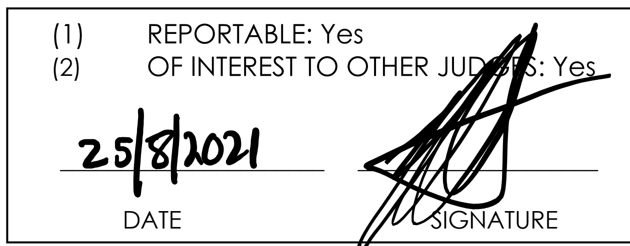
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG


(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

25/8/2021

DATE SIGNATURE

Case No.: 2020/29927

In the matter between:

FREESTONE PROPERTY INVESTMENTS (PTY) LIMITED Plaintiff

and

REMAKE CONSULTANTS CC First Defendant

CLARE SCOTT Second Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. The plaintiff as lessor and the first defendant as lessee concluded two written lease agreements for commercial premises in a shopping centre. The first defendant trades from the leased premises in providing expertise in building, renovation and interior decoration. The plaintiff terminated the lease agreements in November 2020 because of non-payment of rental and other charges.

2. On 15 March 2020 a national state of disaster was declared in terms of the Disaster Management Act, 2002 to combat the Covid-19 pandemic.[1] The first defendant was trading from the premises when the 'hard lockdown' commenced towards the end of March 2020 in terms of the Disaster Management Regulations.[2] The first defendant ceased trading. Although the 'hard lockdown' ended on 30 April 2020,[3] the first defendant only recommenced trading in June or August 2020.

3. The plaintiff seeks summary judgment for the first defendant's ejectment from the two commercial premises and for arrear rental and other

[1] GG 43096 of 15 March 2020,.

[2] Regulations published in terms of section 27(2) of the Disaster Management Act 57 of 2002: GN 318 of 2020 in GG. No 43107 (18 March 2020), and as amended by GN 398 of 2020 in GG. No 43148 (25 March 2020) ["the previous Regulations"]. These regulations were replaced on 29 April 2020 by the regulations published in GN 480 of 2020 in GG. 43258 (29 April 2020), and which have been amended frequently since then ["the present Regulations"].

[3] When Alert Level 4 was declared to be in effect, in terms of regulation 15 of the present Regulations, from 1 May 2020, replacing the 'hard lockdown' under the previous Regulations.

charges. The plaintiff also seeks summary judgment for payment against the second defendant as surety and co-principal debtor.[4]

4. The defendants' primary defence is that the respective obligations of the plaintiff as lessor and of the first defendant as lessee were suspended for the period March to June 2020: the plaintiff was excused from tendering occupation of the premises and the first defendant was excused from paying rentals. The parties' respective obligations became incapable of performance, the defendants argue, because of supervening impossibility of performance as the declaration of the state of disaster with its associated regulations made it unlawful for both the lessor and the lessee to perform their obligations. So, the defendants continue, the plaintiff is not entitled to rentals for that period and, it follows, the plaintiff was not entitled to terminate the lease agreements because of the first defendant's failure to pay those rentals.

5. Neither counsel nor I have found authority squarely on point dealing with the effect of the declaration of the state of disaster and its associated regulations arising from the Covid-19 pandemic on the respective obligations of the lessor and lessee of commercial premises.

6. The defendants admit that the first defendant as lessee is in arrears in a sum of R629 952.94. Although the defendants dispute the precise period

[4] The plaintiff in its summons also seeks damages arising from the termination of the leases but as those are correctly not the subject of the summary judgment proceedings, those damages with their related defences need not be considered

to which these arrears relate, they relate to at least the period March to October 2020. This period includes the 'hard lockdown' for the month of April 2020.

7. What is immediately evident is that the arrears relates to a period considerably beyond the 'hard lockdown' that ended on 30 April 2020.

8. The parties have approached the effect of the declaration of the state of disaster and its associated regulations on the lease agreements as an issue to be determined in the context of the doctrine of supervening impossibility of performance.

9. In the leading case of *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 the appellant firm had contracted with the municipality to light the streets of Kokstad for twenty years. During the term of the contract, in war-time, the partners of the firm were interned as enemy subjects and their business wound-up under the relevant war legislation. The liquidator terminated the agreement. The court *a quo* rejected the municipality's claim for damages on the basis that the firm's partners had been deprived by the action and authority of the State of the power to carry out their obligations under the contract to provide lighting to the streets. On cross-appeal, the Appellate Division upheld the court *a quo*'s dismissal of the municipality's claim for damages for breach of contract.[5]

[5] At 434.

10. Solomon ACJ said at 437:

> *"… it seems clear that by our law, which is based upon the Civil Law, the contract was extinguished so soon as it became impossible for the defendants to carry it on owing to the order of the Treasury winding up their business. And if the contract had come to an end, there could be no further breach of it, and consequently no action would lie for damages for breach of contract."*

11. The doctrine of supervening impossibility performance is firmly entrenched in our law. If performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished.[6] But the doctrine is not absolute. For example, the doctrine may be overridden by the terms or the implications of the agreement in regard to which the defence is invoked[7] and is not available where the impossibility of performance is self-created.[8]

12. A consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster

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[6] For example, *Oerlikon South Africa (Pty) Limited v Johannesburg City Council* 1970 (3) SA 579 (A) at 585A-C.

[7] *Hersman v Shapiro & Co* 1926 TPD 367 at 372, cited with approval in *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1206B.

[8] *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and another* [2013] 3 All SA 251 (SCA) para 28.

should be approached from the perspective of its effect on the performance by the plaintiff of its obligations as lessor and on the performance by the first defendant's obligations as lessee, rather than approached solely from the perspective of whether the first defendant was able to perform its side of the bargain, particularly to pay rentals.

13. In *Peters, Flamman & Co* it was the firm that was unable to perform because its partners were interned as enemy subjects. The municipality remained willing and able to accept performance by the firm if the firm was able to perform.

14. Similarly, in *Petersen v Tobiansky and Tobiansky* 1904 TH 73 it was one of the parties that was unable to perform. In that matter, the defendants were lessees of a store. The defendants were commandeered for military service as burghers of the then South African Republic. As the defendants had to report for military duty, they could not at the same time occupy the leased store. The court found that the defendants were prevented by *vis major* from occupying the leased premises and therefore were entitled to a remission of rent for the period that they could not take up occupation of the store. In that matter, the plaintiff as lessor was willing and able to continue to tender occupation of the store.

15. The implementation of the 'hard lockdown' under the previous Regulations gives rise to a more nuanced situation than where only one party is unable to perform.

16. For example, regulation 11B(1)(a)(i) of the previous Regulations provided that "*For the period of the lockdown … every person is confined to his or her place of residence, unless strictly for the purposes of performing an essential service, obtaining an essential good or service, collecting a social grant, pension or seeking emergency, life-saving, or chronic medical attention*".

17. Regulation 11B(1)(b) of the previous Regulations provided that *"[d]uring the lockdown, all businesses and other entities shall cease operations, except for any business or entity involved in the manufacturing, supply or provision of an essential good or service, save where the operations are provided from outside the Republic or can be provided remotely by a person from their normal place of residence".*

18. And, particularly, regulation 11B(1)(c) of the previous Regulations provided that *"[r]etail shops and shopping malls must be closed, except where essential goods are sold and on condition that the person in control of the said store must put in place controls to ensure that customers keep a distance of at least one square meter from each other, and that all directions in respect of hygienic conditions and the exposure of persons to COVID-19 are adhered to."*

19. The defendants did not plead which regulations prevented the parties from performing their respective obligations under the lease agreements. Presumably it was regulations such as these that restricted the movement of persons that the defendants had in mind when pleading impossibility of

performance. Given what has been described as the extraordinary and stringent nature of summary judgment proceedings, I will assume so in favour of the first defendant.

20. There is no suggestion that either the plaintiff or the first defendant was entitled to trade during the ‘hard lockdown” because either of them fell within any of the exceptions provided for in the previous Regulations that would have enabled them to trade. I assume, again, in favour of the first defendant that (i) the plaintiff was unable to conduct the trade of conducting a shopping centre and so was unable to tender lawful occupation of the leased premises; and (ii) the first defendant was unable to conduct the trade of providing expertise in building, renovation and interior decoration, and so unable to take up lawful occupation of the leased premises.

21. The predicament of the first defendant in being unable to take up lawful occupation is similar to that faced by the firm in *Peters, Flamman & Co* and the lessees in *Petersen*. But somewhat different in this case is that, as pleaded by the defendants, the plaintiff also suffered from the predicament that it could not lawfully tender occupation of the leased premises to the first defendant. It is not clear to me how the plaintiff as lessor was in a position to continue to tender occupation of leased premises in a shopping centre where its personnel too may have been subject to the same restrictions on movement and may not have been able to leave their homes to do what was necessary to tender that

occupation. And regulation 11B(1)(c) expressly required shopping malls to be closed except for the sale of essential goods.

22. It is over-simplistic to analyse the predicament of commercial lessees under the 'hard lockdown' solely from the perspective that it was the lessees that were unable to perform. Lessors too may have been unable to perform. An argument that a lessee's obligation to make payment is not rendered impossible by the 'hard lockdown' as the lockdown did not prevent the lessee from making payment as banking facilities remained available, misses the point. An assessment of whether there was impossibility of performance should not be approached from the narrow perspective that performance in the form of payment always remained possible and therefore there is no room for the operation of the doctrine.

23. I do not suggest that a lessee's commercial inability or diminished commercial ability to pay rentals because of an inability to trade during the 'hard lockdown' may excuse the lessee from making payment. Our law is settled that a *vis major* or *casus fortuitus* that it makes it uneconomical or no longer commercially attractive for a party to carry out its payment obligations cannot constitute a basis to be excused from performance.[9]

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[9] *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 198D/E, applying *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 606 to 607.

24. Rather, a more nuanced approach is called for that a lessor's potential impossibility of performance in the form of being unable to tender lawful occupation must also be taken into account, alongside the lessee's inability to take up lawful occupation, irrespective of the lessee's commercial means. Issues that may arise for consideration include the reciprocity of the parties' respective obligations, such as whether a lessee's obligation to pay rental is only triggered once the lessor has tendered and is able to give lawful occupation. Under the common law the lessor first must give occupation for the applicable period before it can demand rental from the lessee for that particular period, and so the residual rule that rental is payable in arrear.[10] But, as is now usually the case, the terms of the lease agreement may provide otherwise, such as the lessee being required to pay rental in advance such as on the first day of the month, and before enjoying the applicable period of occupation corresponding to that rental payment.

25. I proceed, for purposes of these summary proceedings, on the assumption in favour of the first defendant that the effect of the 'hard lockdown' on the lease agreements incapacitated both the plaintiff and the first defendant from performing their respective obligations.

26. When considered from this more nuanced perspective, what then can be said for the first defendant's reliance on supervening impossibility of

[10] *Van der Merwe v Reynolds* 1972 (3) SA 740 (A) at 746B.

performance caused by the 'hard lockdown' regulations on both its and the plaintiff's obligations to perform under the two lease agreements?

27. Even when approached from this nuanced perspective, the first defendant cannot legally justify its failure to make payment of rentals and other charges for the protracted period of March to October 2020.[11] Whatever restrictions there may have been that prevented the plaintiff and the first defendant from performing their respective obligations for the period of the 'hard lockdown' until 30 April 2020, those restrictions did not persist until October 2020. From 1 May 2020, the lockdown regulations were progressively eased.[12] Any supervening impossibility of performance did not endure for the entire period corresponding to the first defendant's non-payment of rentals.

28. In *Hansen, Schrader and Co v Kopelowitz* 1903 TS 707 the Full Court of this Division refused to recognise a right to remission of rent merely because the lessee had suffered a loss because the country in which the

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[11] Although the defendants seek to make something of the arrear rentals including the month of November 2020 and which then overlaps with the damages claim in the summons, it is clear from the rental statement annexed to the plaintiff's particulars of claim that arrear rentals and other charges are only claimed until the month of October 2020. This is sufficiently clear that in my view the defendants cannot complain of any real prejudice on this aspect.

[12] This commenced with the substitution of the previous Regulations with the present Regulations with effect from 1 May 2020, and which introduced Alert Level 4 in Chapter 3. Easing of restrictions that followed, without professing to be exhaustive, included Alert Level 3 from 1 June 2020 (GN 608 of 28 May 2020 in GG 43364), Alert Level 2 from 18 August 2020 (GN 891 of 16 August 2020 in GG 43620) and Alert Level 1 from 21 September 2020 (GN 998 of 17 September 2020 in GG 43719)

leased property was situated was at war. The court further found[13] that the fact that a great number of people had left the country, so as to reduce the field from which the lessee could draw his custom, was also no ground for remission of rent, because the principle upon which the court grants the remission is that the *vis major* must be the direct and immediate cause of a lessee being deprived of the use of leased premises. Wessels J graphically described the position as follows:

> "*In this case vis major would not be the direct and immediate cause of his leaving the house. It was not a necessary effect of the outbreak of war that these particular premises were not hired by persons. There were people in Johannesburg and bedrooms were occupied, only there were not enough people to occupy all the available bedrooms in the town. The war no doubt was the indirect cause of the dearth of tenants, and a heavy and continued fall in the market may also produce an exodus of people, and lessees of rooms may find themselves without sub-tenants, but the falling stock would not be the direct, immediate and necessary cause of particular bedrooms not being let.*" [14]

29. Similarly in the present matter, that the declaration of the state of disaster and the continued effect of the Covid-19 pandemic may have resulted in a dramatic decline of custom through the shopping centre in which the leased premises were situated, does not afford a defence to the first defendant as lessee.

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[13] At 715, 716.

[14] At 716.

30. The court in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited* 1903 TH 286 also rejected a claim for remission of rental because of a decline in custom arising from the outbreak of war and which rendered it no longer profitable to operate a stationer's shop. The court posited the following particularly relevant analogy at 295, 296:

> *"The consequence of holding that the defendants in this case are entitled to a remission of rent appears to me to be far-reaching. It would involve this, that on the happening of any event amounting to vis major, which caused a temporary diminution of the population of a town, every tradesman who could show that he had sustained a temporary loss or a considerable diminution of profit might be entitled to a remission of rent. Suppose, for instance, that in consequence of the outbreak of an epidemic disease a large proportion of the inhabitants fled, with the result that owing to the absence of their usual customers the tradesmen temporarily were carrying on business at a loss, and closed their shops, it would come as an unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom."*

31. The first defendant's decision not to open its doors for business after the regulations were eased sufficiently to legally permit it to recommence trading also does not constitute a defence. The first defendant's decision to keep its doors closed is not because the prevailing regulations prevented it from trading. The first defendant's decision to cease trading is not a direct consequence of a *force majeure*. As recently stated by Weiner J in *Matshazi v Mezepoli Melrose Arch (Pty) Limited and another and related matters* [2020] 3 All SA 499 (GJ) in the context of deciding

whether a restaurateur was excused from performing its obligations to pay its employees because it was not trading:

> "*The respondent companies are not excused from its obligations to its employees because it has decided not to trade in circumstances where it is able to do so, but has elected not to, in anticipation that such trading will not be profitable. Trading may be burdensome or economically onerous, but economic hardship is not characterised as being a force majeure event;*[15] *it does not render performance objectively and totally impossible.*"[16]

32. Whatever the defence the first defendant may have that it was excused from paying rentals for the period of the 'hard lockdown', that impossibility of performance does not relate to the full period for which it did not make payment. The plaintiff's cancellation of the lease agreements in November 2020 based upon the first defendant's non-payment of arrears for a period that extended beyond when the regulations may have prevented the occupation of the premises is lawful.

33. The first defendant relies upon counterclaims arising from what it contends was a misrepresentation made by the plaintiff. These counterclaims do not constitute a defence to the cancellation of the lease agreements, particularly as the lease agreements expressly provide in

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[15] Citing *Unibank Savings* above.

[16] At paragraph 40.5

clause 4 that the rentals are to be paid free of exchange and without deduction or set-off.

34. In any event, the divergence between the misrepresentation pleaded by the defendants in their plea and the misrepresentation described in their affidavit resisting summary judgment is so great, I in any event am unable to find that the counterclaims are *bona fide* raised.[17]

35. Counsel for the first defendant in his heads of argument, and again in oral argument, submitted that should the court grant an ejectment order, the order should nonetheless be suspended for an appropriate period of eight to twelve months in the exercise of the court's discretion under Uniform Rule 45A. The difficulty, which was readily appreciated by counsel, is that no case was made out for such relief, whether in the first defendant's plea or affidavit resisting summary judgment. In the circumstances, no case has been made out to trigger any discretion that I may have to otherwise suspend the ejectment order.

36. The plaintiff is entitled to the ejectment of the first defendant from the two leased premises as the first defendant's continued occupation after the termination of the lease agreements is unlawful.

37. What remains to be decided is whether summary judgment should be granted for the plaintiff's claim for arrear rentals. Upon adopting the more

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[17] See para 10 in *Vukile Property Fund Ltd v True Ruby Trading 1002 CC and another* (case number 2020/9705) per Moorcroft AJ, in Gauteng Division, Johannesburg (21 May 2020).

nuanced approach, it cannot be said, at least for purposes of resisting summary judgment, that the defence that the first defendant was excused from making payment of rentals for the ‘hard lockdown’ is unarguable as the plaintiff as lessor too may not have been able to perform its obligations to tender lawful occupation for that period. That period forms part of the overall period for which the plaintiff claims payment of arrear rentals and other charges.

38. Plaintiff’s counsel argued that the first defendant has expressly contracted to be liable for rentals notwithstanding any supervening impossibility of performance, and so has expressly contracted to be liable for rentals even for the period of the ‘hard lockdown’.

39. The operation of the doctrine has been explained on the basis of a term that is implied into the contract that if performance becomes impossible, the contract shall not remain binding. For example, the Solomon ACJ for the Appellate Division in *Peters, Flamman & Co* referred to the oft-cited English authority of *Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Limited* L.R. 1916 2 AC 422 in which Lord Parker said:

> “*My Lords in considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible. This principle is one of contract law depending upon some term or condition to be implied in the contract itself and not*

on something entirely dehors *the contract which brings the contract to an end.*" (My emphasis).

40. Lord Loreburn in the same English authority said that:

> "*An examination of the decisions confirms me in the view that, when our Courts have held innocent parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise.*" (My emphasis).

41. In *Schlengemann v Meyer, Bridgens and Co Limited* 1920 CPD 494 at 500) the court referred to another English case, *Marshall v Glanville and another*.[18]

> "*The true principle was laid down in* The Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*, and the question was: Did the parties make their bargain on the footing that a particular state of things would continue to exist? Here it is clear that the parties contracted on the footing that it would continue to be lawful to perform and accept the contemplated service, but, from July 1916, that footing no longer existed, and the contract came to an end.*"

42. It follows that where the parties have expressly in their written agreement stipulated for what will happen in the event of supervening impossibility of

[18] 116 LT at 560. Also referred to in *Bekker NO v Duvenhage* 1977 (3) SA 884 (E) at 889E/F.

performance, there can be no room for an implied term that the parties are excused from performance. This explains why the doctrine of impossibility of performance cannot apply if the contract provides otherwise.[19] A term cannot be implied where there are express terms that provide otherwise. A term is implied in an agreement for the very reason that the parties failed to agree expressly thereon.[20]

43. But irrespective of whether the jurisprudential basis of the doctrine is an implied term, our law undoubtedly allows for parties to contractually regulate the position should there be supervening impossibility of performance.

44. Clause 22.1 of each lease agreement provides that:

> "*The Tenant shall have no claim or right of action of whatsoever nature against the landlord for damages, loss or otherwise, nor shall it be entitled to withhold or defer payment of rent, nor shall the tenant be entitled to a remission of rent, by reason of an overflow of water supply or fire or any leakage or any electrical fault or by reason of the elements of the weather or by reason of the Leased premises or any other part of the Building or Property being in a defective condition or falling into disrepair or any particular repairs not being effected by the Landlord or by reason of there being any defect in the equipment of the Landlord or as a result of any other cause whatsoever.*" (My emphasis).

[19] See, for example, *Ex Parte Lebowa Development Corporation Limited* 1989 (3) SA 71 (T) at 105H/I; *Nuclear Fuels Corporation* above at 1206F/G and at 1208I, citing *Oerlikon* above at 585 B.

[20] *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D.

45. The plaintiff's argument is that in terms of this clause the plaintiff and the first defendant have contracted that the first defendant as the lessee is not entitled to withhold or defer payment of rent and is not entitled to a remission of rental "*as a result of any other cause whatsoever*". Plaintiff's counsel also referred to clauses 4, 9, 17 and 20 of the lease agreements, which he submitted, when read in the context of the lease agreements as a whole, also precluded the first defendant from relying upon supervening impossibility of performance and from claiming a remission of rental.

46. Given the stringent and extraordinary nature of summary judgment proceedings, I am unable to find that these clauses, including clause 22.1, are so clearly applicable to the situation that presented itself that summary judgment should be granted. A more restrictive interpretation of the clauses might be called for. I have already emphasised the potential bilateral incapacity of the plaintiff and the first defendant to perform their respective obligations as lessor and lessee. Questions arise whether the clauses, correctly interpreted with recourse to such evidence as is admissible in aiding the interpretative exercise, which is now more generously received than before,[21] does permit the plaintiff as lessor to claim rental for a period for which it may not have been able to tender

[21] Unterhalter AJA for the Supreme Court of Appeal recently in *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99 (9 July 2021) in para 39 (and see also para 46) referred to the Constitutional Court's affirmation in *University of Johannesburg v Auckland Park Theological Seminary and another* [2021] ZACC 13, especially para 68, that an expansive approach should be taken to admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties intended.

lawful occupation. The plaintiff states in its affidavit that it has already granted discounts in respect of the rental during the period of the national disaster. Although the plaintiff states that it was not obliged to do so, it nonetheless did so and this may constitute subsequent conduct that can aid in the interpretation of clause 22 and the lease agreement generally, even in the absence of ambiguity.[22]

47. I am also cognisant that these clauses were only referred to in argument by the plaintiff and did not feature in the pleadings or the affidavits. I have not had the benefit of close argument on these issues, particularly in the context of the interpretative exercise that needs to be undertaken as to what the particular clauses mean, which are more appropriately explored at trial, after hearing evidence and full argument.

48. I am unable to find that the first defendant does not have an arguable defence in respect of at least a portion of the arrears.

49. As the arrear rental claimed by the plaintiff covers the 'hard lockdown' period, and insufficient detail has been provided by the plaintiff either in its particulars of claim or its affidavit supporting summary judgment to enable the rental and other charges for that period to be readily severed from the balance of the arrears claim, it would not open to me to grant summary judgment in terms of Uniform Rule 32(6) for that portion of the

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[22] *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126, para 15. See however the caution sounded in *Capitec Bank* above, para 50.

arrears claim that does not relate to the period when the plaintiff may not have been unable to tender lawful occupation. Although I was invited by the plaintiff's counsel to undertake such an exercise with reference to the rental statements attached to the papers, it does not appear to me to be a straightforward exercise.

50. The plaintiff has nonetheless had substantial success in obtaining ejectment in these summary judgment proceedings and is therefore entitled to its costs for the summary judgment proceedings. The plaintiff and the first defendant agreed in the lease agreements on the scale of costs.

51. As the second defendant's liability is that of a surety and co-principal debtor for the first defendant's indebtedness, I need not consider the defences raised in relation to that liability.

52. Summary judgment is accordingly granted, and on order is made, as follows:

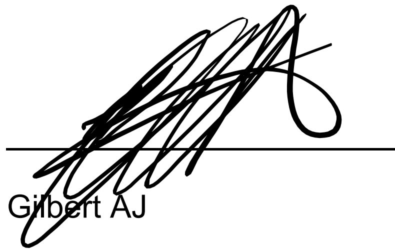
    52.1. The first defendant and all those in occupation through the first defendant are ejected from and are to vacate the commercial leased premises described as Unit SF10A (measuring approximately 212m² and which includes the storeroom measuring 100m² and the eight basement parking bays) in The Colony Shopping Centre, 345 Jan Smuts Avenue, Craighall Park, Johannesburg, within one week of this order, failing which the

sheriff and/or deputy sheriff is authorised to take such steps as are necessary to give effect to this paragraph and, if necessary, to obtain the assistance of the South African Police Services.

52.2. The first defendant and all those in occupation through the first defendant are ejected from and are to vacate the commercial leased premises described as Unit S210 (measuring approximately 400.79m²) in The Colony Shopping Centre, 345 Jan Smuts Avenue, Craighall Park, Johannesburg, within one week of this order, failing which the sheriff and/or deputy sheriff is authorised to take such steps as are necessary to give effect to this paragraph and, if necessary, to obtain the assistance of the South African Police Services.

52.3. The first defendant is pay the costs of the summary judgment proceedings on an attorney and own client scale.

52.4. Leave to defend is granted to the defendants on the plaintiff’s claims for payment of the arrears and of interest thereon, with costs in the cause.



Gilbert AJ

Date of hearing:	17 August 2021
Date of judgment:	25 August 2021
Counsel for the Plaintiff:	Mr J G Dobie
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