



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

ELLERINE BROTHERS (PTY) LTD v McCARTHY LIMITED

The Supreme Court of Appeal (SCA) today handed down their unanimous decision in an appeal against a decision of the North Gauteng High Court concerning the validity of the cancellation of a lease agreement in circumstances where the lessee had been placed in liquidation, ie whether the right to cancel was lost because of a *concursum creditorum*.

The appellant, Ellerine Brothers (Pty) Ltd (Ellerine), concluded a lease agreement with a company called Toits Motor Group (Pty) Ltd (the insolvent) in terms of which it let to it certain business premises. When the insolvent failed to timeously pay the agreed rental, Ellerine put it to terms in a letter which gave it seven days to remedy the breach, failing which Ellerine stated it would take steps to cancel the agreement. During the running of this time period, an application for the liquidation of the insolvent had been lodged by a creditor with the registrar of the high court. The application was duly enrolled for hearing, at which point the *concursum creditorum* was established. Some days later, the insolvent having failed to remedy the breach of its rental agreement, Ellerine purported to cancel the lease with immediate effect.

Ellerine and the liquidators of the insolvent subsequently entered into a cession agreement. As consideration for the rental payable by the insolvent to Ellerine under the lease, the liquidator ceded to Ellerine the insolvent's rights to the rental payable by its sub-lessee McCarthy Limited (McCarthy), which Ellerine thereafter attempted to enforce.

McCarthy defended the action on the grounds that Ellerine had cancelled the rental agreement (which would have the effect also of cancelling the sub-lease agreement) and therefore could not validly claim rent in terms thereof. Ellerine's response was that because the *conkursus* interposed between the giving of notice and the expiry of the seven day period, it could not validly cancel the lease when it purported to do so. The *conkursus* operates to prevent Ellerine from claiming further performance from the lessee under the lease until the liquidator had elected to abide by the lease.

The high court (per De Vos J) found that the lease was validly cancelled, which finding was confirmed by the SCA. The arguments advanced by Ellerine were held to misconstrue the effect, or rather the lack thereof, which the insolvency of the lessee has on a lease. As in the case of any other uncompleted contract, the liquidator inherits the lease in its entirety. The *conkursus* neither alters nor suspends the rights and obligations of the parties thereunder and the liquidator, as the universal successor, steps into the shoes of the insolvent and does not acquire any rights greater than those of the insolvent. In the result, the appeal was dismissed.