

# Rent due: a creditors nightmare

In terms of Chapter 6 of the Companies Act 71 of 2008 (hereinafter referred to as “the Act”) a company, which is financially distressed, may be placed under business rescue. The business rescue proceedings may be commenced with either through a valid resolution passed by the board of directors or through an application made to court by an affected person.

The commencement of business rescue proceedings results in creditors’ proprietary rights, such as those of landlords and property owners, being limited significantly. A company, under business rescue proceedings, can remain in occupation of a leased property, even though it does not pay rent and other expenses related thereto. This is due to the temporary moratorium created by section 133(1) of the Act: a property owner is not precluded from cancelling the lease agreement but cannot enforce its rights against the company under business rescue proceedings.

It is against this background that the Applicant approached the Pretoria High Court in the matter of South African Property Owners Association v Minister of Trade and Industry and Other 2018 (2) SA 523 GP. In an unopposed motion the Applicant sought a declaratory order that the amounts payable to a landlord should be classified as either post-commencement financing as contemplated in section 135 (2) of the Act or that such a cost constitutes a cost arising out of business rescue proceedings.

The Applicant argued that when there is a lease agreement between a company and the property owner, business rescue proceedings commence while that particular lease agreement is still in force. Such a company then remains in occupation of the leased property and continues to incur debts in relation to the lease agreement. The company continues to trade from the leased property but does not pay the rent due and other expenses, such as rates and taxes, water usage, electricity, sewage charges and so forth. The evidential effect on the property owner is that it continues and is obliged to pay for those expenses.

The question before the court is therefore the following: were those debts preferent claims, either because they are costs of business rescue proceedings or because they are post-commencement financing within the meaning of

subsections 135(2) and (3)?

The Court stated that the legislature's intention, in relation to business rescue proceedings, was to enable a company in distress to trade out of its financial misfortune. It confirmed that, in light of this clear intention, the prospects of a successful outcome would be substantially diminished should a company be obliged to vacate the leased premises at the commencement of business rescue proceedings.

The Court held that financing, referred to in section 135 (2) of the Act, related to the obtaining of financing in order to assist in managing the company out of its financial distress. And furthermore, that costs, referred to in section 135 (3), are costs specifically provided for in section 143 of the Act, as well as other costs incurred due to the business rescue proceedings. Section 135(2) could not include existing obligations, other than employees that assist in the management of the company during the business rescue proceedings.

The Court concluded that the debts were a direct result of the terms of the particular lease agreement. It further held that these debts were incidental to the lease agreement and granting the declaratory order sought by the Applicant, the landlord, would elevate an obligation that arose prior to the business rescue proceedings to preference over other creditors which is not provided for in section 135. The Applicant's application was therefore dismissed.

Business rescue is relatively new in South Africa and more companies are making use of it. As indicated above, the purpose of this is to assist a company in distress to trade out of its unfortunate financial situation. This has led to legal uncertainty relating to the rights of creditors. The Courts are then tasked with striking a balance between the creditor's rights and realising the objectives of the business rescue proceedings.

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