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Can a creditor cancel an agreement with a company in business rescue and what is the consequence of a business rescue practitioner suspending an agreement before cancellation?

**The lawfulness of cancelling a contract during business rescue**

Since the inception of business rescue the question of whether a creditor can cancel an agreement during business rescue proceedings has been contentious. It has been uncertain whether cancelling the agreement constitutes "enforcement action" prohibited by section 133(1) of the Companies Act 71 of 2008, which contains the moratorium provisions. This issue had not been brought to our courts' attention up until now.

The case of *LA Sport 4x4 Outdoor CC v Broadsword Trading 20 (Pty) Ltd & others (A513/2013) [2015] ZAGPPHC 78* (26 February 2015) concerned section 133, which provides for a general moratorium on legal proceedings against a company in business rescue. The court *a quo* opined that the cancellation of an agreement during business rescue constituted legal process, which falls under the moratorium in section 133(1). The full bench on appeal overturned this decision and decided that section 133(1) does not limit the performance of juristic acts and that a cancellation is therefore valid.

Recently the Supreme Court of Appeal (SCA), in the case of *Cloete Murray NO and another v FirstRand Bank Ltd (20104/2014) [2015] ZASCA 39* (26 March 2015), ruled on the question of whether cancellation of an agreement constitutes "enforcement action" prevented by section 133(1) of the Companies Act. Fourie AJA at the outset asserted that the question to be decided on is whether the creditor of a company under business rescue can unilaterally cancel an extant agreement that it had concluded with the company prior to the latter being placed under business rescue.

The facts in the *Cloete Murray* place the judgment in context. Skyline Crane Hire (Pty) Ltd (Skyline) was a company voluntarily placed under business rescue in terms of the provisions of section 129 of the Companies Act. Before business rescue, Skyline had already fallen into arrears in respect of the monthly instalments payable to FirstRand Bank Ltd t/a Wesbank (Wesbank) under a master instalment sale agreement (MISA). Wesbank dispatched a letter to Skyline immediately after commencement of business rescue, cancelling the MISA due to Skyline's failure to pay the monthly instalments. The business rescue practitioner (BRP) of Skyline subsequently consented to Wesbank repossessing and selling the goods and the proceeds were

then to be credited to its account. Skyline was later placed into liquidation. The liquidators took the view that Wesbank's cancellation of the MISA was contrary to the provisions of section 133(1) in that it amounted to "enforcement action" and, absent the consent of the BRP or the leave of the court, the cancellation was unlawful.

Fourie AJA referred to the court *a quo*'s decision in *LA Sport* where it stated that cancellation constitutes legal process and Fourie AJA then held that he believes it to be clearly wrong. He emphasised that giving notice of cancellation does not occur in or by means of any process associated with any form of "forum". It was also found that our law of contract provides for a unilateral cancellation in the case of a breach. The legislature intended to allow the company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, but not to interfere with the contractual rights and obligations of the parties to an agreement. The wording of section 133 is consistent with the concept of a temporary moratorium on enforcement of claims, rather than a broader restriction of creditors' rights. Fourie AJA held that there are, in any event, sufficient safeguards for BRP's contained in Chapter 6, including that of the BRP's powers in terms of section 136(2)(a), whereby the BRP may suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings. He further went on to state that, by invoking this provision, the BRP could prevent a creditor from instituting action and repossessing or attaching property in the company's possession. He also found that it may be open to the BRP to rely on section 134(1)(c) to retain possession of the property notwithstanding a lawful cancellation (he did not make a finding on this point *in casu* as the BRP had consented to the Wesbank repossessing the property).

The court concluded that the cancellation by Wesbank of the agreement concluded prior to the commencement of business rescue proceedings did not constitute "enforcement action" as envisaged by section 133(1) of the Companies Act. Therefore, neither the consent of the BRP or the leave of the court was required to effect a lawful cancellation of the MISA.

The effect of this judgment is such that a creditor can lawfully cancel a contract concluded with a company prior to the company commencing with business rescue.

Although a creditor is generally entitled to lawfully cancel a contract during business rescue, the validity of a specific cancellation turns largely on whether the BRP has suspended any obligation in terms of the agreement prior to the notice of cancellation.

### **The consequence of a BRP suspending an obligation in terms of an agreement before cancellation by a creditor**

In practice a BRP frequently suspends an obligation in terms of the agreement before the creditor of the company furnishes a notice of cancellation. In my view, if a creditor purported to cancel the agreement after the notice of suspension had already been issued by the BRP, the cancellation would be unlawful.

My interpretation of the provisions of the Act is such that, once a BRP issues a suspension notice to a creditor, it follows that the company in business rescue is not in breach of any pre-commencement obligations to the creditor. Accordingly, the creditor is not entitled to cancel the agreement or to take any steps to prevent the company in business rescue from occupying the property in its possession.

Another important issue to consider is what the effect of a lawful cancellation of an agreement has on any property that belongs to the creditor but is in the possession of the company in business rescue, pursuant to a rental agreement or otherwise. It appears that the full bench in the *LA Sport* case (at par 52) may have found that, as the cancellation was valid, the company in business rescue was then in unlawful possession of the property and so there would be no prospects of business rescue being successful. The court did not make a definitive decision on this point or elaborate on the issue any further, and so there is still doubt as to whether a lawful cancellation automatically results in unlawful possession of the property by the company in business rescue.

If the court in *LA Sport* was suggesting that this is in fact the case, I find this conclusion to be deficient and wrong. I submit that the lawfulness or unlawfulness of the possession of property as referred to in section 133(1) should be determined on the date on which business rescue proceedings commence. Once it is found that at the start of business rescue the property was lawfully in possession of the company in business rescue, such possession cannot then be rendered unlawful during business rescue by a notice of cancellation given by a creditor. Such an interpretation would fly in the face of the entire rationale behind the concept of business rescue. Therefore, even if it were to be found that the cancellation of an agreement was lawful and valid, the company in business rescue would still be in lawful possession of the property in question.

Furthermore, if at the commencement of business rescue proceedings the company was in lawful possession of the property, the general moratorium in terms of section 133(1) prevents enforcement action in respect of property lawfully in the company's possession, except with the consent of the BRP or the leave of the court. In addition, in terms of section 134(1)(c), if the company in business rescue is in lawful possession of the property, a creditor may not exercise any right in respect of the property, except to the extent that the BRP consents in writing. I am therefore of the opinion that subsequent to the cancelling of an agreement, a creditor is precluded from initiating legal proceedings for the return of a property by section 133(1) and section 134(1)(c). This would mean, for example, that a creditor could not bring an eviction application against a company in business rescue to enforce the cancellation and compel the company to vacate the premises or return the property. To allow for legal proceedings to be instituted to recover property or payments in terms thereof, pursuant to the contract being lawfully cancelled, would not only be contrary to section 133(1) and section 134(1)(c) of the Act, but would entirely undermine the purpose of business rescue proceedings.

In conclusion, section 136(2)(a) dictates that if an obligation in terms of an agreement is suspended by the BRP before the creditor issues any notice of cancellation, the company in business rescue is not in breach of any pre-commencement obligations to the creditor and the

creditor does not have the right to cancel the agreement. The creditor would have to obtain the BRP's consent or apply to court for leave to cancel the agreement and to enforce the cancellation.

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