawfully.

Conclusion

The court held that the Respondent was misusing the business rescue process by remaining in the property unlawfully, carrying on its business and not making any payments of rental or other charges. The business rescue practitioner indicated that the Respondent was unwilling to cooperate with the proper business rescue process. The Applicant attempted to comply with the business rescue proceedings, but the process seemed to have been delayed by the Respondent for its own benefit. Accordingly, the eviction was granted with costs.

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