

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 10589/16**

In the matter between:

**MARK FINLAYSON N O**

First applicant

(In his capacity as trustee of the Old Mill Trust IT3/2008)

**HERMAN JORIS WILLEMSE N O**

Second applicant

(In his capacity as trustee of the Old Mill Trust IT3/2008)

**MAITLAND FIDUCIARY LIMITED N O**

Third applicant

(In its capacity as trustee for the time being  
of the Old Mill Trust IT3/2008)

and

**MASTER MOVERS CAPE CC** (in business rescue)

First respondent

**JOHN FREDERICK KNEALE CAINE**

Second respondent

**DAVID MALYON**

Third respondent

---

**REASONS DATED 10 AUGUST 2016 FOR JUDGMENT DELIVERED ON 2  
AUGUST 2016**

---

**VAN ROOYEN AJ**

[1] The Applicants, in their capacities as trustees of the Old Mill Trust (“the Trust”), as a matter of urgency seek an order evicting the First Respondent (“Master Movers”) and all other persons or entities occupying the Trust’s premises (“the premises”) for commercial purposes. The Second Respondent is the former business rescue practitioner of Master Movers

and the Third Respondent is the sole member of Master Movers. The Third Respondent is also a surety in respect of Master Movers' obligations to the Trust.

- [2] Since 23 February 2016 Master Movers has been under business rescue by virtue of a voluntary resolution to that effect.
- [3] The Trust was granted leave to institute these proceedings ("the eviction application") in terms of s 133 of the Companies Act, 71 of 2008.
- [4] The eviction application was served on 29/30 June 2016 and in the notice of motion the Respondents, if they intended opposing the application, were required to notify the Trust's attorneys in writing by 1 July 2016 and to file answering affidavits by 22 July 2016. The Respondents failed to keep to those timelines.
- [5] This matter was set down for hearing on Monday 1 August 2016 but it was only on Saturday 30 July 2016 that the Third Respondent launched an application for the postponement of the application to the semi-urgent roll ("the postponement application"). A notice of intention to oppose the eviction application was filed by Master Movers. It is dated 29 July 2016 but it is not clear when it was served.
- [6] In the founding affidavit in the postponement application the Third Respondent asserts that a postponement is required because "*as a result of the actions of the Trust, Master Movers has been rendered rudderless since 9 June 2016 and accordingly unable to properly oppose the eviction application*". The relevance of 9 June 2016 is that a Court order was

granted in an application launched by the Trust which had a bearing on the business rescue proceedings. It will be dealt with more fully later herein.

- [7] The Third Respondent does not contend that the Trust is not entitled to an eviction order but asserts that Master Movers has 15 employees and that it stores goods for approximately 230 customers on the premises. According to the Third Respondent it will take at least 3 months to relocate the goods stored at the premises. Moreover, it is contended that the Third Respondent is involved in negotiations with a potential business rescue practitioner and a potential purchaser for Master Movers' business. According to the Third Respondent, those negotiations are likely to be terminated if Master Movers is evicted from the premises and the goods stored thereon are removed.
- [8] The postponement application ought to be considered in the context of the relevant factual matrix and procedural history of this matter.

### **The Lease**

- [9] On 2 December 2013 the Trust and Master Movers concluded a written lease agreement in terms of which Master Movers would lease the premises for a period of 5 years, commencing on 1 January 2014. The material terms of the lease included the following:

9.1 The monthly rental payable by Master Movers would escalate annually and for the period 1 January 2016 to 31 December 2016 it would be R249 501 plus value-added tax. Interest would accrue on all outstanding amounts.

9.2 Master Movers was obliged to pay all charges in respect of rates, electricity consumed, water consumed or any other municipal services supplied to, and refuse removal and sewerage services in respect of, the premises.

9.3 In the event that Master Movers was in default, and remained in default not less than 7 days after being notified in writing to remedy such default, the Trust was entitled to cancel the lease.

### **Breach of the lease**

[10] In breach of its obligations under the lease, Master Movers failed to make payment of rental and other charges due for the period of January 2016. On 11 January 2016, the Trust sent Master Movers a letter notifying it of its breach and demanding that it remedy the breach by making payment of the arrear rental and other charges due, within 7 days thereof. Master Movers remained in default and on 28 January 2016 the Trust's attorneys sent a letter to Master Movers (with the Third Respondent in copy) affording it a further two days within which to remedy its breaches.

[11] On 28 January 2016 Master Movers addressed correspondence to the Trust's attorneys wherein it raised a dispute regarding certain charges levied under the lease. The Trust took steps contemplated in the lease to address the dispute.

[12] Master Movers again breached the lease by failing to make payment of the rental and other charges for February 2016. On 10 February 2016 the Trust's attorneys addressed correspondence to Master Movers wherein the

steps taken in terms of the lease to address the dispute were set out and demand was again made for payment of the amounts owing under the lease within 7 days, failing which the Trust would exercise its rights under the lease. Master Movers failed to make payment.

[13] As at 22 February 2016 Master Movers was indebted to the Trust in the amount of R737 720. It continued with its failure to pay rental after that date and by 1 August 2016 Master Movers owed the Trust a total of R2 962 546. R2 205 833 of that sum represents rental (excluding interest) which should have been paid. In addition, the Trust has paid the amount of R319 544 in respect of municipal services and rates which should have been paid by Master Movers.

[14] Master Movers has continued to occupy the premises and to make use of the municipal services and the Trust has had to cover those charges without having been able to recover those amounts from Master Movers.

### **Business Rescue**

[15] On 23 February 2016, Master Movers was placed under business rescue by virtue of a voluntary resolution to that effect. The Second Respondent was appointed as the business rescue practitioner of Master Movers.

[16] On 19 April 2016 the Trust's attorneys addressed a letter of demand to Master Movers and the Second Respondent and payment of all outstanding amounts was again demanded within 7 days, failing which the Trust would exercise its right to cancel the agreement.

- [17] On 6 May 2016, a letter was addressed to Master Movers' attorneys, the Second Respondent and the Third Respondent, setting out the breaches of the lease and stating that the Trust elected to cancel the lease. It was demanded that Master Movers vacate the premises by 16 May 2016. However, Master Movers has failed to make any further payment and has continued to occupy the premises.
- [18] On 18 May 2016 the Second Respondent filed a "Notice of Substantial Implementation of Business Rescue Plan".
- [19] The Trust launched a court application in which an order was granted on 9 June 2016 interdicting the Second Respondent from implementing the business rescue plan. In addition, the Trust was granted leave in terms of s 133 of the Companies Act to seek the setting aside of the resolution in terms of which business rescue proceedings were commenced. Counsel informed me that such an application is pending and that it will be heard towards the end of August 2016.
- [20] On 9 June 2016 an application was brought by Firstrand Bank Ltd for the provisional liquidation of Master Movers. By agreement between the parties, the application was postponed for hearing to 11 August 2016.
- [21] On 17 June 2016 the Trust brought a further application seeking an order for the removal of the Second Respondent and that Master Movers appoint a replacement practitioner. On 12 July 2016 an order was granted by agreement between the Trust and the Second Respondent in terms of which the Second Respondent was permitted to resign as the business rescue practitioner of Master Movers and the Third Respondent was

permitted to appoint a replacement business rescue practitioner within 21 days of the date of that order, failing which the Trust would be entitled to apply for the appointment of a replacement business rescue practitioner or for other relief.

- [22] The Third Respondent, instead of applying for a replacement business rescue practitioner, brought an application for the setting aside of the resolution pursuant to which Master Movers was placed in business rescue and for an order winding up Master Movers. That application is to be heard on 11 August 2016.

### **Postponement Considered**

- [23] After hearing oral argument presented by counsel for the Trust and the Third Respondent respectively on 2 August 2016, I dismissed the postponement application with costs against the Third Respondent. The reasons that I undertook to furnish later, follow below.
- [24] Since the letter of cancellation and the demand that the premises be vacated in the Trust's letter of May 2016 nobody, including the Second Respondent before his resignation, has disputed the Trust's right to cancel the lease and it has not been shown that Master Movers has any right to continue its occupation of the premises.
- [25] Master Movers has known since May 2016 that the lease was cancelled and that it had to vacate the premises.

- [26] Moreover, when the eviction application was served in June 2016, all the Respondents knew that they were required to notify the Trust's attorneys before 1 July 2016 if they intended opposing the application and they had to file answering affidavits by 22 July 2016. However, nothing was done until Saturday 30 July 2016 when the postponement application was launched whilst this matter was set down for hearing on Monday 1 August 2016.
- [27] The postponement application was launched by the Third Respondent, the sole member of Master Movers. He does not attack the cancellation of the lease and does not make out a case for any right entitling Master Movers to continue its occupation of the premises. The only basis on which a postponement is sought, is that, according to the Third Respondent, Master Movers is deprived of the opportunity to be heard in the eviction application until such time as a new business rescue practitioner has been appointed or Master Movers has been placed in liquidation.
- [28] It was submitted by the Third Respondent's counsel that the effect of s137(2)(a)-(b) and s140(1)(a) of the Companies Act is that, upon a close corporation <sup>1</sup> being placed in business rescue, the business rescue practitioner takes over full responsibility for the management of the close corporation and the members merely follow his orders. In the absence of a business rescue practitioner, the management of Master Movers may not represent Master Movers in this matter and, consequently, Master Movers is deprived of the opportunity to be heard.

---

<sup>1</sup> In terms of s66(1A) of the Close Corporations Act, 69 of 1984, Chapter 6 of the Companies Act applies to close corporations.



- [29] However, the Third Respondent wanted to have his cake and eat it. He asserted *locus standi* to bring the postponement application by virtue of s146(b) of the Companies Act and, as stated in his heads of argument, “a *residual duty as caretaker of Master Movers in his capacity as member*”.
- [30] The grounds for *locus standi* in the postponement application also gave the Third Respondent the right to participate in the eviction application and/or to have a replacement business rescue practitioner appointed.
- [31] In any event, the Third Respondent went to great lengths to explain in the postponement application how negotiations with a prospective purchaser of Master Movers’ business was in progress and how it would be in the interest of Master Movers that it be given more time to pursue those negotiations. However, he failed to put up any defence to the Trust’s right to have Master Movers evicted. If such a defence existed, the Third Respondent, no doubt, would have raised it in the postponement application.
- [32] In these circumstances, Master Movers has had every opportunity since February 2016 to object to the threats of eviction and, when the Second Respondent received notice of eviction in May 2016, he had a further opportunity to inform the Trust if Master Movers had any defence.
- [33] In the absence of a business rescue practitioner, the Third Respondent could have placed a defence, if any, on record in the eviction application. His right to participate in terms of s 146(b) of the Companies Act, enabled him to record facts and circumstances in favour of Master Movers. A business rescue practitioner would have been in no better position to do so

because the Third Respondent is the sole member of Master Movers with intimate knowledge of the affairs of Master Movers.

[34] Moreover, the attempt to hide behind the absence of a business rescue practitioner is futile in circumstances where nobody wants the business rescue process to continue. That includes the Third Respondent who has applied for the setting aside of the business rescue process and for a winding-up of Master Movers instead.

[35] In the meantime, the Trust suffers severe prejudice. The property is its sole potential source of income, it is liable for payment of municipal accounts and it has to make monthly mortgage bond payments.

[36] In the process Master Movers' liabilities increase every month which is not in the interest of Master Movers and its creditors.

[37] The prejudice that would have been suffered by the Trust if the eviction application was postponed would therefore by far have outweighed prejudice, if any, that may be suffered by Master Movers as a result of the dismissal of the postponement application.<sup>2</sup>

[38] In the circumstances set out above, I am of the view that the postponement application was not *bona fide* and that it was an abuse of process which should not be permitted.

[39] For these reasons I dismissed the application for postponement with costs against the Third Respondent.

---

<sup>2</sup> *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS)

### **Eviction Application**

[40] After I had dismissed the postponement application, I was informed by counsel for the Third Respondent that he did not appear for Master Movers in the eviction application. His instructing attorney in the postponement application was also the attorney who purported to represent Master Movers in a notice of intention to oppose the eviction application. I informed counsel that one of three options had to be exercised. If his instructing attorney in the postponement application did not have a mandate to represent Master Movers in the eviction application the notice of intention to oppose had to be withdrawn. If he had a mandate, counsel had to be instructed to represent Master Movers in the eviction application or the attorney had to appear on behalf of Master Movers. I afforded counsel an opportunity to consult with his instructing attorney, after which I was informed that the notice of intention to oppose the eviction application was withdrawn. The application therefore continued on an unopposed basis.

[41] The fact that Master Movers is under business rescue does not have any effect on the Trust's right to cancel the agreement <sup>3</sup>. Section 133(1) of the Companies Act does not apply to the cancellation of the lease and, consequently, the Trust did not require the consent of the Second

---

<sup>3</sup> *178 Stamfordhill CC v Velvet Star Entertainment CC* (1506/15) [2015] ZAKZDHC 34 (1 April 2015) para [27]

Respondent or the leave of the court when it cancelled the lease in May 2016.<sup>4</sup>

[42] After the cancellation of the lease, Master Movers had no right to occupy the premises. Business rescue did not bestow Master Movers, the Second Respondent (or any other business rescue practitioner, if appointed) with rights in respect of the property outside the four corners of the lease except, of course, that in terms of s133(1) the Trust needed the consent of the Second Respondent or the leave of the court to launch the eviction application. The court granted such leave.

[43] The pending applications for liquidation too will have no bearing on the existence or not of a right to occupy the property because a liquidator, if Master Movers is wound up, will not have rights in respect of the property beyond the lease.<sup>5</sup>

[44] In these circumstances, the Trust was entitled to an eviction order and on 2 August 2016 I ordered that:

44.1 Master Movers and all other persons or entities occupying the premises comprising the ground floor and basement of the Old Mill Trust building situate at Mocke & Leo Roads, Diep River together with parking bays ("the Premises") are ordered to vacate the premises within 20 working days of the granting of this order;

---

<sup>4</sup> *Cloete Murray & Another NNO v Firststrand Bank Ltd t/a Wesbank* 2015 (3) SA 438 (SCA) para [33]

<sup>5</sup> *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) para [10]

44.2 The Sheriff (or his/her deputy) is authorised to evict Master Movers and all other persons or entities occupying the premises should the Respondents fail to comply with sub-paragraph 1 of this order;

44.3 The South African Police Services are directed to assist the Sheriff in carrying out sub-paragraph 2 of this order should this be necessary and if requested by the Sheriff or his/her deputy;

44.4 The Sheriff is directed:

44.4.1 to remove from the premises, the goods stored at the premises and to store the said goods;

44.4.2 to place a written notice on the principal door of the premises specifying that the goods are being stored by him and that they may be reclaimed from him;

44.4.3 to release the goods of all persons so stored by him to them respectively upon and against payment by them to him of the costs of storage.

44.5 Master Movers shall pay the costs of the eviction application on attorney and client scale.

---

**VAN ROOYEN, AJ**