RE-EVALUATING THE MEANING AND EFFECT OF A WINDING UP ORDER ON THE INSOLVENT'S CONTRACTS

Ellerine Brothers v McCarthy (245/13) [2014] ZASCA 46 (1 APRIL 2014)

1 Introduction

Although the term "winding up" is not defined in both the Insolvency Act (24 of 1936, hereinafter "Insolvency Act") and the Companies Act (71 of 2008, hereinafter "Companies Act 2008"), it is mostly employed in the latter Act. The winding up of a company involves the gathering and selling of its available assets in order to pay all company-related incurred debts (Business Dictionary http://www.businessdictionary.com/definition/winding-up.html (accessed 2018-03-02); Sharrock, Van Der Linde and Smith *Hockly's Insolvency Law* (2012) 237−274). Thus, winding up allows a company to disband its business operations by selling its realisable assets so as to distribute the proceeds to all creditors. There are two main types of winding up, namely, winding up by court (also known as compulsory winding up; ss 79 and 81 of the Companies Act 2008 read with ss 343−348 of the Companies Act 61 of 1973 (hereinafter "Companies Act 1973")) and voluntary winding up (s 80 of the Companies Act 2008 read with ss 349−353 of the Companies Act 1973). Notably, winding up by court is usually instituted by a creditor or any other aggrieved persons (Sharrock *et al Insolvency Law* 241−251). Likewise, voluntary winding up is initiated by member shareholders through a member's voluntary winding up or by creditors through a creditor's voluntary winding up (Sharrock *et al Insolvency Law* 252−253).

It should be noted that the winding up of solvent companies is currently regulated by the Companies Act 2008 (ss 79−81). On the other hand, the relevant provisions of the repealed Companies Act 1973 are still applicable to the winding up of insolvent companies (ss 337−426). Thus, apart from transitional measures that enable chapter 14 of the Companies Act 1973 to continue regulating the winding up of insolvent companies, no specific provisions for the winding up of insolvent companies are currently found in the Companies Act 2008 (Item 9(1) of Schedule 5 of the Companies Act 2008; also see Sharrock *et al Insolvency Law* 241−253; Swart and Lombard "Winding up of Companies – Back to Basics *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA)" 2015 *THRHR* 356 356). Moreover, provisions under chapter 14 of the Companies Act 1973 (ss 343; 344; 346 and 348−353) are only applicable to the winding up of solvent companies where applicable, to give full effect to the Companies Act 2008's provisions on the winding up of solvent companies (ss 79−81; item 9(2) of

Schedule 5; see further Locke "The Meaning of 'Solvent' for Purposes of Liquidation in terms of the Companies Act 71 of 2008: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*" 2015 *SA Merc LJ* 153 153−154). Given this background, the article investigates the effect of a winding-up order and/or sequestration proceedings on the insolvent's contracts and the continued application of section 348 of the Companies Act 1973 in respect thereof. This follows the interpretational challenges regarding these aspects as indicated in *Ellerine Brothers v McCarthy* (245/13) [2014] ZASCA 46 (1 April 2014) (hereinafter "*Ellerine* case"). Accordingly, this case has importantly addressed the confusion regarding: (a) whether the formation of a *concursus creditorum* interrupts and invalidates the cancellation of a lease contract by the lessor; (b) whether the lessor's cancellation of a lease contract after the commencement of the insolvent lessee's sequestration proceedings is legally binding and valid; (c) whether section 37 of the Insolvency Act is automatically applicable to all the insolvent's lease contracts; and (d) whether the lessor's right to cancel a lease contract is lost through the commencement of, and the granting of a final winding up and/or sequestration order (s 348 of the Companies Act 1973; *Ellerine* case par 1−15).

Notably, the Insolvency Act provides that a sequestration order is any provisional or final order of court that enables the insolvent's estate to be sequestrated by the relevant creditors (s 2). In this regard, the article explores different interpretational challenges regarding the effect of a final sequestration order on the insolvent's lease contracts (s 37 of the Insolvency Act) and the inconsistent application of section 348 of the Companies Act 1973 to such contracts as provided in *Ellerine* case (par 1−15). Related challenges involving the application of the provisions of the Companies Act 1973 to the winding up of insolvent companies have been unmasked in various South African cases to date (*First Rand Bank Ltd v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP); *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 (5) SA 197(FB); *Herman v Set-Mak Civils CC* 2013 (1) SA 386 (FB); *Standard Bank of South Africa Ltd v R-Bay Logistics CC* 2013 (2) SA 295 (KZD)).

2 Overview of the facts

Ellerine Brothers (Pty) Ltd (appellant) concluded a lease agreement with Toits Motor Group (Pty) Ltd (insolvent) in 2006, in order let some of its business premises to the insolvent. Thereafter, the insolvent sub-leased a portion of the business premises to McCarthy Limited (respondent) (*Ellerine* case par 2). However, in 2009, the insolvent failed to timeously pay the agreed rental to the appellant. Consequently, on 16 January 2009, the appellant duly notified the insolvent in writing that cancellation of the lease will ensue if such rentals remained unpaid within seven days of its receipt of the letter (*Ellerine* case par 2). The notification letter was received by the insolvent on the same day but it could not comply with the appellant's demand. Thereafter, the appellant delivered a letter to the insolvent on 27 January 2009 cancelling the lease with immediate effect. Nevertheless, prior to this cancellation, an application for the liquidation of the insolvent was lodged with the registrar of the High Court (court *a quo*) by a creditor on 21

January 2009. This application was enrolled for hearing on 27 January 2009 but was postponed to 27 February 2009 for the filing of all affidavits. Eventually, a final order for the winding up of the insolvent was granted on 27 February 2009 (*Ellerine* case par 3).

The appellant and the liquidators of the insolvent entered into a cession agreement in June 2009 and the liquidators ceded the insolvent's rights to the rental fees payable by the respondent under the sub-lease to the appellant (*Ellerine* case par 4). The deed of cession recorded that the: (a) lease was still in force; (b) appellant was not entitled to cancel the lease from the date of the initial court application for the liquidation of the insolvent; and (c) liquidators had elected to continue with the lease (*Ellerine* case par 4). In October 2009, the appellant issued summons against the respondent in the court *a quo* claiming rental and other amounts that were allegedly due to it in terms of the sub-lease and in accordance with the aforesaid cession agreement. However, the respondent denied liability for the amounts claimed. Thereafter, the parties agreed at a hearing of the matter that the only issue in dispute was whether the appellant could validly cancel the lease after the commencement of the insolvent's winding up proceedings (*Ellerine* case par 5). This follows the fact that the notice of cancellation was given before the commencement of the insolvent's winding up proceedings but the agreed period for such cancellation had not yet expired when the proceedings commenced (*Ellerine* case par 1). Consequently, the court *a quo* was requested to decide on this matter pursuant to an agreement between the parties that it be decided on an agreed statement of facts as envisaged in rule 33 of the Uniform Rules of Court (*Ellerine* case par 1 and 5). The respondent argued that its sub-lease was terminated by the appellant on 27 January 2009 and there were no more rights which the liquidator could cede to the appellant. This defence is consistent with the legal nature of a sub-lease (*Sewpersadh v Dookie* 2009 (6) SA 611 (SCA); *Ellerine* case par 5). On the other hand, appellant maintained that due to the winding up of the insolvent, it could not validly cancel the lease when it purported to do so on 27 January 2009. The appellant's argument is mainly premised on the application of section 348 of the Companies Act 1973 which *inter alia* provides that the winding up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding up of that company (in this matter, such date was 21 January 2009; *Ellerine* case par 6−7). The court *a quo* decided in favour of the respondent and dismissed the appellant's application with costs. Thereafter, the appellant lodged an appeal against this court *a quo* verdict in the Supreme Court of Appeal (SCA). Accordingly, these and other aspects of the matter are discussed in the sub-headings below.

3 Overview of the court *a quo* judgment

As stated above, the appellant sued the respondent in the court *a quo* in October 2009 for rental and other amounts allegedly due to it in terms of the sub-lease in accordance with the cession agreement (*Ellerine* case par 5). The respondent did not dispute the existence of the cession agreement between the appellant and the liquidators. Moreover, the respondent did not reject the role and duties of the liquidators. In relation to this, it is important

to note that neither the term "liquidator" nor the term "liquidation" is expressly defined in both the Insolvency Act (s 2) and the Companies Act 2008 (s 1 read with ss 79−81). However, a liquidator is a person appointed by the courts to oversee the winding up of a company. A liquidator is obliged to conduct an investigation into the liquidated company's affairs in order to determine and collect all the assets belonging to that company and realise them for the benefit of all creditors. Proceeds from the sale of such assets are fairly distributed to all creditors that successfully proved their claims against the liquidated company's estate. Such creditors must have liquidated claims (s 9(1) and (2) of the Insolvent Act). Thus, liquidation legally brings an end to the continued existence of a bankrupt company when its assets are sold and redistributed to all its relevant creditors (ss 10(c) and 12(1)(c) of the Insolvency Act). Notably, the liquidation of a bankrupt company could also include cession of its assets, rights and obligations to creditors. For instance, in *Ellerine* case, liquidators ceded the insolvent's rights to the rental fees payable by the respondent under the sub-lease to the appellant (*Ellerine* case par 4). This suggests that the appellant was now legally entitled to claim rental payments from the respondent. Nonetheless, the respondent rejected this status *quo* citing that the sub-lease was terminated on 27 January 2009 when the appellant issued a cancellation notice on the insolvent (*Ellerine* case par 4−6). It appears the respondent ignored the possible rights that could have accrued to the appellant under the aforesaid cession agreement. Accordingly, the respondent maintained that there were no more rights in existence which the liquidator could have ceded to the appellant (*Ellerine* case par 5). However, neither the respondent nor the court *a quo* focused on the key issue regarding the inability of the insolvent to pay rental fees that were due to the appellant. The court *a quo* did not indicate whether the insolvent deliberately refused to pay the rent as it fell due and/or whether it failed to pay because it was bankrupt. Thus, it is not clear whether the insolvent was factually or actually insolvent. It was imperative for the court *a quo* to clearly highlight and adequately address these and other related aspects before it gave its final verdict to avoid prejudicing the appellant. Certainly, if the insolvent deliberately refused to pay agreed rentals under its original lease to the appellant, it would have been very unfair on the part of the appellant to deny it the right to claim rental payments from the respondent under the cession agreement merely on the basis that the sub-lease was automatically terminated on 27 January 2009 (*Ellerine* case par 4−5). Put differently, the general rules for cession agreements and sub-lease contracts should be flexibly interpreted by the relevant South African courts to avoid possible prejudice on the part of the affected parties.

On the other hand, the appellant argued that by reason of the winding up of the insolvent, it could not validly cancel the lease when it purported to do so on 27 January 2009 by virtue of section 348 of the Companies Act 1973 (Meskin, Delport and Kunst *Henochsberg on the Companies Act* (2008) 740(1); *Ellerine* case par 6). It appears that the appellant calculated the agreed seven-day cancellation period from the initial date when the notice for the cancellation of the lease contract was issued on 16 January 2009. Thus, the appellant argued that the winding up of the insolvent commenced on 21 January 2009, five days after the initial lease cancellation notice was

given to the insolvent but before the seven-day cancellation period had expired (*Ellerine* case par 2−3 and 6). This shows that the winding up of the insolvent commenced on 21 January 2009, as stipulated in section 348 of the Companies Act 1973. Given this background, the appellant argued that the commencement of the winding up proceedings interrupted its purported cancellation of the insolvent's lease contract automatically (*Ellerine* case par 6). The applicant argued further that due to the retroactive commencement of the insolvent's winding up, its right to cancel the lease had been lost by virtue of the operation of the *concursus creditorum* (*Ellerine* case par 6).

The appellant also maintained that its purported cancellation of the lease was nullified by the liquidator when he elected to continue with the lease (*Ellerine* case par 7). Accordingly, the appellant argued further that its right to cancel the lease remained unfulfilled (*De Wet NO v Uys NO* 1998 (4) SA 694 (T) par 698I; *Roering NNO v Nedbank Ltd* 2013 (3) SA 160 (GSJ) par 164E−H, which, *inter alia*, stipulate that in the absence of a right to cancel which accrued before the *concursus creditorum*, the affected party could not validly cancel the lease; *Ellerine* case par 7). This suggests that the respondent's sub-lease remained in force and the liquidator was entitled to cede his right and title in the sub-lease to the appellant (*Ellerine* case par 7). The appellant also submitted that its purported cancellation was nullified by section 37 of the Insolvency Act since it empowers the trustee and/or the liquidator to terminate or continue with the insolvent's completed and uncompleted lease contracts (*Ellerine* case par 8). Despite this, the court *a quo* held that the respondent's defence was consistent with the legal nature of a sub-lease (*Sewpersadh v Dookie supra*). In this regard, the court *a quo* held further that the sub-lessee's rights to the leased property are subject to those of the lessee and the determination of the lease *ipso jure* also terminates the sub-lease (*Ntai v Vereeniging Town Council* 1953 (4) SA 579 (A) par 589A−B). Moreover, the court *a quo* held that a sub-lessee cannot acquire more rights from the lessee than what the lessee has (*Ellerine* case par 5). Eventually, De Vos J decided the issue in favour of the respondent and dismissed the appellant's claims with costs (*Ellerine* case par 1 and 9). Consequently, the appellant sought and obtained the leave to appeal against the court *a quo* verdict as discussed below.

4 Overview analysis of the SCA Judgment

As stated earlier, both the appellant and the respondent agreed that the SCA should decide whether the lease contract was validly cancelled by the appellant after the commencement of the insolvent's winding up proceedings (*Ellerine* case par 5). It is interesting to note that both parties sought for the court *a quo* verdict on this matter pursuant to their agreed statement of facts as envisaged in rule 33 of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa 26 June 2009 as amended (Uniform Rules of Court). Rule 33 deals with special cases and adjudication of any points of law between the disputing parties. For instance, rule 33 of the Uniform Rules of Court empowers the parties to any dispute, after institution of proceedings, to agree upon a written statement of facts in the form of a special case for adjudication in the relevant courts. The statement of facts sets forth the facts

agreed upon, the questions of law in dispute and other key areas of dispute between the parties in question (rule 33(1) and (2) of the Uniform Rules of Court). This clearly shows that the appellant and the respondent had agreed that the main dispute between them was pertaining to the validity of the appellant's cancellation of the lease after the commencement of the insolvent's winding up proceedings. Furthermore, the launch of the agreed statement of facts in the court *a quo* suggests that the disputing parties had expressly authorised the court *a quo* to give judgment on the disputed matter even without hearing any evidence in respect thereof (rule 33(6) of the Uniform Rules of Court).

The SCA upheld the court *a quo* verdict and ruled that the applicant had validly cancelled the insolvent's lease. This entails that both the court *a quo* and the SCA held that the appellant's written notice of its decision to cancel the lease with immediate effect on 27 January 2009 was valid and legally binding on the parties concerned. Thus, both the court *a quo* and SCA correctly held that the respondent's rights as a sub-lessee were subject to those of the insolvent (lessee). Moreover, it is generally accepted that a sub-lessee should not acquire or be given more rights under the original lease than those of the lessee (*Ellerine* case par 5 and 9). Consequently, the fact that the appellant issued a cancellation notice and eventually cancelled the insolvent's lease contract meant that the respondent's sub-lease contract was also cancelled. Accordingly, Van Zyl AJA correctly upheld and concurred with De Vos J regarding the rights of the sub-lease and the cancellation of the lease as well as the sub-lease by operation of the law (*ipso jure*; *Ellerine* case par 5 and 9; *Ntai v Vereeniging Town Council supra*). Nonetheless, both the court *a quo* and the SCA merely stated that the appellant's cancellation was consistent with the legal nature of a sub-lease (*Sewpersadh v Dookie supra*), without clearly providing the differences between a lease, sub-lease and/or assignment. It is common cause that a lease contract allows the lessor (real owner) to let or give up a portion or all its property to another person (lessee) in exchange for the payment of an agreed fee to the lessor for a specified period. In *Ellerine* case, the appellant was the lessor while the insolvent was the lessee. On the contrary, a sub-lease contract occurs where a lessee enters into a contract with another person (sub-lessee) in order to lease part or all of the leased property to the sub-lessee in exchange of an agreed fee that is paid to the lessee for a specified period. In this regard, the lessee retains some legal rights and/or reversionary interests under the original lease contract. In *Ellerine* case, the insolvent was the lessee while the respondent was the sub-lessee. This entails that the insolvent only retained some rights in the sub-lease in so far as the original lease was valid and/or not cancelled by the appellant. On the other hand, an assignment occurs where the lessee gives up or transfers its entire interest under a lease to another person (assignee) for the duration of the lease. Importantly, at common law, if the lessee assigns its interest in the lease, its privity of estate terminates automatically but its privity of contract will still be valid under the original lease. Consequently, it appears that the appellant overlooked these differences and probably treated the insolvent's sub-lease contract as an assignment erroneously. The appellant ought to have noted that a sub-lease, unlike an assignment, does not provide privity of estate as well as privity of a contract between itself and the respondent. In

terms of the sub-lease, the insolvent retained both privity of estate and privity of its contract with the appellant (Noble and Cargile "Assignments and Subleases: The Basics" (9 January 2003) https://www.bradley.com/insights/publications/2003/09/assignments-and-subleases-the-basics (accessed 2018-04-02); see further *Ellerine* case par 5; 9 and 10). Put differently, no legal relationship existed between the appellant and the respondent since the sub-lease did not transfer any insolvent's rights and/or obligations under the original lease to the respondent. It, therefore, suffices to say that despite the cession agreement between the liquidators and the insolvent, the SCA concluded that the appellant could not claim rental fees from the respondent even if the breach in the payment was caused by the respondent (*Ellerine* case par 1; 5; 9; 10 and 16). Paradoxically, the SCA did not consider the aforesaid cession agreement which clearly stated that the appellant was not entitled to cancel the lease since the liquidators had elected to continue with the lease (*Ellerine* case par 4 read with par 5; 9; 10 and 16). This could have been caused by the fact that the appellant had an accrued right to cancel the lease which was effective and enforceable at the time of cancellation. In other words, the purported rights that accrued to the appellant after the cession agreement were not enforceable against the respondent since they were only established after the commencement of the insolvent's winding up proceedings.

Moreover, the SCA upheld the court *a quo* judgment and held that section 37 of the Insolvency Act did not apply to the present matter since the insolvent's lease contract was now governed by the relevant common law principles (*Ellerine* case par 8−9). Thus, the appellant's submission that its purported cancellation of the insolvent's lease was nullified by section 37 of the Insolvency Act was rejected by both the court *a quo* and the SCA. This follows the fact that although section 37 of the Insolvency Act empowers the trustee and/or liquidator to decide whether to terminate or continue with the insolvent's completed and uncompleted lease contracts, it does not materially change the common-law position regarding the cancellation of a contract by the lessor to remedy a breach by a lessee (*Ellerine* case par 8−10). Nevertheless, both the court *a quo* and the SCA did not indicate the actual common-law position in this regard. Accordingly, it must be noted that the common-law position provides that if a liquidator chooses to continue with the insolvent's lease contract, he or she inherits it in its entirety, including its defects. This entails that the liquidator will be obliged to perform all the obligations of the insolvent under the relevant lease contract. Despite this, the appellant failed to note that none of the provisions of section 37 of the Insolvency Act expressly prohibit the lessor and/or aggrieved party from exercising its right to cancel a lease contract at common law whenever there is a breach. Accordingly, both the court *a quo* and the SCA correctly decided that the cancellation of the insolvent's lease by the appellant also terminated the respondent's sub-lease (*Ellerine* case par 8−10). Both De Vos J and Van Zyl AJA held further that section 37 of the Insolvency Act had no effect on the validity of the lease since the appellant acquired the right to cancel the lease in compliance with clause 20.1 of the initial lease contract which provided such right to protect the appellant from the insolvent's breach (*Ellerine* case par 9; *Plaaskem (Pty) Limited v Nippon Africa Chemicals (Pty) Limited* 2014 JDR 1126 (SCA), for the application of common law to

contractual agreements). Thus, the appellant overlooked the fact that a written notice that it gave to the insolvent on 16 January 2009 as well as the subsequent cancellation of the lease agreement was compliant with clause 20.1. Put differently, clause 20.1 was an agreed penalty clause (*lex commissoria*) pertaining to non-performance and breach of the lease contract which empowered the appellant to terminate the lease whenever the insolvent failed to remedy such breach for more than seven days after receipt of a notice demanding payment (*Ellerine* case par 9). Furthermore, the appellant retained the right to cancel the lease contract since the aforesaid right and the breach in question were established prior to the liquidation proceedings. The notice and ultimate cancellation of the lease contract by the appellant are also supported by the *pacta sunt servanda* principle which clearly states that any agreements between the relevant parties must be kept. This principle is the primary basis for all contractual agreements under common law in South Africa. In this regard, the author concurs in part with both Van Zyl AJA and De Vos J, that the appellant had a lawful right and discretion to cancel the lease whenever the insolvent was in *mora* (*Spies v Lombard* 1950 (3) SA 469 (A) par 487A−C; *Goldberg v Buytendag Boerdery Beleggins (Edms) Bpk* 1980 (4) SA 775 (A) par 793 (C); *Nel v Cloete* 1972 (2) SA 150 (A)). However, both the court *a quo* and the SCA failed to adequately consider the practical negative position that the appellant was faced with since the insolvent was liquidated. The author submits that although the appellant could have relied on common law, the court *a quo* and the SCA should have allowed it to claim directly from the sub-lessee under the purported cession only as matter of last resort and/or in the event that the recovery of rental fees through common law was objectively unattainable (*Haitas v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562; *Boost Sports Africa (Pty) Ltd v South African Breweries Ltd* 2014 (4) SA 343 which, *inter alia*, held that where the statutory position regarding a legal issue is unknown or unclear, the common-law position prevails). Despite this, the SCA correctly held that section 37(1) to (3) of the Insolvency Act was similar to the common-law position and did not confer any rights and/or obligations on the liquidator or the appellant which were inconsistent with the common-law position (*Ellerine* case par 14−15; *Fey NO and Whiteford NO v Serfontein* 1993 (2) SA 605 (A) par 613A−F; *Millman NO v Twiggs* 1995 (3) SA 674 (A) par 679H−680A; *Du Plessis v Rolfes Ltd* 1997 (2) SA 354 (A) par 363G).

In relation to the appellant's argument that its cancellation of a lease contract was interrupted by a *concursus creditorum* which came into effect soon after the liquidation of the insolvent, Van Zyl AJA upheld the court *a quo* verdict and held that the insolvency of the lessee had no effect on its lease contract (*Ellerine* case par 10). A *concursus creditorum* generally refers to the claims of all creditors which are instituted against the insolvent's estate in the relevant court for their joint and collective benefit. Consequently, a *concursus creditorum* empowers all creditors as a group to have equal opportunities when claiming against the insolvent's estate rather than individualistic claims of some of the creditors (for related comments, see *Van Zyl v Master of the High Court of South Africa Western Cape High Court, Cape Town* (25059/2011) [2013] ZAWCHC 56; *Walker v Syfret* 1911 AD 141 par 166; *Richter NO v Riverside Estates (Pty) Ltd* 1946 OPD 209

par 223; Sharrock *et al Insolvency Law 5*; Boraine and Calitz "Some Consequences of the National Credit Act 34 of 2005 on the Proof of Claims in Insolvency Law" 2010 *TSAR* 797 797−798). This entails that a *concursus creditorum* protects the creditors' rights collectively to avoid undue preferences and/or bias towards any particular creditor. Given this background, it appears that the SCA's verdict could have been aptly influenced in part, by the statutory position regarding the insolvent's completed and uncompleted contracts in South Africa. For instance, where the insolvent has performed its part in terms of a contract but the other party has not yet performed their own part, the trustee or liquidator of the insolvent's estate may enforce that performance as an asset to the insolvent's estate (s 22 read with ss 23−25 of the Insolvency Act). Notably, the right to enforce performance as an asset to the insolvent's estate automatically lapses if the other party concluded the contract in question *bona fide* and without any prior knowledge of the insolvent's sequestration (s 22 of the Insolvency Act). Moreover, where the obligations of the contract were not performed fully by the insolvent but were performed fully by the other party, the insolvent's trustee may elect to discontinue or continue with that contract and perform the obligations of the insolvent. Accordingly, the trustee may choose to exclude any other party or invoke a remedy of specific performance in respect of the insolvent's contract (*Ward v Barrett NO* 1963 (2) SA 546 (A)). The appellant failed to recognise that the general rule in respect of the insolvent's contracts is that the sequestration or liquidation of the insolvent does not suspend or put an end to such contracts (see *Maharaj v Rampersand* 1964 (4) SA 638 (A) par 646C−D; *Hendricks v Cape Kingdom* 2010 (5) SA 274 (WCC) par 38; 45; *Holdsworth v Reunert Ltd* 2013 (6) SA 244 (GNP) par 4; *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) par 39 and Ndou "Keeping Employees in the Loop" 2015 *Without Prejudice* 16 16−17, for related discussion on the effect of a sequestration order). Consequently, the SCA correctly decided that the lessee's insolvency proceedings are governed by the ordinary principles of common law which also apply to executory contracts of the insolvent (*Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd* 1987 (1) SA 827 (A) par 838H−I; *Ellerine* case par 10). As stated above, the appellant ought to have recognised that when the liquidator elected to continue with the insolvent's uncompleted contract, it merely inherited the lease in its entirety, including the negative and positive obligations of the insolvent. Therefore, Van Zyl AJA correctly held that a *concursus creditorum* does not terminate, alter or suspend the continuous operation of a lease agreement to which the insolvent is a party (*Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd supra*; *Ellerine* case par 10). Instead, a *concursus creditorum* promotes equal protection and proportional distribution of the insolvent's assets amongst all its creditors (*Richter NO v Riverside Estates (Pty) Ltd supra*; *Ward v Barrett NO supra* par 552*; Ellerine* case par 11). The trustee or liquidator does not acquire any rights greater than those of the insolvent (*Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A) par 568C; *Ellerine* case par 10; Bertelsmann, Evans, Harris, Kelly-Louw, Loubser, Roestoff, Smith, Stander and Steyn *Mars: The Law of Insolvency in South Africa* (2008) par 9.1). This clearly indicates that the liquidator was obliged to perform all the relevant obligations of the insolvent under the lease after the formation of a

concursus creditorum and not to prefer the appellant over other creditors (*Goodricke and Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 (1) SA 717 (A) par 723G; *Bryant and Flanagan v Muller* 1978 (2) SA 807 (A) par 812H−813B12; *Ellerine* case par 10; Kunst, Boraine and Burdette *Meskin Insolvency Law and its Operation in Winding-Up* Service Issue 42 (2014) 2.4.1).

The appellant failed to note that a *concursus creditorum* did not affect its rights and obligations under the uncompleted lease contract, instead it provided the appellant with the right to claim monetary damages from the insolvent's estate as a concurrent creditor if the liquidator had elected to cancel the aforesaid contract (*Ellerine* case par 11; Smith *Annual Survey of South African Law* (2013) 591−593; *Smith v Parton NO* 1980 (3) SA 724 (D) par 728H−729A). In relation to this, the SCA correctly held that a *concursus creditorum* merely ensures that a trustee or liquidator is not compelled to perform the obligations of the insolvent under an uncompleted lease contract (*Ellerine* case par 12; *Estate Friedman v Katzeff* 1924 WLD 298 par 302; *Mitchell v Sotiralis's Trustee* 1936 TPD 252 par 254 and *Tangney v Zive's Trustee* 1961 (1) SA 449 (W) par 452−453). Furthermore, where the trustee or liquidator does not make any election in respect of the insolvent's uncompleted contract, the original contract shall remain valid and all the relevant parties will be required to comply with it (*Ellerine* case par 13). Moreover, the SCA correctly decided that a *concursus creditorum* does not excuse a trustee or liquidator from performing the insolvent's obligations which were due to be performed between the date of sequestration and the date upon which the trustee or liquidator made its election to abide by the insolvent's uncompleted contract (*Porteous v Strydom NO* 1984 (2) SA 489 (D) par 494G−H; *Ellerine* case par 12). Thus, the appellant was wrong to assume that its cancellation notice of 16 January 2009 was interrupted by the sequestration of the insolvent since it merely claimed specific performance and that claim did not amount to undue preference (*Porteous v Strydom NO supra* par 494F; *Ellerine* case par 13).

5 Concluding remarks

The verdict in the *Ellerine* case must be welcomed since it satisfactorily addressed some key challenges involving the effect of a sequestration order on the insolvent's contracts in South Africa. This case has also unpacked the confusion regarding the meaning and application of a *concursus creditorum* in uncompleted contracts of the insolvent. As indicated in *Ellerine* case, the aforesaid challenges and confusion are normally exacerbated in contracts involving the insolvent party that is in *mora* while the other party has performed its obligations fully. Moreover, such challenges are also sometimes complicated by diverse interpretational approaches involving the concurrent application of the relevant provisions of the Companies Act 2008, the Insolvency Act and position at common law (*Ellerine* case par 8−15; see further Luiz and Van der Linde "Trading in Insolvent Circumstances − Its Relevance to Sections 311 and 424 of the Companies Act" 1993 *SA Merc LJ* 230 231−233; Boraine and Van Wyk "The Application of 'Repealed' Sections of the Companies Act 61 of 1973 to Liquidation Proceedings of Insolvent Companies" 2013 *De Jure* 644 650−663). Notwithstanding this, the *Ellerine*

case has satisfactorily provided that the formation of a *concursus creditorum* does not interrupt the cancellation of a lease contract by the lessor in respect of the insolvent's uncompleted contracts. The *Ellerine* case has also unequivocally stated that the insolvency of the lessee does not affect the lessor's right to cancel that lease contract at any time to remedy the non-performance on the part of the lessee. Moreover, *Ellerine* case has usefully clarified the role and validity of the powers of a trustee or liquidator of the insolvent's estate in relation to the insolvent's uncompleted lease contracts.

Nevertheless, although Van Zyl AJA correctly dismissed the appellant's appeal with costs, his verdict in the *Ellerine* case does not expressly provide whether section 37 of the Insolvency Act only applies to insolvent's lease contracts where the common-law remedies are not available to the aggrieved party. In this regard, the SCA ought to have adequately provided whether the common-law position automatically takes precedence over the statutory position under section 37 of the Insolvency Act at all times. This follows the fact that the SCA verdict merely states that section 37 of the Insolvency Act is similar to the common-law position without providing any indication regarding the actual time, circumstances or statutory conditions that should be complied with by the aggrieved party before it relies on section 37 of Insolvency Act or common law to remedy any non-performance under the insolvent's lease contracts (*Ellerine* case par 8−15).

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