




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case no: 37587/2020

1.	REPORTABLE:	NO
2.	OF INTEREST TO OTHER JUDGES:	NO
3.	REVISED:	NO
DATE: 19 October 2021		
SIGNATURE OF ACTING JUDGE:		

In the matter between:

**NOGODUKA-NGUMBELA CONSORTIUM (PTY) LTD**

Applicant

and

**RAGE DISTRIBUTION (PTY) LTD t/a RAGE**

Respondent

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**JUDGEMENT**

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**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email. The time and date for hand-down is deemed to be 10h00 19 October 2021.

PRETORIUS AJ:

[1] The defendant currently occupies a premises owned by the plaintiff. The defendant took occupation of the premises pursuant to a written lease agreement concluded between the parties on 29 June 2018 (*“the lease”*). The lease commenced on 1 May 2018 for a fixed term of three years and would terminate on 30 April 2021.

**The pleadings**

[2] The plaintiff claims that the defendant breached the lease in that it failed to pay the agreed monthly rental and charges. As a result, so the plaintiff claims, the plaintiff became entitled to cancel the lease and claim the arrear rental and charges together with damages (respectively claims 1 and 2 in the particulars of claim).

[3] Naturally the plaintiff's claim in its application for summary judgment is restricted to claim 1, in which it claims:

- “1. Payment of the amount of R130,928.80;
2. Interest on the above amount at a rate of 9% per annum compounded monthly from 2 November 2020 to date of payment;
3. Ejectment, forthwith, of the defendant and anyone claiming occupation through the defendant at the premises described as shop no 23 (measuring approximately 159m<sup>2</sup>), Fingoland Mall, erf 501, corner N2 & Road number DR8327, Butterworth, Eastern Cape; and
4. Costs of the suit.”

[4] The summons was issued in November 2020, prior to the lease term terminating on 30 April 2021. The application was argued after the expiry of the lease term. Despite the lease term having expired, the defendant remains in occupation of the premises.

[5] The defendant raised, as a first special plea, that this court does not have jurisdiction as the claimed amount falls within the jurisdiction of the Magistrates Court.

As a second special plea, the defendant contends that, because of the plaintiff's "breach" of the provisions of rule 41A, the plaintiff's claim ought to be dismissed. The defendant, correctly in my view, abandoned both special pleas.

[6] The plaintiff contends that the defendant impermissibly raised defences in its affidavit resisting summary judgment ("*opposing affidavit*") which are not in its plea and consequently the defendant is not entitled to rely thereon in its opposing affidavit.

[7] I am mindful that a defendant raising defences in its opposing affidavit which are inconsistent with the plea cannot be *bona fide* in the absence of a reasonable explanation. In this regard I agree with Moorcroft AJ in *Vukile Property Fund*.<sup>1</sup> This however does not mean, in my view, that a defendant is not entitled in its opposing affidavit to elaborate on its plea and the defences pleaded. The amendment to rule 32 did not affect the rules regarding pleadings – the difference between *facta probanda* and *facta probantia* remains pertinent. In my view the amendment to rule 32 was not intended to require a defendant to plead its defence in the same detail and with the facts necessary to prove the facts to be proved as it would be entitled to do in an affidavit resisting summary judgment.

[8] In the opposing affidavit the defendant relies in essence on two defences. Firstly, the defendant contends that it has not breached the lease as it was never in arrears because of a dispute between the plaintiff and the defendant since the inception of the lease regarding the plaintiff's monthly charges for sewerage and water. The defendant contends that it has disconnected the water supply to the premises with the result that the plaintiff is not entitled to the sewerage and water charges as set out in its statement (annexure "B" to the particulars of claim) ("*the plaintiff's statement*"). Related to this, the defendant contends that the plaintiff was not entitled to charge interest as there were never any arrears.

[9] In its plea the defendant denied paragraph 5.1 of the particulars of claim, being the plaintiff's paraphrasing of certain terms of the lease, including the terms providing for water, sewerage charges and interest. The defendant also denied in its plea the

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<sup>1</sup> *Vukile Property Fund Limited v True Ruby Trading 1002 CC*, unreported judgment under case number 2020/9705, Gauteng Division, Johannesburg at [6]-[12]

claimed arrears. The plaintiff contends that the denials are inadequate and that the defendant should have pleaded the defence regarding the water, sewerage charges and interest in more detail in its plea in order to rely thereon in the opposing affidavit.

[10] Because the first defence was not raised in the plea with the same particularity as in the opposing affidavit, the plaintiff did not have the opportunity to deal with same in its affidavit. As such, and because rule 32 does not provide for a replying affidavit to be delivered, the plaintiff may have been placed at a disadvantage in the context of amended rule 32. Notwithstanding, I am not persuaded that the defendant's opposing affidavit is inconsistent with the plea.

[11] As a second defence, the defendant contends that the plaintiff did not comply with its obligations in terms of the lease or tendered compliance thereof during the "*alert level lockdown*" period of 27 March to 17 August 2020, with the result that the defendant did not enjoy complete and unfettered beneficial occupation of the premises. The alert level lockdown, so the defendant contends, constitutes a *vis major* event and the defendant is, as a result, entitled to a remission of rental. This defence is consistent with the plea.

### **The first defence - sewerage and water**

[12] In its plea, the defendant admits the conclusion of the lease (annexure "A" to the particulars of claim). Save for the defendant's denial of paragraph 5.1 of the particulars of claim, the remainder of the terms of the lease pleaded by the plaintiff are admitted by the defendant in its plea with the reservation that they are consistent with the lease. There is however no specific allegation in the plea regarding the alleged dispute about sewerage and water.

[13] Analysing paragraph 5.1 of the particulars of claim, it is not immediately evident what it is the defendant denies in its plea. The basic monthly rental, escalation and administration costs are provided for in the schedule to the lease; the municipal rates, electricity, water, sewerage and refuse removal are provided for in clause 24 of the lease and the interest on late payments is provided for in clause 6.1 of the lease. It is only the prime rate of interest, alleged in paragraph 5.1 to be 7%, which is not

contained in the lease. From a reading of the opposing affidavit, it appears that the denial in the plea pertains to the defendant's challenge of the plaintiff's entitlement to invoice for water and sewerage and, as a result, interest on arrears.

[14] The defendant alleges in its opposing affidavit that a dispute regarding amounts charged by the plaintiff for sewerage and water has been enduring between the parties since the inception of the lease. The defendant contends that it has disconnected the water supply to the premises with the result that the plaintiff is not entitled to the sewerage and water charges as set out in its statement. Those charges, the defendant contends, should be deducted from the arrears claimed by the plaintiff. By charging the defendant for water and sewerage, so the defendant continued, the plaintiff has created the impression that the defendant is in arrears. The defendant contends that it was never in arrears and accordingly it has not breached the lease. As a result, the defendant argues that the plaintiff was not entitled to cancel the lease or to claim ejectment of the defendant from the premises.

[15] For the allegation that a dispute existed in respect of water and sewerage "*since inception of the lease*", the defendant relies on email correspondence exchanged on 30 September 2020. I am not convinced that the correspondence supports the alleged dispute since inception of the lease. At best, the correspondence indicates that the defendant removed "*the tap*" from the premises and that the plaintiff stopped invoicing the defendant for water consumption. It is not stated in the correspondence, neither the plea nor opposing affidavit, when the water was disconnected.

[16] Having regard to the plaintiff's statement it appears that the plaintiff invoiced the defendant for water consumption for the months of August 2018 to September 2019 (14 months) in the total amount of R3 197.26 and for sewerage since July 2018 until November 2020, being the last month reflected in the plaintiff's statement. The total amount of sewerage charges for the said period is R19 529.74.

[17] In terms of the lease, particularly clause 24.2, the defendant would be liable for water consumed by the defendant as well as municipal (local authority) charges in respect of the premises. In respect of water, the import of clause 24.2 is, on my reading of the lease, clear – the defendant would be liable only for water consumed.

The sewerage charge however appears not to be consumption based but a fixed charge by the municipality, which the plaintiff would recover from tenants on a *pro rata* basis.

[18] Because it is not evident when the water supply to the property was disconnected, there is nothing before me to cast doubt on the information reflected in the plaintiff's statement. In any event, clause 44.3 of the lease provides that all utilities, including amongst others sewerage, charged to the defendant and which appear on the plaintiff's invoice will be accepted by the defendant to be true and correct and will constitute *prima facie* evidence in any litigation between the parties, provided that the defendant does not raise a query within fourteen days thereof. There is no convincing evidence that the defendant raised any queries.

[19] I am not persuaded by the argument advanced by the defendant's counsel that the email correspondence supports the defendant's contention that the water supply was disconnected since inception of the lease. I am also not persuaded by the argument that, in terms of the lease, sewerage is a factor of the water consumed and that, if no water is consumed, no sewerage can be charged. As mentioned, the sewerage charge is in my view not consumption based but is a fixed charge by the municipality to the plaintiff, which the plaintiff then recovers proportionately from tenants, including the defendant.

[20] The defendant's counsel argued that the water and sewerage dispute is a factual dispute, which cannot be resolved in these proceedings, and that the dispute is sufficient to resist summary judgment. There may be merit in the argument, however, it is not required of me to resolve the dispute, at least not for purposes of the ejectment relief sought. All that is required is a finding that the defendant was in breach of the lease.

[21] Is the defendant in breach? The defendant contends that the water and sewerage charges, since inception of the lease, should be deducted from the alleged outstanding amount. Since the defendant's liability for sewerage charges is provided for in the lease, I am not convinced that there is any basis for deducting them from the arrear amount. Moreover, the terms of the lease expressly exclude any such

deduction in clause 4.1 in terms of which it was agreed that *“the Total Monthly Rental is payable monthly in advance, on the first day of every month, free of exchange and without deduction or set-off...”* and in clause 4.5 in terms of which it was agreed that *“the Tenant may not withhold the payment of the Total Monthly Rental and any other amounts for any reason whatsoever subject to the provisions contained in this Lease.”*

[22] But assuming in favour of the defendant for purposes of summary judgment that the water and sewerage charges should be deducted, its contention that the defendant would not be in arrears if the water and sewerage charges since inception of the lease are deducted from the alleged outstanding amount of R130 928.80, appears to be incorrect. The total water and sewerages charges reflected on the statement is an amount of R22 529.74 (R3 197.26 plus R19 529.74). Deducting R22 529.74 from the claimed amount results in an arrear balance of R108 399.06.

[23] To bolster its argument that it was never in arrears, the defendant argued that a rental remission in respect of the period 27 March 2020 to 17 August 2020 – a period of approximately five months – should also be considered and deducted from the arrears. The argument is subject to a finding on the second defence, which I deal with below.

[24] The plaintiff however argued that the defendant was in arrears even before the lockdown on 27 March 2020 and, as a result, whether or not the defendant is entitled to a remission of rental, it was in breach. To test this, I had regard to the plaintiff's statement from which it appears that the arrear amount on 2 March 2020 was R33 869.84. Deducting the total water and sewerage charges as at that stage, an amount of R13 712.34, there is still an outstanding balance of R20 157.50. I reiterate that I am not persuaded of any basis for deducting the charges. However, assuming in favour of the defendant for purposes of summary judgment that it is entitled to the deduction, it appears that the defendant was in arrears even after deducting the said charges and thus in breach prior to the lockdown.

[25] Albeit that the water and sewerage dispute may cast some doubt in respect of the quantum of the plaintiff's claim for payment, I am not persuaded that it constitutes a defence against the defendant's claim for cancellation and ejectment.

## **The second defence - *vis major***

[26] The defendant contends that the plaintiff did not comply with its obligations in terms of the lease or tendered compliance thereof during the “*alert level lockdown*” period of 27 March to 17 August 2020, with the result that the defendant did not enjoy complete and unfettered beneficial occupation of the premises. The alert level lockdown, so the defendant contends, constitutes a *vis major* event which excused the defendant from performing in terms of the lease. Accordingly, the defendant is, so it argued, entitled to a remission of rental.

### *The Regulations*

[27] A national state of disaster was declared on 15 March 2020 in terms of the Disaster Management Act, 57 of 2002 in reaction to the Covid-19 pandemic. The “hard lockdown” commenced on 27 March 2020 in terms of the Disaster Management Regulations<sup>2</sup> (“*the March 2020 Regulations*”). The hard lockdown ended on 30 April 2020 after new regulations were published on 29 April 2020<sup>3</sup> (“*the April 2020 Regulations*”), which replaced the March 2020 Regulations.

[28] In terms of the March 2020 Regulations various premises were closed to the public during the period of the lockdown. Regulation 11B(4) placed an obligation on landlords to close premises under their control, save for essential goods and services, and on tenants to keep closed the rented premises under their control.

[29] It appears that the defendant’s business is not an essential service as defined in the March 2020 Regulations with the result that the plaintiff was obliged by those Regulations to close the premises from which the defendant conducted its business. The defendant in turn was obliged by the said Regulations not to occupy or use the premises for the subsistence of the period envisaged in the March 2020 Regulations.

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<sup>2</sup> 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)

<sup>3</sup> GN 480 of 2020 in GG. 43258



[30] From the lease it appears that the defendant's business is clothing retail and as such the defendant was a "*permitted service*" under the April 2020 Regulations. It is therefore necessary for purposes of the present matter to distinguish between the period during which the premises was closed and unoccupied<sup>4</sup> ("*the hard lockdown period*") and the period during which occupation by the defendant was permitted, albeit subject to certain restrictions ("*the restricted lockdown period*").

[31] The restrictions imposed by the March 2020 Regulations were relaxed by the April 2020 Regulations. As restrictions were relaxed, the country was placed on various alert levels, which were regulated by several amendments to the Regulations. The alert levels and effective dates thereof for the period relevant to the second defence were the hard lockdown period (alert level 5) from 27 March to 30 April 2020, alert level 4 from 1 to 31 May 2020, alert level 3 from 1 June to 17 August 2020 and alert level 2 from 18 August 2020.

[32] The fact that the plaintiff was unable to afford the defendant beneficial occupation of the premises and the fact that the defendant was unable to occupy the premises and enjoy the benefits thereof during the hard lockdown period are certain. As such, the plaintiff's performance of its obligation to afford the defendant beneficial occupation was rendered impossible by the March 2020 Regulations.

### *Supervening impossibility*

[33] Supervening impossibility (such as *vis major*) arises when performance of an obligation becomes objectively impossible through no fault of either of the parties. Legal impossibility of performance arises where performance in terms of an existing obligation is prohibited by legislation,<sup>5</sup> provided that the impossibility arose after the obligation arose. The act of Government in promulgating the March 2020 Regulations, in accordance with the powers afforded to it in terms of the Disaster Management Act,

<sup>4</sup> The period between 27 March 2020 (the level 5 lockdown) and 30 April 2020

<sup>5</sup> *Witwatersrand Township Estate & Finance Corporation Ltd v Rand Water Board* 1907 TS 231; *Bayley v Harwood* 1954 3 All SA 459 (A); 1954 3 SA 498 (A); *Bekker v Duvenhage* 1977 3 All SA 130 (E); 1977 3 SA 884 (E); *Gordon v Pietermaritzburg-Msunduzi Transitional Local Council* 2001 4 SA 972 (N); *SA Forestry Co Ltd v York Timbers Ltd* 2004 4 All SA 168 (SCA); 2005 3 SA 323 (SCA)

and the effect thereof on the obligations of the parties in terms of the lease, therefore constitutes supervening legal impossibility.

[34] The general effect of supervening impossibility is that reciprocal obligations are extinguished. No person can do the impossible and it is only logical that if the object of an obligation falls away, the obligation itself must fall away. However, impossibility of performance extinguishes an obligation only if the impossibility is absolute or objective.

[35] I was not referred to any recent authorities on point by counsel, nor could I find any before the hearing of the matter. It is therefore required to consider older authorities on the subject.

[36] In *Bayley v Harwood*<sup>6</sup> the Appellate Division dealt with a lease agreement, the performance in terms of which was made impossible by supervening legislation. The tenant (Bayley) had leased from a lessor (Harwood) a premises which the lessor had been using as a health and pleasure resort and which the tenant contemplated using for the same purpose. The lessor undertook to transfer all trading licences held by him in respect of the premises and the tenant undertook to retransfer them at the expiration of the lease. In February 1951, the licensing board indicated that it would refuse the tenant's application for the licences unless certain substantial structural alterations and additions, as required by the Peri-Urban Areas Health Board in terms of its by-laws promulgated in February 1951, were made. As the lessor had refused to carry these out, the lessee vacated the premises tendering rent up to the date of vacation. The court held that the promulgated legislation constituted a *vis major* event and rendered the premises unfit for its intended purpose.

[37] The Appellate Division in *Bayley* reasoned that the right of a lessee to vacate the premises and be released from the liability to pay rent after his vacation also arises from a legislative prohibition against the use of the property for the purpose for which

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<sup>6</sup> 1954 3 All SA 459 (A); 1954 3 SA 498 (A)

it was leased.<sup>7</sup> The court referred<sup>8</sup> to *Zweigenhaft v Rolfes, Nebel & Co*<sup>9</sup> where it was held:

“A remission is claimable where the enjoyment of the property for the purposes for which it was let is hindered or prevented by some vis major happening without the default, actual or constructive, of either party.’

[38] The Appellate Division continued to consider the foreseeability of the change in the law<sup>10</sup> and held:

“Now if legislation were to prohibit absolutely the use of leased premises by the lessee for the purpose for which they were leased there could, in my view, be no doubt that the lessee would be entitled to remission, notwithstanding that the prohibition was of a kind that the legislature might, generally speaking, have been expected to introduce. To defeat the lessee there would, at least, have to be actual contemplation, at the time of the contract, of the possibility of such legislative prohibition.”<sup>11</sup>

“But, if what has to be done to ward off the prohibitory effect of the change in the law is something that the lessee could not reasonably be expected to do, there seems to me to be no principle upon which it can be held that he has no right of remission. The sovereign power, acting legislatively, has intervened so as to prohibit him from using the premises for the purpose for which they were leased, unless, indeed, he incurs expenditure which he has not contracted to incur and which there is no reason why he should incur.”<sup>12</sup>

[39] The common law position is that a party to a lease agreement is released and excused from its obligations if performance is prevented by *vis major* or *casus fortuitus*,<sup>13</sup> even if such non-performance would otherwise amount to a breach. It is only when the non-performing party is to blame for the impossibility,<sup>14</sup> bears the risk of impossibility,<sup>15</sup> foresaw or ought reasonably to have foreseen when entering into

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<sup>7</sup> At 503

<sup>8</sup> At 505

<sup>9</sup> 1903 TH 242 at 246

<sup>10</sup> At 506

<sup>11</sup> At 507

<sup>12</sup> At 507-508

<sup>13</sup> *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427 at 434-435

<sup>14</sup> *National Stadium SA (Pty) Ltd v Firststrand Bank Ltd* 2011 2 SA 157 (SCA); 2011 3 All SA 29 (SCA) at [41]

<sup>15</sup> *Southern Era Resources Ltd v Farndell* 2010 2 All SA 350 (SCA); 2010 4 SA 200 (SCA) at [8]

the contract the cause of the impossibility<sup>16</sup> or where the debtor was in *mora* when the supervening impossibility arose, that the debtor may be liable for damages resulting from its failure to perform.<sup>17</sup>

[40] When an obligation is extinguished by supervening impossibility of performance, any reciprocal obligation is also extinguished.<sup>18</sup> But, where there exists partial impossibility of performance, the obligation is not extinguished. If, in those circumstances, the creditor cannot reasonably be expected to accept partial performance, the creditor is entitled to terminate the obligation.<sup>19</sup> When partial performance is, however, accepted, any counter-performance is reduced proportionately.<sup>20</sup> Similarly, in circumstances where performance becomes temporarily impossible, the obligation is not extinguished. Performance (and any reciprocal obligation) is suspended for the duration of the impossibility. If, however, performance becomes totally or partially impossible because of the temporary impossibility, the rules relating to total or partial impossibility apply.

[41] A lessor has the obligation to afford a lessee the use and enjoyment of the leased premises. The lessee's use and enjoyment can be disturbed by either a breach by the lessor or as a result of a supervening impossibility. In the present matter performance in terms of the lease was prohibited by the promulgation of the Regulations and, as such, the inability to perform constitutes objective legal impossibility.<sup>21</sup>

[42] A further example of South African courts having dealt with tenants that have been prevented from receiving full use of leased premises as a result of supervening impossibility is war.

[43] In *North Western Hotel Ltd v Rolfes, Nebel & Co*<sup>22</sup> a tenant of a hotel was deprived of nearly all the rooms of the hotel due to an occupation thereof by the British

<sup>16</sup> *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1997 1 All SA 11 (A); 1996 4 SA 1190 (A)

<sup>17</sup> *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 3 All SA 57 (W); 1998 4 SA 802 (W)

<sup>18</sup> *Bayley v Harwood* 1954 3 SA 498 (A)

<sup>19</sup> *Joubert v Bester* 1977 1 All SA 185 (T); 1977 4 SA 560 (T)

<sup>20</sup> *Hansen, Schrader & Co. v Kopelowitz* 1903 TS 707 at 714; *World Leisure Holidays (Pty) Ltd v Georges* 2002 5 SA 531 (W)

<sup>21</sup> *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1210

<sup>22</sup> 1902 TS 324

forces. During its occupation of the hotel, the British forces caused substantial damage to the hotel, to such a degree that the hotel was no longer fit for the intended use. It was held that, as a general rule, a tenant is not obligated to pay rental when he or she cannot enjoy beneficial occupation because of a *casus fortuitus*, unless there is an express term to the contrary.<sup>23</sup> In those circumstances the lessee can claim remission of rent.<sup>24</sup>

[44] In *Kopelowitz v Hanse, Schrader & Co*<sup>25</sup> the facts also pertained to a tenant which lost beneficial occupation of a leased premises during a time of war. The Court *a quo* allowed a reduction of rental. On appeal<sup>26</sup> Solomon J held as follows:

“It appears to me, however, that the following general principle may fairly be deduced from the leading authorities on the subject, a principle which has already been adopted in previous cases in this court that a lessee is entitled to a remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent in making use of the property for the purposes for which it was let, by *vis maior* or *casus fortuitus*, provided always that the loss of enjoyment of the property is the direct and immediate result of the *vis maior* or *casus fortuitus*, and is not merely indirectly or remotely connected therewith.”<sup>27</sup>

[45] Because the loss of enjoyment of the property was not the direct and immediate result of the *vis maior* (the war) but merely had an indirect effect, the remission of rental was not allowed on appeal. The present matter is distinguishable, at least to the extent of the hard lockdown period (27 March to 30 April 2020). In circumstances where the defendant was deprived wholly of its use and enjoyment of the property because of the March 2020 Regulations, I am satisfied that the loss is the direct and immediate result of the *vis maior* event.

[46] It may be worth making mention of the approach followed by the Superior Court in Québec, Canada. The Canadian legal system is, much like the South African legal system, based on common law. The Superior Court of Québec was required to consider the impact of lockdown conditions, imposed as a result of the Covid-19

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<sup>23</sup> At 335

<sup>24</sup> At 331

<sup>25</sup> 1903 TH 134

<sup>26</sup> *Hansen, Schrader & Co. v Kopelowitz* 1903 TS 707

<sup>27</sup> At 718-719; see also 711 and 722-723

pandemic, on tenant's obligations to pay rent and landlords' remedies and obligations when tenants fail to pay rent because of the lockdown.

[47] In *Investissements immobiliers G. Lazzara inc. v. 9224-5455 Québec inc.*,<sup>28</sup> the Superior Court had to determine a dispute pertaining to the failure to pay rental under a lease during the Covid-19 pandemic. The landlord contended that the tenant breached the lease agreement by failing to make rental payments and sued for the payment of arrear rental and eviction. In response to the pandemic, the Canada Mortgage and Housing Corporation had put a programme in place whereby it would fund 50% of the rent for eligible months by way of a "*forgivable loan to landlords*", with the tenant paying 25% of the rent to its landlord and the remaining outstanding 25% of the rent becoming a loss for landlords. The tenant paid 25% of the rent due for June and July 2020 and undertook to continue to pay 25% of the rent due for each month for which assistance would continue to be available. The landlord relinquished its voluntary right to apply for relief under the programme and instead demanded payment for the full rental from the tenant. The court held that the landlord's decision was unfounded because it failed to mitigate its damages. The court held further that landlords should consider all means to and first mitigate their damages before employing litigious or legal remedies. In the result, the court ordered the tenant to pay only 25% of the rental for as long as the programme was in effect irrespective whether or not the landlord was granted relief under the programme.

[48] The decision may instruct a possible approach to be employed by South African courts to disallow legal remedies for payment of rental in the absence of landlords mitigating their damages, such as an insurance claim.

[49] In a further Canadian Superior Court decision, *Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc.*,<sup>29</sup> the tenant relied on the superior force (*force majeure*) as a justification for not paying rent in respect of a leased premises used as a gym. The tenant contended that, as a result of the lockdown conditions, it was unable to generate revenue and was accordingly relieved from paying rental. In its decision, the court held that the lockdown conditions do not

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<sup>28</sup> 2020 QCCS 2176

<sup>29</sup> 2020 QCCS 2251

constitute a superior force which prevents the tenant from paying rent but rather a superior force which prevents the landlord from fulfilling its obligation to provide “peaceful” (free and full) enjoyment of the leased premises. As such, the court reasoned, the landlord was prevented from providing peaceful enjoyment with the result that it was not able to demand payment of rental. In the result the court granted a reduction of rental.

*Express agreement excluding the doctrine*

[50] The doctrine of supervening impossibility is not unlimited. *Pacta sunt servanda* remains the basis of our contract law<sup>30</sup> and anything possible and honourable, provided it is not contrary to public policy, can be contractually agreed. Parties to a lease can therefore modify or even exclude common law, but they must do so expressly.<sup>31</sup>

[51] The supervening impossibility doctrine functions as a term that is implied into a contract and will operate on the basis that, when performance becomes objectively impossible, the contractual obligations will be extinguished. This is unless the parties agree expressly otherwise. The plaintiff contends that certain terms of the lease constitute an express exclusion of the operation of the doctrine. In support thereof, the plaintiff relied on clauses 4, 17, 20 and 21 of the lease.

“4.1 The Total Monthly Rental is payable monthly in advance, on the first day of every month, free of exchange and without deduction or set-off, to the Landlord’s nominated agent at the agent’s address.”

“4.5 The Tenant may not withhold the payment of the Total Monthly Rental and any other amounts for any reason whatsoever subject to the provisions contained in this Lease.”

“17. The Tenant shall have no claim of whatever nature, whether for remission of rent, inconvenience, financial loss or otherwise, by reason of the Property and/or the Leased Premises falling into a state of disrepair and/or by reason of the interruption of any services (including but

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<sup>30</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at [57] cited with approval in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at [44]

<sup>31</sup> *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 (4) SA 1190 (A) at 1206B

not limited to the supply of electricity, water, air-conditioning and/or lifts) relating thereto, or by reason of any maintenance, repair, renovation rebuilding activities.”

“20.1 The Tenant shall (and shall bear all costs involved in doing so) comply with all laws, by-laws and regulations relating to tenants or occupiers of businesses in leased premises or affecting the conduct of any business carried on in the Leased Premises.”

“22.1 The Tenant shall have no 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 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.”

[52] The plaintiff primarily relies on clause 22.1 and specifically the words “*any other cause whatsoever*” to include the Covid-19 pandemic. As such, the plaintiff argued, the lease changed the common law position that the obligations are extinguished as the parties were entitled to do by express agreement.<sup>32</sup> The defendant’s counsel argued that, when reading clause 22.1 in its entirety, it does not provide for the Covid-19 pandemic and that neither clause 17 nor clause 22.1 excluded the defendant’s common law rights relating to supervening impossibility.

[53] For the lease to exclude the defendant’s common law right to claim a remission of rental, the lease would need to be unequivocal in its terms. For purposes of summary judgment, I am not persuaded by the plaintiff’s argument that the parties have agreed that the defendant is not entitled, in these circumstances, to withhold or defer payment of rent and is not entitled to a remission of rental and that, as a result, the defendant is precluded from relying upon supervening impossibility of performance and from claiming a remission of rental. Consequently, a finding in these proceedings that the terms of the lease are adequate to exclude the operation of the doctrine of supervening impossibility and the defences the defendant may have pursuant thereto

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<sup>32</sup> Relying on *Roberts v Krause* 1913 OPD 27



may, before the leading of permissible evidence and full argument during a trial, be premature.

[54] But even if the terms of the lease are adequately phrased to exclude the doctrine, the validity and enforceability thereof may be disputed. It is fathomable (although I could not find any contemporary authority in support) that, given the worldwide Covid-19 pandemic and the severe consequences thereof, not only on the health of people but also the adverse effect on economies, that a term in a lease compelling a tenant to make payment of the full agreed rental without an entitlement to a remission thereof is contrary to public policy and accordingly not valid or enforceable.

*Direct impact*

[55] During the hearing of the matter the plaintiff's counsel argued that the alert level lockdown had no direct impact on the defendant's occupation of the premises and accordingly that the impossibility of performance did not excuse the defendant from making payment in terms of the lease. It was further argued that the lockdown regulations did not prevent the defendant from occupying the premises nor did it cause the premises not to be fit for the purposes it was leased by the defendant - it was "*an unfortunate consequence of the Regulations*". This however, so the argument goes, does not mean that the plaintiff did not comply with its obligations in terms of the lease.

[56] I agree with the argument only partially. There is, in my view, no doubt that the hard lockdown period had a direct impact on the defendant's occupation of the premises and that it was because of the March 2020 Regulations that the defendant could neither occupy nor trade from the premises. But, as far as the restricted lockdown period is concerned, the position appears to be different.

[57] Albeit that very little information about the defendant's business was provided, it appears to me that the defendant was permitted to resume its business on 1 May 2020 (the restricted lockdown period) as was made possible by the April 2020 Regulations. The plaintiff's counsel argued that the defendant did not indicate what period it was not able to trade and to what extent it was not able to trade. I agree that

the defendant's allegations in this regard lacks particularity. The defendant merely alleges that it could not "*freely trade at all or not without severe restriction trade*" between 27 March 2020 to 17 August 2020. As far as I can determine, the defendant was able to trade from 1 May 2020. I further cannot find any evidence that the plaintiff did not tender occupation of the premises to the defendant since 1 May 2020.

[58] In respect of the hard lockdown period, where the March 2020 Regulations prevented the plaintiff from providing the defendant with beneficial occupation of the premises and prevented the defendant from enjoying beneficial occupation of the premises, performance was objectively impossible.<sup>33</sup>

#### *Hardship in performing*

[59] I agree with the plaintiff's submission<sup>34</sup> that a mere difficulty in making performance does not prevent a valid contract from arising. Supervening impossibility that 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.<sup>35</sup> If the defendant decided not to trade during the restricted lockdown period when it was, it appears to me, able to do so, it so decided at its peril and there is no supervening impossibility which excuses it from performing in terms of the lease.<sup>36</sup>

[60] After the hearing of the present matter, Gilbert AJ handed down a judgment in this Division<sup>37</sup> in a matter which pertained to a summary judgment application for payment of arrear rental and ejectment pursuant to a lease and where the defendants raised a similar defence.

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<sup>33</sup> However, the position may be different during the restricted lockdown period. Mere difficulty of performance is not sufficient to release a debtor. The standard of conduct required from a debtor in performing is, in fact, extremely high; see *Yodaiken v Angehrn & Piel* 1914 TPD 254 and *Hersman v Shapiro & Co* 1926 TPD 367

<sup>34</sup> Relying on *Hersman v Shapiro and Co* 1926 (TPD) 367 375-377

<sup>35</sup> *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 198D-E

<sup>36</sup> *Freestone Property Investments (Pty) Ltd v Remake Consultants CC and another*, unreported judgment under case number 2020/29927, Gauteng Division, Johannesburg at [31]

<sup>37</sup> *Freestone Property Investments (Pty) Ltd v Remake Consultants CC and another*, unreported judgment under case number 2020/29927, Gauteng Division, Johannesburg

[61] For the reasons mentioned, I agree with Gilbert AJ that “(a) *consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster 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*”<sup>38</sup> and that the “*implementation of the ‘hard lockdown’ under the previous Regulations [March 2020 Regulations] gives rise to a more nuanced situation than where only one party is unable to perform.*”

[62] Being mindful of the nature of summary judgment procedure, I am prepared to assume in favour of the defendant that it may be entitled to a total rent remission for the hard lockdown period. But I am not convinced that the defendant is entitled to a rent remission for the restricted lockdown period from 1 May 2020, merely because it elected not to trade, or its trading hours may have been limited or its pool of customers had decreased as a result.

[63] In *Hansen, Schrader & Co. v Kopelowitz*,<sup>39</sup> Wessels J compared a tenant’s loss of full occupation of a premises during war with a passage of Pothier<sup>40</sup> that if an inn is let along a public road, and the road is changed so that the inn is no longer frequented, but has become completely deserted, then a remission of rent can be claimed. This is the case provided that the road upon which the inn is situated is completely closed by public authority and not that another, a shorter and better road, has been opened so that travellers avoid the longer and more difficult route on which the inn is situated. If a second road has been opened which takes the travellers away from the first inn and affects its custom, then no remission can be claimed. The mere fact, therefore, that the trade of the inn has diminished because the travellers have left the road and taken a better route will not justify a remission of rent.<sup>41</sup> In such a case, the learned

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<sup>38</sup> At [12]

<sup>39</sup> *Hansen, Schrader & Co. v Kopelowitz* 1903 TS 707

<sup>40</sup> Louage, sec 152

<sup>41</sup> At 712 and 715

Judge held, no remission can be claimed, and therefore the mere fact that the customers have decreased can give no right to a remission.<sup>42</sup>

[64] I am therefore of the view that the defendant is not entitled to a remission of rental for the period it was permitted to occupy the premises, which, it appears to me in these proceedings, was from 1 May 2020.

[65] When deducting the rental amount invoiced for the period 27 March 2020 to 30 April 2020, an amount of R45 360.37 for April 2020 and R9 849.87 proportionately for March 2020 – being a total of R55 210.24, the defendant would still have been in arrears and, as such, in breach of the lease. Even deducting in addition, the amounts pertaining to the alleged water and sewerage dispute, the defendant remains in arrears.

[66] In the result, the plaintiff was entitled to cancel the lease and is entitled to the ejectment of the defendant from the premises.

### **The claim for payment**

[67] It remains to be decided whether the plaintiff is entitled in these proceedings to the relief claimed for payment of the arrear rental as of November 2020, an amount of R130,928.80 with interest.

[68] Rule 32(3)(b) requires that the defendant satisfies the court by affidavit that the defendant has a *bona fide* defence to the action. As Colman J held in *Breitenbach v Fiat*,<sup>43</sup> one of the things clearly required of a defendant by rule 32(3)(b) is that the defendant sets out in its affidavit facts if proved at the trial, will constitute an answer to the plaintiff's claim. The Supreme Court of Appeal<sup>44</sup> more recently held that the procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court.<sup>45</sup>

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<sup>42</sup> At 715

<sup>43</sup> *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 227G

<sup>44</sup> *Job Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA)

<sup>45</sup> At 11G-12D

[69] The nature of the defences raised by the defendant is such that it is not possible for me to easily determine the exact amount for which the defendant may be liable. The uncertainty is not created only by the water and sewerage charges on the statement but also by charges in respect of interest, rates and taxes (which according to the lease schedule would not be payable) and others which were not addressed during the hearing of the matter. Both parties have pleaded their cases with limited support and without making use of the evidentiary tools available to them. The defences raised by the defendant in respect of the claim for payment can best be decided by a trial court having had the benefit of the evidence to be presented by the parties and full argument.

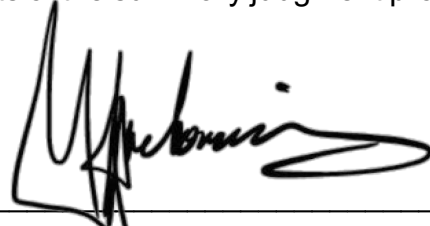
[70] For the reasons mentioned, I cannot say with conviction that no triable issue has been raised by the defendant in respect of the claim for payment or at least a portion thereof. I am guided by the principle that where there is doubt, summary judgment should not be granted.

[71] The plaintiff is entitled to costs as it is substantially successful in obtaining an order for the ejectment of the defendant in these proceedings.

In the circumstances I make the following order:

1. The defendant and all those in occupation through the defendant are ejected from and are to vacate the premises described as Shop no 23 (measuring approximately 159m<sup>2</sup>), Fingoland Mall, Erf 501, corner N2 & Road number DR8327, Butterworth, Eastern Cape 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 order and, if necessary, to obtain the assistance of the South African Police Services.
2. Leave to defend is granted to the defendant on the plaintiff's claims for payment of the arrears and of interest thereon (prayers 1 and 2 of claim1).

3. The defendant is ordered to pay the costs of the summary judgment proceedings.



JF PRETORIUS

ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING: 12 August 2021

DATE OF JUDGMENT: 19 October 2021

COUNSEL FOR THE PLAINTIFF: JG Dobie

INSTRUCTED BY: Reaan Swanepoel Attorneys

COUNSEL FOR THE DEFENDANT: AJ Venter

INSTRUCTED BY: Trevor Swartz Attorney