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

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 26/10/2022

A Maier-Frawley

CASE NO: 2020/43806

In the matter between:

GROWTHPOINT PROPERTIES LIMITED Plaintiff

and

AFRICA MASTER BLOCKCHAIN COMPANY (PTY) LTD Defendant

JUDGMENT

MAIER-FRAWLEY J:

1. This is an opposed application for summary judgment in which the plaintiff sought:
    1. Confirmation of its cancellation of the written lease agreement attached to the particulars of claim as annexure 'A' (claim A);
    2. An order for the ejectment of the defendant and all persons occupying through it from the leased premises (claim B);
    3. Payment of arrear rental in the sum of R453 649.64 and arrear utilities in the sum of R67 405.91 (claim C);

4. Payment of interest on the aforesaid amounts at the prescribed rate (7.25) plus 2% from date of demand on 2 November 2020 until date of final payment;
5. Costs of suit on the attorney and client scale;
6. That the plaintiff's claim for damages (claim D) be postponed *sine dies*.

2. By the time of the hearing of the matter, the defendant had vacated the leased premises, rendering the relief sought in respect of claims A and B moot or nugatory. Thus, only claim C was pursued together with the ancillary relief pertaining to interest and costs in the application for summary judgment.

Background facts

3. The common cause or undisputed and unrefuted facts are the following:

4. The parties concluded a written lease agreement, a copy of which appears as annexure 'A' to the particulars of claim. In terms thereof, the defendant leased certain commercial premises in Woodlands office Park, Woodmead from the plaintiff. The lease was to endure for 60 months, commencing on 1 October 2019 and terminating on 30 September 2022. The defendant admits that it was obliged, in terms of the lease, to pay the amounts averred in paragraphs 6.5 to 6.9 of the particulars of claim, being in respect of monthly rentals[1] and operating costs, and further amounts in respect of utilities and interest.[2]

5. Relevant terms and conditions of the lease agreement, included the following:

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[1] This included office rental, balcony rental, rental for 6 basement parking bays and 3 open parking bays

[2] These included the defendant's consumption of electricity, water, consumption, gas, refuse and sanitation including effluent and sewerage, and a percentage share of assessment rates levied by the local authority from time to time,

5.1. All payments under the lease were to be made on or before the first day of each month without any deductions or set-off (clause 10.1);

5.2. Should any amounts not be paid on or before the due date, interest would accrue thereon for the benefit of the plaintiff from the due date to date of payment, both dates inclusive (clause 10.3);

5.3. The defendant would be liable to pay legal costs on the attorney and own client scale, should legal action be instituted (clause 26.6);

5.4. A certificate of balance signed by a representative of the plaintiff would constitute *prima facie* proof of the amount due, owing and payable by the defendant to the plaintiff (clause 29.5);

5.5. Interest would be calculated at the publically quoted prime interest rate, certified by any branch manager of the Plaintiffs bankers to be charged by it on overdrawn accounts of its most favoured private sector clients, plus 2% (clause 1.12);

5.6. Clause 26 provides, *inter alia,* for the plaintiff to despatch a breach notice in the event that the defendant fails to pay any amounts due in terms of the lease on or before due date, in which it affords the defendant at least 7 days in which to remedy its breach, failing which, the plaintiff would be entitled, amongst other remedies, to cancel the lease forthwith, eject the defendant from the premises, claim damages, and/or the full value of any arrears owing to the plaintiff;

5.7. *Inter alia,* in terms of clause 22.2, the defendant was not entitled to defer or withhold payment of monthly rental or any other charges for any reason whatsoever;

5.8. *Inter alia,* in terms of clause 22.5, *'The Tenant shall not have any claim of any nature whatsoever, whether for cancellation, damages, remission of Total Monthly Rent or any Other Charges or otherwise against the Landlord for any loss or damage caused to or sustained*

by the Tenant...as a result of vis major or causus fortuitous or any other cause whatsoever..."

6. The plaintiff avers in its particulars of claim that it complied with all its obligations under the lease agreement.

7. The Plaintiff further avers that it agreed to defer 50% of the rental and operating costs for the months of April 2020 and May 2020 to assist the defendant due to the nationwide shutdown as a result of the Covid pandemic,[3] which amounts were, by agreement between the parties, to be paid back by the defendant to the plaintiff over a period of 9 months on the first day of each month, commencing on 1 July 2020.

8. The plaintiff avers that the defendant failed to make payment of rentals and related charges during the months of June 2020 to November 2020. Claim C is thus made up of the accumulated arrears over that period.

9. In terms of the certificate of balance annexed to the particulars of claim as annexure 'C', as at 1 November 2020, the defendant was in arrears in respect of rental and related charges in the amount of R521 055.55, made up as to R453 649.64 in respect of arrear rental and rental related charges, and R 67 405.91 in respect of arrear utilities and interest, which amounts were itemised and computed on the basis set out in paragraph 13 of the particulars of claim. The amounts are further reflected in the plaintiff's tenant ledger summary report, a copy of which was attached as annexure 'D' to the particulars of claim. A further breakdown of the outstanding amount was provided to the defendant in the plaintiff's statement, dated 1

[3] A copy of the deferral letter is annexed to the Particulars of Claim as annexure 'B'.

November 2020,[4] with reference to the relevant invoices that preceded the statement.

10. In a letter dated 2 November 2020, the plaintiff demanded payment of arrear rental and related charges in the amount of R521 055.55 from the defendant within 7 days of date thereof, which the defendant admits receiving electronically on such date. When payment was not forthcoming after the expiry of the 7 day period, on 17 November 2020, the plaintiff gave notice of its election to cancel the lease agreement.[5]

11. On 18 November 2020, a day after the cancellation notice, the defendant addressed a letter to the plaintiff's attorneys in which it acknowledged receipt of the cancellation notice, however, alleging therein, *inter alia*, that its failure to remedy the *'situation'* that led to the plaintiff's letter of cancellation was not intentional and was beyond its control, as, during level 5 to level 3 of the lockdown, *'there was no business activity from our part and we never used the offices'*. The defendant requested the plaintiff not to cancel the lease but rather to grant it rent relief by means of a 'rent deduction from April to December 2020', with the view to it paying the outstanding amount in full at the end of December 2020 or January 2021, and thereafter paying the 'normal rent' as from January 2021. The request was ostensibly declined as the plaintiff issued summons on 14 December 2020.[6]

Defendant's plea

12. The following issues were admitted in the defendant's plea:

12.1. the conclusion of the lease agreement on 11 July 2019;

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[4] The statement was attached to the plaintiff's letter of demand, dated 2 November 2020, annexure 'E' to the particulars of claim.
[5] The cancellation notice is attached to the particulars of claim as annexure 'F'.
[6] A copy of the defendants letter dated 18 November 2020 appears as annexure 'G' to the particulars of claim.

12.2. the terms of the lease agreement;[7]

12.3. defendant's liability to pay rental, operating costs and the averred percentage share of assessment rates per month in the amounts and during the periods averred in paragraphs 6.5 to 6.9 and 6.11 of the particulars of claim;

12.4. defendant's liability to pay for its consumption of electricity, water, gas, refuse, sanitation, including effluent and sewerage in terms of the lease;

12.5. defendant's failure to make payment to the plaintiff in accordance with the terms of the lease agreement;

12.6. that the defendant took occupation of the leased premises on 1 August 2019 and remained in occupation thereof (that is, until its eventual vacation of the premises);

12.7. that the defendant received all services, goods, and property that it was entitled to receive, occupy and/or possess in terms of the lease agreement, save for its subsequent dispossession of 4 parking bays by the plaintiff (referred to below);

12.8. defendant's receipt of the plaintiff's breach notice/letter of demand, dated 2 November 2020, and its failure to remedy the averred breach, as well as receipt of the plaintiff's letter dated 17 November 2020 in which the plaintiff the notified the defendant of its cancellation of the agreement; and

12.9. the plaintiff's entitlement to cancel the lease agreement or to confirmation of its cancellation of the lease agreement.

13. The defendant disputed the following in its plea:

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[7] The salient terms are averred in paragraph 6 (including sub-paragraphs thereto) of the particulars of claim. These have been set out earlier in the judgment.

13.1. Its liability to pay for charges associated with the monthly rental payable in respect of 4 basement parking bays, averring that it had been allocated 6 basement parking bays (as averred in paragraph 6.8 of the particulars of claim) but had subsequently been unlawfully dispossessed of 4 such bays by the plaintiff, by reason of which, it denied that the plaintiff complied with *all* its obligations under the lease agreement (*the parking bay dispute);*

13.2. The existence of a valid and binding rent deferral agreement, as alluded to in para 7 above[8] (*the rent deferral dispute);*

13.3. By way of confession and avoidance, the defendant admitted having failed, neglected or refused to make payment to the plaintiff in terms of the lease agreement but averred that its *'failure to perform in terms of the agreement was caused as a direct result of the impact of the unforeseen global COVID — 19 Pandemic [COVID 19) on its business and pleads further that it was subsequently forced to cancel the lease agreement. Said cancellation of the agreement occurred on 29 June 2020 and the said cancelation letter included a bona-fide attempt to cooperate with the Plaintiff and to mitigate any potential damages. The cancelation letter is attached hereto as Annexure P1'*[9] (*Covid 19 defence);*

13.4. That as at 1 November 2020, it was in arrears in respect of rentals and related charges in terms of the lease agreement, in the amount of R521 055.55, as calculated in paragraph 13 of the particulars of claim (*inaccuracy of amount claimed defence);*[10]

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[8] Para 7 of the particulars of claim.
[9] Para 8 read with paras 10 and 19.1 of the plea
[10] In para 9 of the plea it is averred that the calculations stipulated in para 13 of the particulars of claim are inaccurate in terms of the total rental, rental charges and interest accrued on the aforesaid, 'specifically in so far as it does not consider the spoliation on the part of the Plaintiff, of 4 of the allocated parking bays.' In para 19.2 of the plea, it is averred that the plaintiff's calculations of the amount owing by the defendant are inaccurate because they include rental charges for 4 basement parking bays (of which the defendant was allegedly dispossessed).

13.5. The defendant denied the contents of paragraph 14 of the particulars of claim, i.e., it denied being in breach of the lease agreement in that it refused and or neglected to make payment of the rentals and related charges for the months of about June 2020 to November 2020, as agreed in terms of the Agreement,[11] averring that the 'COVID-19 rendered its performance in terms of the agreement impossible, through no fault of its own.'[12] *(denial of breach defence)*

14. The defendant also raised a special plea, averring that service of the summons was defective for want of compliance with Rule 41A(2)(a) of the Uniform Rules of Court, by virtue of which it sought the dismissal of the plaintiff's claim with costs, alternatively, the suspension of the action 'until the non-compliance of the Plaintiff has been condoned and the time periods to comply with Rule 41A have been met'. I will refer to this as *'the Rule 41A defence'.*

15. The plaintiff contends that the defendant's plea raises no real triable issues, lacks *bona fides* and was entered merely for the purpose of delay.

Relevant legal principles

16. In *Joob Joob,*[13] Navsa JA stated as follows:

'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient

[11] As averred in para 14 of the particulars of claim.
[12] Para 10 of the plea.
[13] *Joob Joob v Stocks* (161/08) [2009] ZASCA 23 (27 March 2009) at paras 32 & 33

disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E.'

17. *In Maharaj*[14] *v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E Corbett AJ said the following:

'[O]ne of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. ... At the same time the

[14] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E

defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.'

18. The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice.[15] I bear in mind the requirements of the amended rule 32, which were discussed in the Full Court decision of *Raumix*.[16]

19. The parties are in agreement that although the amended rule 32 of the Uniform Rules of court requires of the Plaintiff to show that the defences, as pleaded, do not raise any issue for trial, it is still incumbent upon a defendant to satisfy the court that it has a *bona fide* defence to the action.[17] It is expected of a defendant to show the court that there is a reasonable possibility that the defenses it advances may succeed at trial. [18] To this extent, the defendant should swear to defenses, valid in law, in a manner which is not inherently and seriously unconvincing.[19]

20. It is trite that a certificate of balance is a liquid document upon which summary judgment may be claimed.[20]

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[15] *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another; Steeledale (Pty) Ltd v Gorrie; Firstrand Bank Limited t/a Wesbank v Sondamase; SA Taxi Impact Fund (RF) (Pty) Ltd v Tau; Masango Attorneys v Transport and Allied Workers Union of South Africa and Another; Hartless (Pty) Ltd v City of Johannesburg Metropolitan Municipality; Standard Bank of South Africa Limited v Schneider; Nedbank v Chibuye and Others; Absa Bank Limited v Mayer Familie Trust and Others* 2020 (1) SA 623 (GJ), par 16, a decision of the Full Court, Gauteng Division, Johannesburg ("*Raumix*").

[16] Id Raumix (cited in fn 15 above), at paras 15 & 18.

[17] Reference is made to *Maharaj supra* in the defendant's heads of argument in this regard. In deciding whether the defendant has a *bona fide* defence, the court must enquire whether (i) the defendant has disclosed the nature and grounds of the defence; and (ii) on the facts so disclosed, whether the defendant appears to have a defence which is *bona fide* and good in law. The defendant further points out that it is expected of the defendant to show the court that there is a reasonable

[18] See: *Citibank NA, South Africa Branch v PaulNO and Another* 2003 (4) SA 180 (T) at 200J-201A.

[19] See *NBS Boland Bank Ltd v One Berg Rivier Drive CC and others; Deeb and Others v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 938.

[20] See *Nedbank Ltd v Van Der Berg* 1987 (3) SA 449 (W), applying the dicta in *Astra Furnishers (Pty) Ltd v Arend* 1973 (1) SA 446 (C) at 450.

Discussion

21. The question is whether the respondent has put up a discernible sustainable defence, one that gives rise to a triable issue at trial. This will depend on whether or not the defendant has met the required threshold to ward off summary judgment, as discussed in the authorities cited above.

22. *Ex facie* the plea, the defendant admitted its liabilities in terms of the lease agreement (as pleaded in par 6 of the particulars of claim), although it disputed liability to pay for 4 parking bays. It also admitted its failure to perform in terms of the agreement, and the plaintiff's entitlement to cancel the agreement.

23. Save for denying liability to make payment of rental in respect of 4 basement parking bays, the defendant failed to plead any cognizable defence in respect of its liability to pay and its failure to pay the other costs and charges forming part of claim C (i.e., the amounts pertaining to arrear rental and rental related charges and arrear utilities and interest, as calculated in par 13 of the particulars of claim, but excluding the basement parking rental in respect of 4 bays). On its own version, the defendant fell into arrears[21] and offered to pay the full outstanding amount by December 2020 or January 2021, subject to it its request for rent deferral relief for the period April 2020 to December 2020, being part of the period in which claim C was computed, being granted.

24. Despite no counter-claim having been filed, the defendant sought in its plea:

    (i) An order confirming the date of cancellation of the agreement [by the defendant] on 29 June 2020 (this notwithstanding having admitted the plaintiff's entitlement to cancel the agreement in the plea);

[21] Per its letter of 18 November 2020.

(ii) The dismissal of the action with costs, alternatively, *'That the total sum claimed by the Plaintiff be reduced to such an extent deemed just and equitable by this court having consideration for the Defendant's ability to perform in the COVID 19 global pandemic, that was not possible to have been foreseen or resisted and made it impossible for the Defendant to perform. at no fault of its own'* (this notwithstanding its assertion that it should be excused from rendering performance due to the effects of the covid-19 pandemic on the basis that performance became objectively impossible)

(iii) In terms of Claim C: that the Plaintiff's calculations be declared erroneous / inaccurate and dismissed in its entirety.

25. I now turn to discuss the pleaded defences in turn.

Rule 41A defence

26. Sub rule (2)(a) of Rule 41A compels a plaintiff or applicant to file a prescribed Rule 41A Notice of agreeing or opposing mediation, *before* summons or motions may be issued. Sub rule (2)(b) compels the defendant or respondent to also file a prescribed Rule 41A Notice of agreeing or opposing mediation, *before* a plea or opposing papers may be issued. The above notices according to sub rule (2)(c) have to be substantially in accordance with Form 27 of the First Schedule. According to sub rule (2)(d) the said notices will be without prejudice and not filed with the Registrar. Neither party initially complied with these provisions. However, by the time the application for summary judgment was argued, the plaintiff had delivered the requisite notice, whilst the defendant had not itself followed the rule.

27. There is no sanction for non-compliance provided for in the rule and courts have thus far been disinclined to uphold technical objections of non-compliance with Rule 41A.[22]

28. The defendant was unable to cite any authority for the proposition that the plaintiff's non-compliance with the rule entitled it to a dismissal of the action. It pleaded, in the alternative, that the action should be suspended until the rule is complied with. Given that plaintiff subsequently filed the relevant notice, it cannot be said that a postponement of the matter to enable the parties to consider whether or not mediation would be appropriate, would serve any purpose. Presumably, with these considerations in mind, the defendant did not seriously pursue its objection at the hearing of the matter and nothing further need be said about it.

Parking Bay defence and plaintiff's alleged breach

29. The defendant denied that the plaintiff complied with all its obligations under the lease agreement in that it allegedly failed to provide the defendant with the use and enjoyment of 4 parking bays, having erected a makeshift storage room in the place of the 4 parking bays. This version is disputed by the applicant in its affidavit in support of the application for summary judgment

30. The defendant contends that the plaintiff is not entitled to demand performance from it in circumstances where it is itself in breach of the lease agreement. In this regard, the defendant relies, in its heads of argument, on the *exceptio non adimpleti contractus,* contending that the parties'

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[22] See: *Nedbank Ltd v Wesley Groenewald Family Trust & Others* 2021 JOL 50593 FB, par 9, where the following was said 'The rule's objective is the expedition of disputes through mediation and where no resolution of the matter is possible, to identify issues that require adjudication.'; See too: *MN v SN* (10540/16) [2020] ZAWCHC 157 (13 November 2020); *Nomandela and another v Nyandeni Local Municipality and Others* 2021 (5) SA 619. In *MB v NB* (2008/25274) [2009] ZAGPJHC 76; 2010 (3) SA 220 (GSJ) (25 August 2009), para 60, the court noted its intention to limit the fees which the attorneys could charge because 'the failure of the attorneys to send this matter to mediation at an early stage should be visited by the court's displeasure'.

obligations under the lease agreement were reciprocal. Reliance was placed on the case of *Ntshiqa*,[23] where the court held that the *exceptio* is available to a lessee whose use and enjoyment of the premises was impaired as a means of enforcing the lessor's counter-performance.

31. What the defendant omitted to point out, however, is that the judgment in *Ntshiqa* has not been followed consistently. A number of other courts have since held that a lessee who received partial use and enjoyment is entitled to pay a reduced rental over the period in which it was deprived of undisturbed use and enjoyment of the leased premises, proportional to its reduced use, but is not entitled to withhold the full rent.[24]

32. The common law position was conveniently summarised by Rampai J in *Loch Logan.*[25] It should be noted that in the present case, the defendant failed to

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[23] *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (Tks), a decision of the Full Bench of the Transkei Supreme Court.

[24] See: *Ethekwini Metropolitan Unicity Municipality (North Opertational Entity) v Pilco Investments CC* (320/2006) [2007] ZASCA 62 (RSA) (29 May 2007), par 22, where Van Heerden JA said (albeit without reference to *Ntshiqa)* that "It follows that, upon taking occupation of the property in late 1994, the plaintiff became obliged to pay rent to the defendant, as stipulated in clause 1 of the lease. Of course, because the plaintiff was, until early June 1997, **deprived of the use of that portion of the property** which was being used by the person making pre-case fencing, **the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property**. If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted." (own emphasis)

See too: T. Naude: '*The principle of reciprocity in continuous contracts like lease: What is and should be the role of the exception non adimpleti contractus (defence of the unfulfilled contract)*' 2016 Stell LR 323 at 326-330, for a detailed exposition of the relevant case law.

[25] *Loch Logan Waterfront (Pty) Ltd v Carwash 4 U (Pty) Ltd and Another* (3618/2011) [2012] ZAFSHC 32 (1 March 2012), paras 18-19 & 22, (with reference to *Ntshiqa),* where the following was said

"At common law, the legal position is and has always been that an aggrieved lessee is entitled to rent remission, where through the lessor's default, neglect or omission, the lessee is partially deprived of the use and enjoyment of the leased property. Accepting for the moment, that the leased premises were structurally defective, as the first respondent contended; that the applicant had failed to remedy the breach and that the applicant has thereby neglected its basic obligation to see to it that the first respondent has undisturbed use and enjoyment of the leased premises, the complete withholding of rental was not a recognised remedy in law.

provide any particularity as to the period during which it was allegedly deprived of the use and enjoyment of 4 basement parking bays to enable an assessment of the extent of its alleged diminished use and enjoyment. The defendant did not suggest that it had decided to withhold payment of monthly rental as a result of the alleged diminished use and enjoyment of the parking bays allocated to it under the lease. Moreover, the defendant has remained silent about whether or not it notified the plaintiff of the alleged breach, that is, after the alleged dispossession occurred. Stated differently, there is no suggestion by the defendant that it ever asserted the right to withhold payment of rental or to claim a reduction in the rental payable prior to the institution of the action by the plaintiff, as envisaged in clause 26.5 of the lease agreement[26] More significantly, the defendant failed to pertinently answer the plaintiff's allegations in paragraph 34 of its affidavit in support of summary judgment, namely, that *'From the inception of the Agreement, being October 2019, alternatively, at all relevant times, the Plaintiff duly allocated and made available to the Defendant 6 parking bays, which the Defendant admits. And from October 2019 until March 2020 the Defendant duly made payment towards the allocated parking bays as*

An apposite course of action for the first respondent to adopt in such circumstances, would have been to claim remission of rental proportionate to the extent of deprivation and to retain the difference between the agreed rental and the reduced rental every month for as long as the diminished use and enjoyment, occasioned by the lessor's default, endured. (**SISHEN HOTEL (EDMS) BEPERK v SUID-AFRIKAANSE YSTER EN STAAL INDUSTRIëLE KORPORASIE BPK 1987 (2) SA 932** (AD) at 955 I – J; **NTSHIQA v ANDREAS SUPERMARKET (PTY) LTD 1997 (3) SA 60** (TkS) at 65 H – 66 A and **SWEETS FROM HEAVEN (PTY) LTD v STER KINEKOR FILMS (PTY) LTD 1999 (1) SA 796** (W) at 802 I – J)

In **MPANGE AND OTHERS v SITHOLE** (07/7063) **[2007] ZAGPHC 202** (22.06.2007) Satchwell J adopted a similar approach. From the authorities cited in this judgment it can be distilled that the magnitude of the lessor's default, in other words, unjustifiable (neglect or omission or interference or commission or disturbance) will almost invariably give a fair indication of the lessee's available remedy. The relative remedy of rental remission applies to cases of minor deprivations whereas the absolute remedy of rental withholding applies to cases of major deprivations. (Kerr, supra)"

[26] Clause 26.5 of the lease agreement provides as follows:

" *Should the Landlord commit any breach of the terms of this Lease and fail to remedy that breach within 14 (fourteen)days (or such longer period as may be reasonably required should such breach not be capable of being remedied within 14 (fourteen) days after written notice requiring that it be remedied, then the Tenant shall have the right but without prejudice to and in addition to any other rights which it may have at law and in its sole discretion to claim specific performance.*

stipulated in the Agreement' (emphasis added). Payment by the defendant in respect of the allocated parking bays is not dealt with by it at all. The defendant merely denied the aforesaid allegations 'insofar as they are contradicted' by the defendant's submissions relating the plaintiff's alleged breach. The defendant alleged in par 19 of its affidavit that '*It appears that the plaintiff's approach in the affidavit in support of summary judgment is to deny that the Defendant was deprived of the parking bays as alleged. Thus, there exists a dispute between the parties regarding this issue. This dispute can only be determined at trial.* ' The defendant has failed to plead what amount is disputed in relation to the parking bay dispute. It has also failed to indicate whether it disputed the charges as and when raised by the plaintiff, in respect of the allocated bays. Nor has it claimed repayment of any amounts it paid due to the alleged dispossession of the 4 parking bays.

33. The parking bay defence has been asserted *ex post facto* in needlessly vague and superficial terms, such that it points to a lack *bona fides* or a failure to meet the required threshold to resist summary judgment, for failing to disclose the material facts upon which the defence is based with sufficient particularity and completeness. As a different amount of rental was payable during different periods of the lease, at the very least, one such material fact would pertain to the period during which the respondent was allegedly dispossessed of the 4 basement parking bays. Yet no details were provided as to when the alleged dispossession occurred for purposes of assessing the amount by which the respondent's rental obligations were to be reduced (assuming the dispossession occurred). Nor was the fact of the dispossession ever asserted or relied on by the defendant prior to the institution of the action.

34. The defendant was in any event not contractually entitled to withhold payment of the rental on account of the alleged deprivation of the use of 4

out of 6 basement parking bays. In terms of clause 22 of the lease agreement, 'The Tenant shall not under any circumstances be entitled to cancel this Lease nor be entitled to withhold or defer payment of Total Monthly Rent or any Other Charges by reason of the Premises or any appliances, air-conditioning or other installations, fittings and/or fixtures in the Leased Premises or the Building being in a defective condition or falling into disrepair or any particular repairs not being effected by the landlord timeously or at all or for any other reason whatsoever'. In terms of clause 10.1, 'All payments in terms of this Lease to be made by the Tenant to the Landlord shall be made on or before the 1st (first) day of each month without demand, free of exchange, bank charges and without any deductions, counterclaim or set.off whatsoever-...'(own emphasis)

35. In the circumstances, I cannot find that the defendant has raised a *bona fide* and valid defence giving rise to a triable issue.

Covid 19 Defence/Rental deferment dispute/defendant's alleged cancellation of the lease agreement

36. As these defences contain some measure of overlap, they will be considered together.

37. The defendant baldly denied that the parties agreed to any deferral of rental during the months of May and June 2020. Annexure 'B' to the particulars of claim depicts the plaintiff's letter in which it offered the defendant a 50% deferral of rental and operating costs for the months of May and June 2020. Annexure 'FA2" to the plaintiff's affidavit in support of the application for summary judgment contains an email of 3 June 2020 by one H. Maeko, the CEO of the defendant, in which he unequivocally accepted the plaintiff's rent deferment Covid 19 relief offer, with implementation from the 1st July 2020. The aforesaid denial on the part of the defendant cannot in these circumstances be said to be genuine.

38. The defendant avers that it cancelled the lease agreement on 29 June 2020, i.e., prior to its receipt of the plaintiff's breach and subsequent cancellation notices. It relies in this regard on a letter, dated 29 June 2020,[27] addressed by its CEO, Mr Moake, to the plaintiff in which, *inter alia*, the following request was made: *'This letter serves as notice to request cancellation of rental lease agreement for AMBC. The rational on the cancellation is based on the fact that we have not been able to trade since the lockdown due to COVID 19 pandemic. Therefore as a start-up company we have not had income since March 2020 and this situation has put our company in a difficult position. We are aware of the binding lease conditions and to that effect we are offering to look for tenants who can occupy our offices. We also request that Growthpoint help us find tenants who can take over our lease...'*

39. As is immediately apparent from the said letter, the defendant merely made a plea *ad misericordiam*[28] for its release from its obligations under the lease agreement. But as indicated earlier, in its letter of 3 June 2020, the defendant's representative accepted the plaintiff's rent deferment Covid 19 relief offer, without reference to any change in its financial strength. That the defendant did not regard this as a cancellation of the lease, let alone an effective cancellation thereof, is evident from its letter dated 18 November 2020 in which it requested the plaintiff *not* to cancel the lease.[29] The purported cancellation defence in any event flies in the face of the defendant's admission that it failed to perform its obligations in terms of the lease agreement, entitling the plaintiff to cancel same.

40. As regards the covid 19 defence, the defendant pleads that its failure to perform its obligations under the lease agreement was caused by the covid 19 pandemic and that the effects of the pandemic rendered performance of

[27] Defendant's purported cancellation letter appears as annexure "P1' to its plea.
[28] Loosely translated, this is an appeal to compassion or pity.
[29] This letter is referred to in para 11 above.

its obligations objectively impossible. Whilst it pleaded certain effects of the pandemic on its business in generic terms, averring that it derived no income from trade activities during the period March 2020 until June 2020 , it failed to provide any specificity or particularity of its business activities, its financial position and any other sources of income, more particularly, after lockdown level 3 ended. It contented itself with making generalised statements in its letter of 18 November 2020, namely, that there was no business activity during level 5 to leve 3 of the lockdown. It is publically known that the hard lockdown (level 5) endured from 26 March 2020 until 16 April 2020. At a later stage, the country was in alert level 3 from 1 June 2020 to 17 August 2020, where after alert levels 2 and 1 followed. Why the defendant could not earn an income at the end of alert level 3 was not disclosed. The facts indicate that that the defendant accepted, without demur, two months' rent deferral relief offered to it by the plaintiff without reference to any incapability on its part to comply with its ongoing financial obligations.

41. The defendant submits in its heads of argument that 'the circumstances of this case and the effects of the Covid-19 pandemic entitle the Defendant to rely on the defence of *vis majeure* alternatively *casus fortuitous* and that in doing so the defendant discloses a *bona fide* defence to the Plaintiff's claims.'

42. However, clause 22.5 of the lease agreement, [30] expressly excludes reliance by the defendant on a defence based on *vis majeure* or *casus fortuitous*. In effect, in terms of this clause, the defendant indemnified the plaintiff against the consequences of any impossibility of performance by it of its financial obligations under the lease as a result of *vis majeure* or *casus fortuitous*.

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[30] As indicated earlier in the judgment, Clause 22.5 provides that *"The Tenant shall not have any claim of any nature whatsoever, whether for cancellation, damages, remission of Total Monthly Rent or any Other Charges or otherwise against the Landlord for any loss or damage caused to or sustained by the Tenant...as a result of vis major or causus fortuitous or any other cause whatsoever..."*

43. In *Glencore,*[31] the court held that if provision is not made contractually by way of a *force majeur* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement

44. Nothing whatsoever has been said by the defendant in relation to the nature of the impossibility sought to be invoked by it, with reference to the specific provisions of the lease agreement to which it agreed to be bound, its admitted liability under the lease agreement, the peculiar circumstances in which it took advantage of the rent deferral offered to it, and the continuity of its trade operations (evidenced by its letter of 18 November 2020). In *MV Snow Crystal,* [32] *Scott JA held as follows:*

"...As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant." (footnotes omitted)

45. In *Unlocked Properties,* [33] the court, citing *Unibank,* [34] stated that:

"Impossibility is furthermore not implicit in a change of financial strength or in commercial circustances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable."

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[31] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* [2007] JOL 21043 (O); [2002] ZAFSHC 2 (29 march 2002) at par 10.
[32] *MN Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA), par 28.
"
[33] *Inlocked Properties 4 (Pty) Limited v A Commercial Properties CC* [18549/2015) [2016] ZAGPJHC 373 (29 July 2016), para 7.
[34] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W).

46. By its acceptance of the Plaintiff's deferral offer, the defendant implicitly undertook future performance, notwithstanding which, it breached its payment obligations, entitling the plaintiff to cancel the agreement.

47. For these reasons and all the other reasons given, I remain unpersuaded that the defendant has raised either any *bona fide* or sustainable defence, such as to give rise to triable issues in relation to the plaintiff's claim C, for purposes of warding off summary judgment being granted against it.

48. The papers indicate that the plaintiff has complied with the requirements of rule 32, as amended. In addition, it relies on a certificate of balance in respect of the aggregate total amount claimed, the contents of which have not been effectively or successfully refuted by the defendant.

49. Accordingly, the following order is granted:

ORDER:

1 Summary judgment is granted in favour of the plaintiff against the defendant for in respect of Claim C for:

a. Payment of the amount of R 453 649.64 (Four Hundred and Fifty Three Thousand Six Hundred and Forty Nine Rand and Sixty Four Cents) in respect of the rentals payable to the Plaintiff;

b. Payment of the amount of R 67 405.91 (Sixty Seven Thousand Four Hundred and Five Rand and Ninety One Cents, in respect of the utility charges, rates and taxes and interest payable to the Plaintiff;

c. Payment of interest on the amounts *supra* at the prescribed rate, being 7,25% plus 2% from date of demand, being 02 November 2020, until date of final payment;

d. Payment of the plaintiff's costs on the attorney and client scale.

2 The plaintiff's claim for damages is postponed *sine dies.*

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	29 August 2022
Judgment delivered	26 October 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 26 October 2022.

APPEARANCES:

Counsel for Plaintiff:	Adv T. Carstens
Instructed by:	Retief & SJ Meintjes Attorneys
Counsel for Defendant:	Adv R. Ernst
Instructed by:	Hartley & Joubert Inc Attorneys