**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**[Reportable]**

Case No.: 11877/2020

In the matter between:

**THE TRUSTEES FOR THE TIME BEING**
**OF THE BYMYAM TRUST** Applicant

and

**THE BUTCHER SHOP AND GRILL CC**[1] Respondent

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**JUDGMENT DELIVERED ELECTRONICALLY ON 19 NOVEMBER 2021**

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**PANGARKER AJ**

[1] The respondent was converted to a company but the citation remains as per the Notices and documents filed in the matter throughout the proceedings

**Introduction**

> *'These are unprecedented circumstances which require a collaborative stance from landlord and tenant. Hopefully, the anticipated publication of new Lockdown Regulations will be beneficial to our restaurant business and we can then negotiate further in good faith as to further future rentals. Both landlord and tenant, self-evidently, wish to return to normal business circumstances.'*[2]

1. These words by the respondent, which are contained in correspondence addressed to the applicant's legal representative, epitomise what 2020 and the sudden arrival of the COVID-19 pandemic and its resultant government regulations, meant for a long-established and successful restaurant business in Cape Town.

2. Following the declaration on 11 March 2020 by the World Health Organisation *(WHO)* that the coronavirus was a global pandemic, the President of South Africa on 15 March 2020, declared the COVID-19 pandemic to be a national disaster and imposed a 21 day lockdown period in terms of the Disaster Management Act[3]. Pursuant to the declaration, the Minister of Co-operative Government and Traditional Affairs, in terms of section 27 of the aforesaid Act issued various regulations[4].

3. In an attempt to curtail the spread of the coronavirus by limiting contact between people, further regulations were published in terms of the Act from time to time which, *inter alia*, placed certain prohibitions on the operation of businesses and commercial enterprises[5]. The lockdown periods were extended and alert levels were adjusted depending on the spread of the virus. Nobody, including businesses with long-standing

[2] BNG 7, p117
[3] 57 of 2002
[4] GG R398 dated 25 March 2020
[5] See for example GN480 of 2020 in GG 43258 (29 April 2020)

reputations and consistent growth and profit, was left unaffected by the pandemic and the regulations imposed on individuals and businesses.

4. It is accepted that the regulations issued imposed significant restrictions on economic activity, which required businesses to cease operating during the lockdown periods with the exception of, *inter alia*, essential service providers. South Africa went into lockdown (alert level 5) from midnight on 26 March to 30 April 2020. The alert level was adjusted to level 4 from 1 to 31 May 2020 and thereafter, to level 3 from 1 June to 17 August 2020; followed by alert level 2 from 18 August 2020. Adjusted alert level 1 took effect from the period 21 September to 28 December 2020[6].

5. Central to this matter is the question whether a commercial tenant is entitled to withhold payment of rental to the landlord payable in terms of a lease agreement during the period of national lockdown and whether it is entitled to claim a rental remission, wholly or in part, as a result of the legislative restrictions caused by the imposition of the regulations.

**The parties**

6. The applicant is the Trustees of an *inter vivos* Trust which is the owner of two units consisting of sections 1 and 2 as described on sectional title plan number S 857/2015 in the scheme of the land and buildings situated in Greenpoint, plus an undivided share in the common property in the same scheme[7]. These immovable properties *(the leased premises)* were leased to the respondent in terms of a lease

[6] The adjusted alert levels are found on the South African Government website www.gov.za *'COVID-19/ NOVEL CORONAVIRUS - About alert system'*

[7] BNG4.1, 4.2, p 95-96

agreement, *BNG2*[8] concluded between the parties, duly represented, on 20 February 2014.

7. At the time of conclusion of the lease, the respondent was a close corporation which in April 2017, was subsequently converted to The Butcher Shop and Grill Pty Ltd. The leased premises are used as a restaurant, butchery, deli and wine shop with the largest part of the leased area being used as the well-known premium steakhouse restaurant.

**The applications**

8. With the imposition of the hard lockdown, restaurants were required to close with the result that the respondent ceased operation of the restaurant on 23 March 2020 and there followed correspondence between the parties regarding the respondent's rental obligations under the lease. As alert levels changed in 2020, the restaurant was allowed a seating capacity of 50% and its case is that the regulations imposed affected its business negatively with a substantial loss of turnover. It is common cause that the respondent did not fulfil its obligations fully in terms of the lease.

9. In August 2020, the applicant instituted its application by way of Notice of Motion wherein it seeks the following orders[9]:

> *1. That the respondent make payment to the applicant of the amount of R1 576 919, 20 (one million five hundred and seventy six thousand nine hundred and nineteen rand and twenty cents) representing all amounts due by the respondent to the applicant, as at 1 August 2020, pursuant to the terms and provisions of the lease agreement between the parties,*

[8] P28-93
[9] P30

*dated 20 February 2014.*

2. *Interest on the above amount from 1 August 2020, to date of payment of all amounts due, as at a rate equivalent to the prime rate of interest of Absa Bank Limited.*

3. *That the applicant be authorized to supplement the founding papers, to claim further amounts which may accrue in favour of and become owing to the applicant, by the respondent, pursuant to the terms and provisions of the lease agreement between the parties, dated 20 February 2014, prior to the hearing and final determination of this application.*

4. *Costs of suit on a scale is between attorney and client, plus VAT.*

5. *Further and/alternative relief.*

10. The respondent holds the view that during the lockdown, it was exempt from paying the full rental in terms of the lease agreement because the legislative regulations constituted a *vis maior* or *casus fortuitus*[10]. I address this aspect in greater detail below.

11. As things stand, and as the matter progressed from August 2020 and procedural issues and amendments of relief sought overtook some of the initial relief sought, I am of the view that it is necessary to set out in more detail, the litigation between the parties in this matter. The reference to the *main application* is a reference to the applicant's application and page references in footnotes refer to the relevant pages of the record unless otherwise indicated.

12. In response to the application, the respondent on 9 September 2020 gave notice

[10] *Spolander v Ward 1940 CPD 24 at 27-32*

of its intention to oppose the application and delivered a notice of counter application. It is common cause that the affidavit by the respondent's director, Mr Pick, constitutes an answering affidavit to the main application and also the founding affidavit in the respondent's counter application[11].

13. The counter application which was eventually superseded by two later amendments, seeks the following relief[12]:

1. *That the applicant's application for the relief sought in its notice of motion dated 26 August 2020 be stayed pending the outcome of this counter-application.*

2. *Condoning the late filing of this counter-application and the answering affidavit filed here with.*

3. *Declaring that the respondent is entitled to a remission of the "base rental" in respect of the premises leased from the applicant in terms of the agreement of lease attached to the applicant's founding affidavit marked "BNG 2" ('the lease agreement') such that the rental payable for the period 1 April 2020 to 31 August 2020, exclusive of VAT, is as follows:*

3.1 *1 April to 30 April 2020: R55, 555, 09;*

3.2 *1 May to 31 May 2020: R65, 069, 00;*

3.3 *1 June to 30 June 2020: R96, 902, 00;*

3.4 *1 July to 31 July 2020: R143, 785, 00; and*

3.5 *1 August to 31 August 2020; R183, 053, 00.*

4. *That the applicant's application is dismissed, and the applicant be ordered to pay the respondent's costs on a scale as between party and party from*

[11] P139
[12] P136

*6 October 2020.*

14. The counter application seeks a stay (and dismissal) of the main application and a declaratory order that the respondent be entitled to a remission of the base rental. The respondent's replying affidavit to its counter application was met with the applicant's application to strike out certain parts thereof on the basis that it constitutes new matter in reply[13]. The respondent subsequently delivered a notice to amend its counter application by introducing alternative prayers for relief to the abovementioned orders sought. In summary, the respondent seeks as prayer *3A* in the alternative to prayer *3* of its counter application, a declaration that it is entitled to a remission of the base rental payable from 1 April to 31 August 2020 in an amount to be determined by the Court. In an alternative, the respondent seeks a further order that the counter application be postponed for hearing of oral evidence on the question of quantum of the respondent's rental remission counter claim/application[14].

15. Pursuant the respondent's rule 28 notice to amend, the applicant delivered a notice in terms of rules 30 and 30A on the basis that the rule 28 notice was delivered outside the prescribed 10-day period contemplated in rule 28(5). The respondent then delivered its amended notice of counter application which included a prayer for condonation. Subsequently, the applicant, not to be outmatched, delivered a notice of amendment in respect of its main application seeking the following amendment: that the amount initially claimed in its notice of motion be amended to reflect an increased amount of ***R2 980 845, 11***, and that the date of ***1 August 2020*** be changed to ***1 June 2021***[15]. The basis for the amendment was that according to the applicant, the respondent was still not paying the base rental as per the lease agreement.

[13] P269
[14] P271-273

16. It is important to note that in its supplementary affidavit attached to its rule 28 notice, the applicant attached *BNG24*, invoices for rental and levies up to June 2021 which are addressed to Apoldo Trade CC t/a The Butcher Shop and Grill. A day prior to the hearing date of 15 June 2021, the respondent delivered its notice of objection to the applicant's notice of amendment, objecting on the basis that the applicant's notice of amendment was served on the respondent in circumstances where the matter had already been set down for hearing and that no explanation was provided for the delay which was prejudicial to the latter for various reasons set out[16] which in my view, are not relevant to the main issues in this matter.

17. The applications were not argued on 15 June 2021 as the procedural issues described above culminated in an order being taken by agreement between the parties[17]. The Order regulated the conduct of the matter, including the delivery of the applicant's late heads of argument, amendments and supplementary affidavits but absent was an agreement regarding the applicant's application to strike out, which was argued simultaneously with the main and counter application. Insofar as costs were concerned, at paragraph 9 of the Order the parties agreed that all questions related to costs would stand for later determination. On 9 July 2021, the applicant amended its main application.

18. The respondent delivered Mr Pick's further supplementary affidavit to the applicant's amended application and so too the applicant delivered Mr Gamsu's[18] supplementary affidavit of 1 June 2021 in accordance with paragraph 6 of the Order.

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[15] The period for which the arrear rental is charged

[16] P353-355

[17] See Order marked "X", p357-360. The legal representatives were also informed on 14 June 2021 that I was seized with a similar matter where a defence of rental remission (the applicant's claim on motion was for arrear rental during the lockdown in 2020) was raised. As things happened, further submissions were made by counsel in light of a recent judgment delivered by another Division which counsel had brought to my attention. However, the entire matter was settled between the parties in October 2021, with no judgment being delivered in matters 11404/2020 and 14647/2020 (consolidated)

[18] Mr Gamsu is the applicant's deponent; Mr Dani Pick is the respondent's deponent

Pursuant thereto, and in terms of paragraph 7 of the Order, Mr Gamsu deposed to a supplementary replying affidavit in the main application and supplementary answering affidavit in the counter application as amended.

19. It was pursuant to the content of various paragraphs in the aforementioned affidavit of the applicant and the attachment of an addendum to the lease, *BNG31*[19], that the latter introduced into the proceedings a reference to the juristic entity, Apoldo Trade (Pty) Ltd (Apoldo). The upshot of this reference and introduction was that the respondent then gave notice of its intention to amend its amended counter application by inserting paragraph *1A* therein which reads as follows:

> *Insofar as necessary, declaring that the separate corporate personalities of the respondent and Apoldo Trade (Pty) Ltd be disregarded for purposes of the relief sought by the respondent in paragraphs 2 to 4 below*[20]*.*

20. On 9 July 2021, the respondent delivered a supplementary replying affidavit responding to the averments related to the addendum to the lease and at paragraph 9.2 of such affidavit, Mr Pick makes the averment that:

> *9.2 Secondly, and in any event, the facts of this case are such that the respondent and Apoldo should for all intents and purposes be regarded as the same entity, and that a claim for remission in Apoldo's hands is in fact a claim for remission in the respondent's hands.*

21. The procedural marathon did not end there as the applicant, on 23 July 2021, launched its second application to strike out; this instance, paragraphs 9.2 to 22 of the

[19] P430
[20] P360-361

respondent's supplementary affidavit referred to in the preceding paragraph. The basis of the application was that these paragraphs, together with the annexures to the affidavit constitute new matter[21].

22. In conclusion, the further amended notice of counter application dated 26 July 2021 which contains the two amendments which I have referred to above, is the final version of the respondent's counter application. The main, counter application as amended and the two striking out applications were argued by counsel on 29 July 2021.

**Factual background**

23. The conclusion of the lease agreement on 14 February 2014 at Cape Town and its terms are common cause between the parties and so too the fact that the restaurant occupies the bulk of the leased premises, at least 90% thereof. The base rental payable monthly in advance at the launch of the main application was **R286 114, 87** excluding VAT for the entire leased premises. It is undisputed that the premises also comprise a wine shop, butchery and deli, though it is in dispute that the respondent has access to a storage facility. Ultimately, this dispute is not material to my determination of the applications. The lease would continue for 10 years from date of commencement and was subject to a renewal period of 5 years[22].

24. The base rental was payable as per clause 6.3 of the lease agreement which states that:

> *All amounts payable by the Tenant to the Landlord in terms of this Agreement shall be paid free of deduction and set-off into the bank account of the Landlord*

[21] P477-478
[22] BNG2, Schedule 1, p89

*or such other bank account in the Republic of South Africa nominated by the Landlord, in writing.*

25. Until March 2020, prior to the declaration of the national sate of disaster, the respondent had paid the full rental and operational charges timeously. While the applicant's invoices for the period March to August 2020 reflected in annexures *NG 6.1* to *6.6* for **R1 576 919, 20** are not denied, the respondent indeed denied that the amount was due and owing. Ancillary charges for rates, taxes, utilities and the like were indeed paid to the applicant during the abovementioned and extended periods mentioned in the applications.

26. In a letter dated 23 June 2020[23], the applicant's representatives were informed that the tenant ceased the operation of its restaurant business on 26 March 2020 due to the government's imposition of the COVID-19 regulations and indicated that it would continue to do so dependent on amendments to those regulations. Furthermore, that as a result of the changed circumstances attended by the legislative prohibitions, which made its performance of its obligations impossible, the tenant was thus excused from its contractual liability and obligation for as long as such regulations existed. In addition to the above, it was alleged that a supervening event made performance impossible and thus there was thus no beneficial use of the leased premises for the purpose for which it was intended.

27. The respondent's case is further that the closure of the restaurant was directly related to the regulations imposed and that the applicant was likewise precluded from providing beneficial occupation of the premises to the tenant. The letter concludes that the tenant was entitled to a rental remission for the entire period for which the regulations prohibited its use of the leased premises because the COVID-19 pandemic

[23] BNG7, p115-117

and its concomitant regulations were examples of *vis maior* which made performance objectively impossible. The payment of part of the rental was tendered.

28. In response, the applicant through its attorney, indicated that the abovementioned correspondence exhibited a lack of understanding of the law[24] regarding remission of rental and that this view was not *"legally sustainable"*[25]*.* In support of its stance, the applicant relied on the definition of *"beneficial occupation"* in clause 1.2.2 of the lease which defines the term as *"the physical possession and control of the leased premises"*[26]. The attorney furthermore indicated that the applicant was not required in terms of the lease to provide that the respondent must be able to trade and operate its commercial business from the premises.

29. In addition, the applicant's stance was that in terms of clause 26 of the lease, rental was due to it without deduction or set off and that the problems which arose as a result of the imposition of the regulations did not excuse the respondent's obligation to pay the rent monthly in advance[27]. In the correspondence, the applicant denied a reciprocal obligation on its part as rental was due monthly in advance.

30. It is furthermore contended that the tenant had some beneficial occupation even during alert level 5 in that it was operating the butchery and therefore able to perform some business from the leased premises. In addition to the aforementioned, the applicant expressed a view that even if a loss of beneficial occupation entitled the respondent to an abatement of rental, which the applicant in any event denied, then the amount was not easily ascertainable, which is a necessary requirement for a rental remission claim. It is noted that the applicant's earlier correspondence dated 17 June

[24] BNG8, p119-129
[25] BNG8, par 5, p120
[26] BNG2, par 1.2.2, p32
[27] Clause 7.13 of lease, p46

2020 notified the respondent of the arrears in terms of the lease and requested payment within 7 days' failing which the lease would be cancelled. It is common cause that the lease was not cancelled.

31. On 25 September 2020 the respondent made an open offer to settle the application on the basis that the rental be paid as set out in in paragraph 7 of its correspondence[28]. The amounts per month constituted a portion of the monthly rental due, commensurate with the respondent's ability to trade from the premises for the months of April to August 2020. In annexure *AA4*, the applicant's attorney requested that the respondent provides evidence of a loss of beneficial occupation, as alleged and that until then, the applicant remained unmoved by the respondent's complaint that it was entitled to any rental remission for the period claimed.

32. Subsequently to the above mentioned correspondence, the respondent's attorney provided a summary of turnover figures for the preceding 4 years which, it was submitted, illustrated the material impact which the lockdown regulations had on the respondent's monthly turnover[29]. According to the respondent's summary, the turnover percentage change or reduction for the period April to August 2020 stood at 56%, compared to 2019 at 11% for the same period[30]. Although the open tender was extended to 6 October 2020, the applicant rejected it and forged ahead with its application.

33. The respondent's opposition to the main application sets out that the restaurant has a seating capacity of 200 people and as the alert levels changed in lieu of various regulations passed, it was only allowed a 50% capacity, thus 100 guests, applying social distancing protocol. The butchery together with the deli and wine shop has a

[28] AA3, par 7, p179-180
[29] AA6, p187-189

smaller gross margin than the restaurant. The respondent makes the averment that it suffered a reduction in turnover during the period 1 April to 31 August 2020 of **R6 841 269** or an average monthly decrease of 56%, and its losses for the 2020 financial year was **R1 254 000**. All ancillary charges were paid during the extended lockdown period.

34. The respondent's deponent, Mr Dani Pick, makes the averment that the lease does not alter the common law in relation to *vis maior* and persists that the applicant was not able to give it beneficial occupation of the premises and thus it was entitled to remission of the rental. It is evident from the affidavits that the parties disagree about the meaning of the words "*beneficial occupation"* and while the respondent agrees that it could operate the butchery during April to August 2020 to a limited extent, it disagrees that the common law rental remedy of remission does not apply. The facts indicate that the respondent paid part of the base rental for the abovementioned period and its extension[31].

35. The applicant denies that the regulations limited the respondent's trading ability to 50%. Furthermore, it takes issue that a reduction or loss of turnover would equate to a loss of beneficial occupation. According to the applicant, the respondent failed to provide proof of its loss of net profit in its answering affidavit[32] and therefore it follows that there was no loss of beneficial occupation, hence the respondent is not entitled to rental remission.

36. The counter application prior to the amendments seeks a rental remission of the amounts for the specific periods from April to August 2020 as mentioned in paragraphs 3.1 to 3.5 of such application. On my understanding, these amounts reflect the

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[30] See Turnover table, AA6, p189

[31] My reference to an extension relates to the period referred to in the amended application (i.e. until 1 June 2021)

[32] The respondent's answering affidavit served to also be a founding affidavit in its counter application

equivalent of 10% of the turnover for those periods which are reflected in the table at paragraph 40 of Mr Pick's answering affidavit. The respondent contends that its counter application is not only about loss of profit in respect of a determination of loss of beneficial occupation. Furthermore, it alleges that its contention that the regulations limited its ability to trade from the leased premises was not denied by the applicant. According to the respondent, the reduction in its turnover is evidence of the extent to which it was deprived of beneficial occupation of the leased premises. As an illustration, the respondent provides annexure *RA1*[33]*,* its management accounts for April to October 2020 which it alleges, also indicates its loss of profit. The correctness of *RA1* is confirmed by Mr Hendler of MGI Bass Gordon, auditor and accountant of the respondent.

37. I indicated above that the parties amended the relief sought in their applications. To illustrate, the applicant seeks arrear rental until 1 June 2021 and for an increased amount of R2 980 845, 11. This is supported by Mr Gamsu's supplementary affidavit of 1 June 2021 wherein the applicant relies upon invoices from September 2020 to 1 June 2021 for the increased arrear rental amount as anticipated in terms of prayer 3 of its original Notice of Motion[34].

38. The respondent's amended counter application seeks, in addition to the relief in the initial application, a declaratory order that the separate corporate personality of the respondent and *Apoldo* be disregarded, and alternative relief that the amounts claimed as rental remission for the period 1 April to 1 June 2021 be determined by the Court.

39. Mr. Pick's supplementary affidavit dated 23 June 2021 which addresses the applicant's amended relief as described above, disputes the amount claimed as the

[33] Annexure *RA1* is attached to Mr Pick's answering affidavit to the main application/founding affidavit to the counter application, p263

applicant included staffing costs from April 2020 to June 2021 totalling **R142 567, 26** for which the respondent disputes any liability. Secondly, the applicant is accused of failing to take into consideration **R277 653, 94** which constitutes rental payment and other charges for June 2021. I must point out that the applicant's counsel at the commencement of proceedings on 29 July 2021 indicated that this amount was taken into account, hence the reduction of the applicant's claim, which I address at the conclusion of the judgment.

40. The respondent takes further issue that the interest levied from September 2020 to June 2021 is incorrect and submits that the applicant bases the calculation on its entitlement to have received payment of 100% base rental from April 2020 which fails to take into account the respondent's rental remission. The respondent also alleges that it paid at least 52% of the base rental for 1 April 2020 to 30 June 2021 and that rental remission of 48% of the base rental is fair, reasonable and proportionate given that it was deprived of the full use and benefit of the leased premises.

41. As to annexure *RA1,* its management accounts for the 2020 period, Mr Pick points out that it contains two errors: firstly, it erroneously reflects depreciation as a monthly expense of **R120 000** rather than **R208 000**, and secondly, it reflects **R372 748** as having been paid as the April 2020 rental[35]. It is explained that Mr Hendler rectified these errors subsequently[36] and to this end, a confirmatory affidavit is provided.

42. The respondent's case is further that its business was detrimentally affected by the lockdown regulations[37] as follows:

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[34] BNG24, p291-304
[35] See RA1, p263
[36] See annexure D which reflects the adjusted amounts in respect of April 2020 rental and depreciation
[37] The reference to the various lockdown levels and regulations is common cause

42. 1 from 1 June to 17 August 2020 (alert level 3), trading was allowed from the leased premises; no alcohol was allowed to be sold nor served; seating capacity was restricted to 50% and the business could only operate within stipulated times;

42.2 from 18 August to 20 September 2020 (alert level 2), alcohol was allowed on an on-consumption basis and the seating capacity remained at 50%;

42.3 from 20 September to 29 December 2020 (alert level 1) the respondent's ability to trade remained as for alert level 2;

42.4 from 29 December 2020 to 12 February 2021 (alert level 3), the business operated as set out in paragraph 42.1 above[38];

42.6 from 12 February to 15 June 2021, the business was allowed to operate subject to an 23h00 curfew and 50% seating capacity;

42.7 from 16 June 2021 and at the time Mr Pick's supplementary affidavit was delivered, the curfew for restaurants was adjusted to 22h00 with the onset of the *third wave*, meaning that they had to close by 21h00, which was during peak business service.

43. Mr Pick attaches annexure *D*[39], the supplemented management accounts for 1 March 2020 to end May 2021. The respondent asserts that annexure *D* reflects the reduction in turnover during the abovementioned lockdown periods and that it is entitled to approximately 48% rental remission as claimed in its amended notice of counter application; alternatively, that it is entitled to such rental remission in an amount to be determined by the Court on the papers, and further alternatively, to an amount as

[38] It is common cause that the country was in the second wave of the pandemic, hence the alert level was raised to curb contact between citizens, reduce the rate of infections and number of fatalities

determined after the hearing of oral evidence on the quantum of loss suffered.

44. In his supplementary replying affidavit dated 2 July 2021, Mr Gamsu stated that in terms of clauses 7.2 and 7.3 of the lease the applicant is entitled to charge staffing costs and that the respondent was paying these amounts since the inception of the lease, yet objected to these charges from April 2020. The applicant disputes that the calculation of interest is incorrect as alleged and takes issue with the explanation regarding errors in annexure *RA1*. Furthermore, the applicant holds the view that Mr Hendler, who admitted the accounting errors on the supplemented management accounts, is not entitled to depose to a contradictory affidavit in circumstances where he had previously confirmed that *RA1* was indeed correct. It is submitted that the Court cannot place any credible reliance on the amounts provided by the respondents for purposes of justifying its claim for a remission of rental. The applicant persists with its stance that the respondent has failed to provide any supporting documentation to show how the suggested losses suffered as a result of a loss of beneficial occupation due to the regulations, were calculated.

45. The matter then took a surprising turn when Mr Gamsu, with reference to an audit report compiled by the respondent's auditors[40] and which was provided to the applicant's attorney in mid-June 2021, highlights that this report refers to turnover figures of an entity known as Apoldo Trade (Pty) Ltd and not to the respondent and thus it cannot be used as justification for the respondent's failure to pay rental to the applicant. According to the applicant, Apoldo was not its tenant in terms of the 2014 lease agreement.

46. According to the applicant, it became aware sometime after conclusion of the

[39] P391-2

[40] See BNG27. Note, Mr Hendler is employed at MGI Bass Gordon

lease that another entity was occupying the leased premises and queries were addressed to Mr. Hendler in this regard. Mr Hendler's explanation in an email dated 7 June 2019[41] was that Mr Alan Pick, the father of Mr Dani Pick, was the 100% shareholder of the respondent which trades primarily in Johannesburg and at the commencement of trading in Cape Town, the former had decided to update his new business through a separate entity named Apoldo Trade CC which was converted to a private company in 2017. It is explained that the shareholding in respect of both entities remained the same and that MGI Bass Gordon were the auditors for Apoldo and the respondent. Mr Pick explains that turnover certificates for the tenant was provided to the applicant in the name of Apoldo and that the auditors were under the wrongful impression that the applicant was aware of these facts.

47. Mr Hendler confirmed in his email that Apoldo was the entity trading from the leased premises, that there was no change in composition of the shareholding of either juristic entity and that there was no prejudice to the applicant in the circumstances. Thus, the request in 2019 was that Apoldo was to continue to occupy the premises as the tenant, alternatively, that the applicant was requested to consent to the respondent sub-letting the premises to Apoldo and further alternatively that the lease with the respondent be terminated and a new lease be concluded with Apoldo.

48. The upshot of the information provided by Mr. Hendler was that an addendum was concluded to the 2014 lease agreement and was signed by the parties' representatives and Apoldo on 14 August 2019[42]. The addendum provided that the applicant consented to the respondent sub-letting the premises to Apoldo; the terms and conditions of the lease remained binding on the respondent and the latter and Apoldo agreed to be jointly and severally equally responsible for the terms of the lease agreement.

[41] BNG30, p428-9
[42] BNG31, p430

49. The applicant argues that in terms of the addendum, Apoldo is the respondent's sub-tenant and that the respondent's averments which it presents in order to avoid liability in terms of the lease agreement apply to Apoldo and not to the respondent and therefore it is submitted that to the extent that there was a loss of beneficial occupation of the leased premises, such loss was suffered by Apoldo and not by the respondent. Thus, it is argued that the respondent cannot claim the remission of rental in its favour.

50. In the respondent's further supplementary replying affidavit dated 9 July 2021, Mr Pick points out that the fact that Apoldo is in occupation of the premises as sub-tenant does not preclude it from claiming rental remission. Importantly, it is contended that there is no difference between the two entities and that for purposes of the counter application, the respondent and Apoldo should be regarded as the same entity. Following on from the latter submission, it is asserted that a claim for rental remission by Apoldo is the equivalent of a claim for rental remission in the hands of the respondent. Ultimately, Mr Pick states that the business of the respondent and that of Apoldo is not distinguishable and that any such distinction is in fact artificial.

**Issues to determine**

51. The relief sought by the parties evolved to a certain extent subsequent to their respective amendments of their applications and in light thereof, in my view the issues which require consideration in this matter may be summarized as follows:

51.1 the applicant's two striking out applications;

51.2 whether the separate corporate personalities of the respondent and Apoldo should be disregarded for purposes of the respondent's relief claimed in its further amended counter application i.e. whether the corporate veil should be pierced;

51.3 dependent on my finding in the preceding paragraph, whether the respondent is entitled to claim rental remission, and if so, to what extent (quantum);

51.4 the applicant's main application as amended;

51.5 Costs.

52. Aspects regarding whether I should stay the hearing of the main application or not, may be dispensed with easily. In view of the relief sought and the counter application based on the common law, it is prudent to determine the counter application before the main application.

**The first application to strike out**

53. The applicant's first application[43] to strike out certain parts of the respondent's replying affidavit as new matter is in respect of the last sentence of paragraph 13 including annexure *RA1*, paragraphs 14 and 15 in their entirety and the last sentence of paragraph 38[44]. The relevant parts of paragraphs 13, 14 and 15 all relate to the respondent's averments that it sustained a financial loss during the lockdown due to the regulations. *RA1,* its management account for March to October 2020, is used in support of its claim that it suffered financial losses.

54. It is trite that a party must make out its case in motion proceedings in its founding affidavit and that it will not generally be allowed to supplement such case by adducing supporting facts in its replying affidavit. At paragraph 13 of the Supreme Court of

[43] Dated 16 November 2020, p268-9
[44] Pages 254-261

Appeal's (SCA) judgment in *Mostert and Others v Firstrand Bank t/a RMB Private Bank*[45], van der Merwe JA stated the following:

> *'It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit.*[46] *See the oft-quoted dictum in Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177G-178A and the judgment of this court in Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others [2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 26. In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.'*

55. In *Finishing Touch 163 (Pty) Ltd v BHP Biliton Energy Coal South Africa Ltd & Others*[47], the respondent in the appeal raised new matter in its replying affidavit in the proceedings in the Court *a quo*. The SCA, in referring to the exceptional circumstances which may arise where a Court in its discretion may allow new matter in reply, distinguished in paragraphs 25 to 27 of its judgment between circumstances where new facts are brought to light in reply for the first time but were known to the applicant at the time of deposing to the founding affidavit and a situation where facts which alleged

[45] [2018] ZASCA 54
[46] My emphasis

in the answering affidavit reveal the existence or possible existence of a further ground for the relief which the applicant seeks[48].

56. Having regard to these authorities, it is apparent that allowing new matter in a replying matter would be limited to exceptional circumstances which fall to be determined in the exercise of a Court's discretion. It is trite that such discretion must be exercised judicially having regard to all the facts and circumstances of the particular matter, and in my view, also having regard to the procedural history of the particular matter which such Court is seized with. I say this because in a matter such the one before me, where there were various amendments which affected and supplemented the initial relief sought by the parties, together with condonation and irregular step applications, the material facts and circumstances relevant to the exercise of my discretion when determining the striking out application cannot be viewed in isolation.

57. If the reason for introducing new matter in reply is with a view to reply to a defense raised by the other party and which is a matter which could not have been in the original affidavit, then the discretion should be exercised in favour of allowing the new matter. The applicant's counsel argued that the respondent had failed to present any evidence in the founding affidavit to its counter application indicating that it had sustained any loss as a result of the legislative prohibitions nor had it provided any proof or evidence of an alleged loss of beneficial occupation. Counsel submitted that the only averments made were that the respondent had suffered a reduction in turnover, but had failed to provide any documentary evidence of such reduction and how it was calculated. It is the applicant's further submission that the respondent had attempted to introduce new evidence by way of annexure *RA1* which purports to prove the alleged losses for the period March to October 2020. The argument is that *RA1* should have been attached to Mr Pick's founding affidavit to the counter application and that it

[47] [2012] ZASCA 49

constitutes new matter.

58. The respondent's counsel firstly takes issue with the fact that the first striking out application was launched more than 6 months after the respondent had already filed its replying affidavit to the main application[49]. Secondly, it is submitted that the applicant suffered no prejudice as it had never raised the issue or an objection related to new matter prior to May 2021.

59. In the respondent's affidavit supporting the counter application, it attached management accounts from March 2019 to March 2020 which indicated sales excluding VAT and its reduced turnover for the period April to August 2020[50]. It has always been the respondent's claim that the reduced turnover showed the loss it suffered due to the imposition of the legislative prohibitions on trading, thus it did not have beneficial occupation of the leased premises and it therefore followed that it was entitled to a remission of rental for the periods mentioned. In paragraphs 25, 47, 49, 50, 53, 63 and 64 of the applicant's answering affidavit, Mr Gamsu indicates that the applicant disagreed and took issue that a loss in turnover amounted to proof of a financial loss and loss of beneficial occupation. The applicant, though, goes a step further in paragraph 63[51] where Mr Gamsu states the following:

> *'What is required, before a remission of rental can be considered, or agreed, is real evidence of the actual loss of beneficial occupation suffered by the respondent. Unless the respondent can show real evidence that it suffered an actual loss of net profit pertaining to the whole of the leased premises, in respect of the Cape Town branch of the respondent's operations, as a result of its lack of beneficial occupation, there can be no question of a loss of beneficial*

[48] See also *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 (D) at 704-5; Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978 (1) SA 173 (W) at 177G*

[49] See respondent's rule 30 and 30A application and accompanying affidavit, p344-8

[50] Annexures attached to Mr Pick's founding affidavit to the counter application, p186-9

*occupation.'*

60. Evident from the above is that the applicant clearly does not view a reduced turnover as a financial loss which warrants a remission of rental, while the respondent on the other hand, disagrees. Thus, in reply to Mr Gamsu's denial regarding the loss of turnover and that it constitutes evidence of financial loss, and simultaneously responding to the applicant's call to produce '*real evidence'*, the respondent in reply then provides the management accounts in *RA1* and responds to the applicant's averments in the replying affidavit. In my view, the dispute as to whether a loss of turnover constitutes actual financial loss is a dispute which permeates throughout the matter.

61. Having regard to the affidavits, I am in agreement with the respondent's counsel that *RA1* and paragraphs 13, 14, 15 and 38 are responses to the queries raised in the applicant's answering affidavit. To clarify, paragraph 15 specifically elaborates on annexure *RA1* and I am inclined to agree that it attempts to answer the applicant's invitation to provide evidence of a financial loss. Whilst *RA1* was not attached to Mr Pick's affidavit in support of the counter application, in my view it elaborates on the turnover table at page 189 and to the extent that it constitutes new matter, it provides a basis for further relief sought in the counter application as referred to in ***Finishing Touch 163***[52]. Paragraph 38 expands on the content of *RA1* and the alleged financial loss suffered during 2020.

62. The applicant's decision to apply to strike out the aforesaid paragraphs and *RA1* from the respondent's replying affidavit more than 6 months after it was filed, negates any prejudice which it may have suffered as a result of the content thereof. To add, I

[51] P215

[52] See para 25-7 of the judgment

have not been provided with an explanation as to what prejudice, if any, would be suffered by the applicant should these paragraphs and *RA1* remain in Mr Pick's affidavit. Furthermore, there was no suggestion of a postponement and as matters transpired, the parties had in any event agreed on the filing of supplementary affidavits albeit to deal with limited issues raised relating to Apoldo.

*63.* Having regard to the considerations mentioned by the SCA in the *Mostert* judgment referred to above, I am satisfied that the introduction of the information and evidence contained in paragraphs 13, 14, 15, 38 and *RA1*, whilst to a limited extent indeed constitutes new matter, and considered against the backdrop of the entire matter and disputes between the parties, do not prejudice the applicant. Furthermore, I am also satisfied that all these factors contribute to establishing exceptional circumstances which warrant the exercise of my discretion in favour of the respondent. In the result, the first application to strike out falls to be dismissed.

**The second application to strike out**

64. I indicated earlier in the judgment that the parties reached an agreement on 15 June 2021 regarding the filing of further affidavits. The applicant was given leave to file a supplementary answering affidavit to the counter application and introduced an addendum to the lease as an annexure to Mr Gamsu's affidavit for the first time in the matter. In terms of the Order, the respondent was allowed to reply specifically to the issue of the addendum and did so on 9 July 2021. It bears reminding that the addendum formed part of the evidence relevant to the applicant's mention and introduction of Apoldo.

65. The applicant seeks to strike out paragraphs 9.2 to 22 plus any annexures of the respondent's supplementary replying affidavit. The abovementioned paragraphs

deal with, explain and refer to the relationship between the respondent and the entity Apoldo. The annexures are the financial statements of Apoldo, an ABSA Bank overdraft facility letter addressed to the respondent and an *"about"* page printed from the respondent's website explaining its history from inception 27 years ago.

66. Subsequent to the applicant's supplementary answering affidavit doing so, there was no specific reference in the matter to an addendum to the lease or to Apoldo[53]. While I agree that this is new matter, the content of the supplementary replying affidavit certainly focuses on the addendum and the reference to Apoldo. Furthermore, it is the applicant which belatedly raised as a defence to the counter application, the fact that the respondent does not occupy the leased premises but that another entity does. Certainly, the goal posts shifted with the introduction of these facts and the respondent was allowed to respond, which it did.

67. These facts and the introduction of the addendum and Apoldo lead to an amendment of the counter application. Viewed in isolation, without regard to Mr Gamsu's supplementary affidavit and the addendum, I would certainly agree with the applicant's counsel that paragraphs 9.2 to 22 constitute new matter which could be prejudicial to the applicant. However, in light of how the matter evolved, the introduction of the addendum and Apoldo and the Court Order allowing the respondent to reply to the new facts alleged by the applicant, I see no reason why these paragraphs and accompanying annexures should be struck out.

68. In my view there is no prejudice to the applicant should paragraphs 9.2 to 22 of Mr Pick's supplementary replying affidavit remain and there are sufficient exceptional circumstances as determined above which persuades me to exercise my discretion in

[53] While the earlier invoices were addressed to Apoldo t/a The Butchers Grill and Shop, neither party took issue with this reference

the respondent's favour and allow the paragraphs and annexures to remain. Thus, the second striking out application should also be dismissed.

**Piercing the corporate veil: the issue of Apoldo and the respondent**

69. The references above to the introduction of Apoldo as a juristic entity occupying the leased premises, the conclusion of the addendum to the lease and its content and the respondent's amended relief seeking a declaration that separate corporate personalities of the respondent and Apoldo be disregarded for purposes of the relief sought by the respondent, refer.

70. The respondent submits that the facts of the matter are of such a nature that a claim for remission in Apoldo's hands are in fact a claim for remission in the respondent's hands. I am referred in this regard to *Ex parte Gore and others NNO*[54] in support of the amended relief sought. The submission is that Courts have no general discretion to disregard a company's separate corporate personality merely because it would be just and equitable to do so, but that the Courts do pierce the corporate veil where justice requires it. Furthermore, the respondent's counsel acknowledges that in most instances, the doctrine of piercing the corporate veil is frequently invoked where there has been an abuse of the separate juristic personality of the company by, for example, shareholders or directors, but argues that there would be no reason preclude the Court from making such finding and piercing the corporate veil in this matter.

71. The respondent contends that the facts of the matter establish a basis and the reason to disregard the separate juristic personalities of the respondent and Apoldo in order to then grant the respondent the rental remission as sought. The respondent relies on the factors in paragraph 21 of Mr Pick's supplementary affidavit in support of

[54] 2013 (3) SA 382 (WCC)

the contention that Apoldo and the respondent are in effect not separate entities or that there is no substance to distinguish between them.

72. Mr Pick points out that his father holds 100% of the shares in both entities and is a director of both; the deponent himself is the managing director of both companies which include branches in Johannesburg; ABSA Bank regards the respondent, Apoldo and Dine & Grill in Sandton as part of one group of companies; the branding, marketing and intellectual property of the entities are the same; the entities have the same meat and wine supplier; the suppliers regard the two entities as one and the same business; Apoldo and the respondent share the same administrative offices, one group accountant, the same audit firm and the businesses fund each other. For example, the respondent advanced R12 million to fund fixtures and fittings of the Green Point premises. In addition, the cash flow generated by the branches in Sandton and Cape Town is available for the group as a whole and group accounts reflect the profit and loss of the business of the respondent as a whole.

73. To add, the respondent avers that the applicant was aware of the existence of Apoldo though raised this aspect very late in the matter and through its actions, it signified that it accepted and regarded the two entities to be one and the same. Furthermore, it is submitted that I should ignore distinction between the two companies for purposes of the relief sought in the amended counter application.

74. In contrast to the respondent's approach and submissions, the applicant's counsel has referred me to section 20(9) of the Companies Act[55]. Similarly, the applicant also relies on *Ex parte Gore* and it is submitted that usually improper conduct or fraud were present in cases where the corporate veil was lifted. The submission is that in light of the authorities on the topic, and the facts and circumstances of the

[55] 71 of 2008

matter, as alleged, there are no circumstances for a claim that there be a piercing of the corporate veil or that the respondent and Apoldo are to be regarded by the Court as one entity or that the separate identities are to be ignored for purposes of the amended counter application.

75. Section 20(9) of the Companies Act states that:

> *(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may—*
>
> *(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and*
>
> *(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).*

76. My understanding of section 20(9) is that the Court must be able to find an *unconscionable abuse* of the juristic personality of the company as a separate entity before it may pierce the corporate veil. In *Hulse-Reutter and Others v Godde*[56], the SCA held that the separate legal personality of a company is to be recognized and upheld except in unusual circumstances and that much would depend on a close analysis of the facts of each case, considerations of policy and judicial management. This view was echoed in *Amlin (SA) (Pty) Ltd v Van Kooij*[57] at paragraph 22 where the Full Bench of

[56] 2001 (4) SA 1336 (SCA) at par 20
[57] 2008 (2) SA 558 (C)

this Division stated that Courts will disregard the separate legal personality of a company where it is used to conceal wrongdoing or avoid obligations. Furthermore, the Court held that the piercing of the veil must be resorted to sparingly and as a last resort where justice will not otherwise be done between the litigants[58]. *Amlin* and *Hulse-Reutter* are authority that the corporate veil may only be lifted in exceptional circumstances. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[59], the Appellate Division (as it was) indicated that each case in determining whether the Court should pierce the corporate trial, involved a process of inquiry into the facts and the Court did not formulate any general principles for application as to when the corporate veil may be pierced.

77. Moving forward a few years, Binns-Ward J had the opportunity in *Ex parte Gore* to embark on a thorough and detailed examination of the statutory framework of section 20(9) for piercing the corporate veil and the common law approach. In an Order wherein leave was granted to liquidators of several companies to promote certain of the companies' assets to be dealt with as if they were the property of the holding company, the learned Judge found that the liquidators' investigations uncovered that the affairs of the group were, in all material respects, conducted in a fashion where there was no distinction of the corporate identity of the various companies of the particular group[60].

78. At paragraph 15 of *Ex parte Gore*, Mr Justice Binns-Ward remarked that insofar as the group was concerned (the King Brothers), the conclusion was drawn that through its activities and disregard of the separate corporate personalities of the companies within the group, the finding was that the group was in fact a sham and that there was no distinction as to which company within the group, investors' funds were allocated to. At paragraph 29 of the judgment, the learned Judge stated that:

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[58] *Amlin*, par 24
[59] 1995 (4) SA 790 (A) at 808E
[60] *Ex parte Gore* at par 8

*'In my view the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other. The courts have shown an acute appreciation that juristic personality is a statutory creation and that 'their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted'.*[61]

79. In my view, paragraph 29 of the judgment provides guidance to Courts in matters where a party seeks an order that the corporate veil be pierced or that the separate legal or juristic personalities of the corporate entities be disregarded, such as in this matter: consideration should be afforded to the legal concept of juristic personality, which must be recognized and given effect to; in addition, there should be a deliberation of the legal considerations related to the separate juristic personality versus the negative moral and economic effects of approving of an unconscionable abuse of the corporate entity. *Ex parte Gore* makes it clear that the remedy in section 20(9) is available in circumstances where the facts of a particular case justifies it, and in so doing detracts from the notion that the piercing the corporate veil should only be regarded as being adopted in exceptional or drastic situations, such as was held in *Amlin*[62].

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55 Footnote 30 at the conclusion of paragraph 29 of *Ex parte Gore* reads as follows:

'30 In *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563, at para.s 16-18, I remarked upon what I considered to be the '*generally flexible approach*' indicated in the *Cape Pacific Ltd* judgment as being applicable when piercing of the corporate veil falls to be considered and determined; an observation illustrated with reference to Scott JA's remark in *Hülse-Reutter* supra, at para.20 that '*Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment*'.'

80. Turning to the facts at hand, Mr Alan Pick is the director and founder of Apoldo and the respondent. The two juristic entities share the same accounting officers and auditors, there is one group accountant for all three entities (this includes the Dine and Grill in Sandton), their administrative functions are dealt with by the same person, the auditing firm is shared and the business of the respondent operates on the basis that the cash flow generated by the various branches is available for the business or group as a whole. Furthermore, the companies share the same financial institution and from the financial statements of Apoldo, one notes that Dine and Grill and the respondent extended loans to Apoldo in 2017[63]. From *BNG6.1* to *6.6*, the tax invoices from March 2020 to August 2021 and the management accounts attached to the answering affidavit, one sees that invoices for rental and charges are addressed to Apoldo Trade CC t/a The Butcher Shop and Grill.

81. However, the respondent's correspondence received from the City of Cape Town related to an application for a licence to sell take-away foods during the lockdown, refers only to the respondent with no reference to Apoldo. Similalrly *RA1,* the management accounts from March to October 2020, refers to the respondent only with no reference to Apoldo and reliance is placed on the figures in these accounts in respect of the rental remission claim. These documents were also confirmed by Mr Hendler. To the extent that the respondent, Apoldo and Dine and Grill share administration, the same financial institution, accountants and auditors, have the same suppliers, the same shareholders and directors and that the profit is distributed between the companies, I can accept that they belong to the same group of companies established and managed by Alan Pick and his son Dani Pick.

82. Having regard to what is stated in ***Ex parte Gore*** and the other authorities referred to, I agree with the applicant's counsel that there is absolutely no evidence in

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[62] See par 34

[63] DP4, p264were

this matter of any sham, fraud or impropriety on the part of the directors or shareholders of the respondent or Apoldo. That said, there is no evidence – and it has not been suggested – that there was an *unconscionable abuse* of either of these two juristic entities. Understanding that in ***Ex parte Gore,*** section 20(9) was interpreted widely and that a Court approaching the question of piercing the corporate veil should approach it less formalistically and with more flexibility, the facts and evidence presented do not support any view of an unconscionable abuse of the juristic personality of either the respondent or Apoldo as referred to in section 20(9) of the Companies Act.

83. To illustrate further, I agree with counsel for the applicant that the authorities provided and referred to by both parties, indicate that the legal fiction of piercing the corporate veil was applied against a debtor company for the benefit of a creditor and not in favour of debtors. In this matter, the respondent, which in the circumstances is the applicant's debtor, seeks to avoid liability by requesting that the corporate veil be pierced in order that the separate legal personalities of Apoldo and itself be disregarded so that it be entitled to claim a rental remission. In my view, what is being sought is that the concept and principle of piercing the corporate veil and/or ignoring the separate legal personalities of Apoldo and the respondent in favour of a debtor and there is no justification for such relief.

84. The fact that invoices were rendered to Apoldo Trade CC t/a The Butchers Shop and Grill and that the applicant at some stage realized that there was a different entity operating from the leased premises does not form a basis for disregarding the separate legal personalities of Apoldo and the respondent. Furthermore, there is no evidence that an entity called Apoldo Trade CC t/a The Butchers Shop and Grill ever existed as the CIPC reports indicate that the respondent at all times, first as a close corporation and then as a company, was called The Butcher Shop and Grill[64].

[64] See BNG5, BNG28 and 29

85. The respondent is reminded of the remarks of Van Reenen J in *Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*[65] *which preceded Ex parte Gore* and are insightful and apt in the circumstances of this matter:

> *'Courts do not have a general discretion to disregard a company's separate legal personality whenever they consider it just or convenient to do so. The then Appellate Division (per Smalberger, JA who wrote the majority judgment) in Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd & Others 1995(4) SA 790 at 803 G-H and I-J expressed the view that it is a salutary principle that courts should not lightly disregard a company's separate legal personality, but should strive to give effect to it, as to do otherwise would negate and undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach thereto, but held that where fraud, dishonesty or other improper conduct is present, other considerations come into play, in which event, the need to preserve the separate corporate personality of a company has to be balanced against policy considerations favouring the piercing of the corporate veil.'*

86. Given what I have found above, I am inclined to conclude that there is no basis for exercising my discretion in terms of section 20(9) of the Companies Act nor any cause to disregard the separate legal personalities of Apoldo Trade Pty Ltd and the respondent. There is also no cause to find that justice would require such a disregard to distinguish between the separate juristic personalities of the two companies. In the result, the relief sought in prayer 1A of the further amended counter application is refused.

[65] [2002] ZAWCHC 53 at par 23

## ***Vis maior, casus fortuitus* and rental remission**

87. The above finding leads to the next question which is whether the respondent may claim rental remission in circumstances where, although it is the lessee in terms of the parties' lease agreement, it has not occupied the leased premises? Before I turn to answer the question, a consideration of some authorities and legal principles on the matter of *vis maior* and rental remission would be appropriate.

88. The authors of *Wille's Principles of South African Law*[66] state that:

> *"Vis major, or superior force, is some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, vis divina, or 'act of God', but also the acts of man. Casus fortuitus, or inevitable accident, is a species of vis major, and imports something exceptional, extraordinary, or unforeseen, and which human foresight cannot be expected to anticipate, or which, if it can be foreseen, cannot be avoided by the exercise of reasonable care or caution.*[67]

89. In *United Mines of Bultfontein v De Beers Consolidated Mines*[68], the plaintiff company had leased certain claims in a diamond mine to the defendant and these were to be paid without any deduction or abatement. At the outbreak of the Anglo-Boer war in October 1899 to March 1900, the mine was occupied by the Queen's military forces and it was pleaded that during this period, the lessee was deprived of the beneficial use, occupation and enjoyment of the property and therefore not liable for rent for that period. In the Court *a quo*, judgment was granted in favour of the plaintiff. On appeal, it was recognized that a war amounts to *vis maior* but the appeal was dismissed on the

[66] 9th edition, p849
[67] I have excluded the footnote references in *Wlle's Principles of South African Law* from this passage, but these are footnotes 1075 – 1080 on pages 849-850
[68] (1900) 17 SC 419

basis that legislation passed prior to the onset of the war[69] deprived the defendant of its common law right to remission or abatement of rent where it was deprived of beneficial occupation of the leased property.

90. In *Bayley v Harwood*[70] the purpose of the leased premises was in order to conduct certain businesses for which trading licenses were necessary (a resort). The licensing board refused the lessee's application for licenses unless certain substantial alterations were made to the resort in terms of the By-laws. The lessor refused to carry out the renovations causing the lessee to vacate the premises, tendering rent up to the date of vacation. The Court found that the legislative prohibition of the use of the property until alterations were effected amounted to *vis maior*. At 507D-F of its judgment, the Appellate Division (as it then was) found that the changes in the law had prevented the lessee's beneficial enjoyment of the premises, which interference was direct and immediate and the lessee could not reasonably have made provision for it in the lease. In *Bayley v Harwood* it was held that the enactment of legislation amounts to *vis maior*. Consequently, the Appellate Division upheld the appeal, finding that the lessee was entitled to claim rental remission.

91. *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC*[71] is authority for the finding that a lessor's duty is to deliver the leased property in a proper condition and that the property is to be placed at the disposal of the lessee for its undisturbed use or enjoyment (*commodus usus*)[72]. *Casus fortuitus*, which is a form of *vis maior*, refers to a fortuitous event which is not foreseeable[73]. Thus, a lessee's *commodus usus* may be disturbed or totally deprived by *vis maior* or *casus fortuitus* and as is seen in the earlier *Bayley v Harwood*, where an act of legislation which has as its

[69] General Law Amendment Act, 1879

[70] *1954 (3) SA 498 AD*; *Hansen, Schrader & Co. v Kopelowitz 1903 TS 707 at 716; Peters, Flamman and Co v Kokstad Municipality 1919 AD 427*

[71] [2005] ZAWCHC 88

[72] *Rebel Liquor*, par 47

[73] *Rebel Liquor*, par 52

result the direct interference with the lessee's beneficial occupation, use and enjoyment of the leased premises, it may be regarded as *vis maior* and is not attributable to either of the parties to the lease.

92. *Thompson v Scholz*[74], an unreported judgment of the SCA and one which the respondent strongly relies upon for its relief for rental remission, has garnered much consideration by later authorities. In view of my ultimate finding in this matter, it would be unnecessary to deal in great detail with the various considerations which the aforementioned judgment has attracted. However, certain pertinent aspects bear mentioning: the matter did not involve a lease agreement but rather, a sale of a farm and its residence. By the time the purchase price was paid and transfer registered in the defendant's name, the plaintiff was still occupying the residence and an issue arose regarding occupational interest whereby the plaintiff subsequently instituted an action against the purchaser. Nienaber JA at page 247 A-C of the judgment, expressed the view that where the lessee is deprived in whole or part, he can be excused from paying rental – in other words, be entitled to an abatement thereof – *pro rata* to the reduced enjoyment of the property. The learned Judge of Appeal went on to state that in circumstances where the lessee is entirely deprived of use and enjoyment, he would be entirely absolved from paying rental[75].

93. While *Tudor Hotels Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd*[76] dealt with an appeal regarding an eviction, it considered the issue of reciprocity between the landlord and tenant in circumstances where rent was paid in arrears and found that rent payable in arrears alters the landlord's reciprocal obligation to provide beneficial

[74] 1999 (1) SA 232 (SCA)

[75] The SCA dealt, referred to and applied the propositions regarding the *exceptio non adimpleti contractus* set out in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)*

[76] [2017] ZASCA 111 – confirms decision of Binns-Ward J in *Hencetrade 15 (Pty) Ltd v Tudor Hotel Brasserie & Bar (Pty) Ltd [2016] ZAWCHC 55; the matter involved and eviction and did not involve vis maior; see also Van der Stel Sports Club v Cape Perfect Health CC t/a Perfect Health [2018] ZAWCHC 167*

occupation to the lessee[77]. In *Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC*[78], the SCA held that in circumstances where the lessee is deprived of the use of the property, he is entitled to rental remission where the amount is capable of prompt ascertainment and it may be set off against the landlord's rental claim and if not, the lessee was obliged to pay the rent as agreed and thereafter claim the amount remitted[79].

94. With specific reference to this matter[80], and after consideration of the above authorities and those referred to in the footnotes herein, I highlight the following:

94.1 it is evident that a lessee is entitled to claim rental remission where there is a deprivation of or lack of beneficial use or occupation *(commodus usus)*, partially or fully, of the leased premises, and where the interference is caused by *vis maior* or *casus fortuitous*, neither of which eventuality is the fault or cause of either the lessor or lessee;

94.2 an act of legislation has been found to constitute *vis maior* and it thus follows that the COVID-19 regulations passed in terms of the Disaster Management Act would amount to *vis maior* or *casus fortuitous;*

94.3 the rental remission may be set off against the lessor's claim (for non-payment of rental) if it is capable of speedy and prompt ascertainment;

.94.4 the landlord has the obligation to provide beneficial occupation of the leased premises to the lessee;

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[77] At par 11

[78] [2007] SCA 62 at par 22

[79] See also *Arnold v Viljoen 1954 (3) SA 322 (C)*

[80] It is important to note that I am not dealing with nor addressing issues related to reciprocity in terms of the lease agreement

94.5 while the authorities recognize reciprocity between the two parties, where the rental is payable in arrears, the lessor's reciprocal obligation to provide beneficial occupation to the lessee may be affected;

94.6 the lessee's obligation to pay rent in terms of the lease is not discharged (even where the impossibility of performance is not due to his fault) where the parties specifically provided in their agreement that the lessee would be responsible for and/or take the risk upon himself for the impossibility supervening[81].

95. Having stated the above, I am of the opinion that further context should be added to the preceding paragraph. While the above factors are mentioned and have been highlighted in the authorities which counsel referred me to and which I have researched on the question of the common law rental remission, each matter where rental remission due to *vis maior, casus fortuitus* or impossibility of performance is claimed as a result of the effect of the COVID-19 regulations imposed, should be considered within the context of the merits of the specific matter. The context I refer to would include consideration of the specific regulations applicable at the relevant time(s), the extent to which performance was not possible, the extent to which there was a lack of beneficial occupation (if any) and, quite importantly, the terms of the parties' lease agreement. As to the latter, it is especially relevant whether or not provision was made in a lease agreement for the risk in the eventuality of *vis maior, casus fortuitus* or impossibility of performance. It would thus be prudent that a commercial lease agreement includes a clause dealing with the risk associated with *vis maior, casus fortuitus* and the impossibility of performance.

96. It warrants emphasising that I have not addressed the *dicta* relevant to rental remission claims based on the lessors' interference of the lessee's beneficial occupation

[81] See *Nuclear Fuels Corporation of SA (Pty) Ltd v ORDA AG 1996 (4) SA 1190 (A) at 1206-11* and the discussion about foreseeability of the risk

as this matter relates to a rental remission claim based on loss of beneficial occupation due to *vis maior/casus fortuitus.*

**Is the respondent entitled to claim rental remission?**

97. The lockdown regulations were clearly a form of *vis maior*, of that there is no doubt. It is common cause that the respondent did not occupy the leased premises during the lockdown and extended lockdown periods mentioned in the counter application and at the time that the various regulations were passed as from March 2020. It is further not in dispute that Apoldo occupied and traded from the premises and utilised the entire leased area. The question thus arises whether, and in circumstances where I have not disregarded the separate corporate personalities of Apoldo and the respondent, the respondent as lessee may claim rental remission where it has sub-let the leased premises?

98. The lessee is entitled to the beneficial use and occupation of the leased premises and the lessor has the obligation to provide it. An addendum was concluded allowing the respondent to sub-let to Apoldo. Aside from the addendum, which indicates that the applicant consented to the respondent sub-letting the premises to Apoldo, there is no evidence that the latter paid rent to the respondent and it has certainly not been alleged that this occurred. The addendum was concluded in accordance with the provisions of paragraph 16 of the lease agreement.

99. "*Beneficial occupation"* in terms of the lease is defined as "*the physical possession and control of the leased premises"*[82]. In the matters dealing with rental remission defences or claims, it is evident that the prerequisite for such a claim is that the lessee's beneficial occupation, use or enjoyment of the leased premises must have

been lost, disturbed or partially deprived, whether (as in this case) by *vis maior, casus fortuitus* or a supervening event. From the evidence, the applicant as lessor provided the respondent as lessee with beneficial occupation of the leased premises after conclusion of the lease in 2014 and the lessee remained in beneficial occupation or physical possession of the premises until the applicant became aware a few years later in 2019 that it was no longer occupying the property, and as it was made known from the affidavits, Apoldo then physically occupied the entire leased premises. The evidence indicates that the lessee was not in physical possession and control of the leased premises from 2019, possibly earlier.

100. The respondent relies on *North Western Hotel Ltd v Rolfes Nebel & Co*.[83], a 1902 judgment of the erstwhile Transvaal Supreme Court as its authority that a tenant is entitled to rental remission from the landlord for a sub-tenant's loss of the full use and enjoyment of the leased premises. As to the facts of this matter, in an action instituted by the plaintiff, the owner of a hotel which was leased to the defendant and which the latter sub-let to a third party, the sub-lessee on the same terms and conditions as the lease. The government at the time forbade the sale of liquor in hotels and bars, resulting in the sub-lessee closing the hotel. Thereafter, during the war, the sub-lessee re-opened the hotel as it was obliged to house military forces therein and after a further period, the sub-lessee lost the right to sell liquor on the premises, resulting in the hotel's closure once again. Unbeknown to the lessee, the sub-lessee instituted a claim for compensation with the authorities as a result of the losses caused by the military occupation of the hotel and damage caused to the hotel. The lease was never cancelled.

101. At page 329 of the abovementioned judgment, Wessles J stated that:

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[82] BNG2, par 1, p32
[83] 1902 TS 324

*'The defendants contend that inasmuch as the sub-lessees had no beneficial occupation they are not responsible for rent to the lessees, and therefore the lessees had constructively no beneficial occupation, and can set up the want of beneficial occupation on the part of the sub-lessees. The contention of the defendants that they are in the same favourable position as the sub-lessees is practically admitted by the plaintiff company; for though the company denies generally the amended plea of the defendants, their counsel, Mr Leonard, boldly accepted this position and argued his whole case from the standpoint that the lessees and sub-lessees were one*[84]*.'*

Evident from the above passage of the judgment is the fact that the plaintiff accepted that the lessee and sub-lessee were one and the same and the matter was argued from this perspective. The Court made various findings regarding the periods of loss of occupation and in respect of the last period of occupation, it was held that the sub-lessee was totally deprived of beneficial occupation as the hotel was occupied by military forces. The expulsion of the sub-lessee by military forces was regarded as *vis maior* and the claim by the sub-lessee for compensation from authorities did not destroy the lessee's common law right of remission of rental.

102. Both counsel submitted that they can find no later authority on the question of whether a lessee may claim rental remission based on loss of beneficial occupation by the sub-lessee which occupies the leased premises and in my research, neither could I. Counsel for the respondent argued that *North Western Hotel* remains good in law more than 100 years later and has not been overturned. The applicant's counsel is unpersuaded by the aforementioned authority which he describes as a 'novel argument'[85].

[84] My emphasis
[85] Applicant's supplementary heads of argument, par 24, p9

103. Certainly, I find I agree with the applicant's counsel that the abovementioned judgment does not make findings that a lessee, as a matter of law, may claim rental remission from the lessor where the sub-lessee's beneficial occupation, loss or enjoyment of the leased premises is disturbed. On my understanding of the judgment, the Court accepted the approach adopted by the parties and determined the matter from the perspective that the lessee and sub-lessee were one and the same. To add further, the judgment does not contain a finding nor does it establish a legal principle that a lessee may claim rental remission where it is not in beneficial occupation or physical control of the leased premises; or, put another way, that a lessee may claim rental remission where the loss of use and enjoyment of the leased premises is that of the sub-lessee's.

104. In addition, in my evaluation, the important and distinguishing fact as stated at page 329 of the judgment above is that the plaintiff in the action (landlord) took no issue and accepted that the lessee and sub-lessee were one and the same and thus that the lessee was in the same position as the sub-lessee in that it had lost beneficial occupation as a result of the military forces occupying the hotel. The lessee, as defendant in the action, thus premised its apparent right in terms of the common law to claim rental remission on the basis that it had (also) lost beneficial occupation of the hotel as a result of its' sub-lessee's loss of beneficial occupation.

105. Not only was no legal principle as submitted by the respondent established in *North Western Hotel* but its facts and circumstances are distinguishable from those in this matter. The applicant in this matter has steadfastly opposed any notion that the respondent and Apoldo are one and the same entity and I need not traverse these findings again. Furthermore, I have already found that the separate juristic personalities of the two entities may not be disregarded.

106. In circumstances where a sub-lease is concluded, there are two contracts: the lease between lessor and lessee, on the one hand, and the sub-lease between lessee and sub-lessee[86]. The lessor has obligations toward the lessee and not toward the sub-lessee[87]. The addendum concluded between the parties in terms of which the applicant consented to the respondent sub-letting the premises in no way creates an agreement in terms of which the applicant is obliged to provide beneficial occupation to the sub-lessee nor does it create obligations and rights between the applicant and Apoldo.

107. The facts in this matter are that the respondent was not occupying the leased premises nor in physical possession or control thereof. The reliance on ***North Western Hotel*** in my view is, with respect, misplaced as it provides no authority for the view that the respondent may claim rental remission from the applicant where it was not in occupation, where the sub-lessee occupies the leased property and where any alleged loss of beneficial occupation, use or enjoyment of the leased premises, was that of the sub-lessee's. Furthermore, I respectfully disagree with the judgment which, because the parties approached the matter from the viewpoint that the lessee and sub-lessee were one and the same, proceeded from the same viewpoint and disregarded the fact that the lessee had not been in physical control or possession of the leased hotel and thus not in beneficial occupation thereof. In my respectful view, a lessee cannot avail itself of the common law claim for an abatement or remission of rent in circumstances where its use, enjoyment and beneficial occupation was not deprived or disturbed. Accordingly, I do not find ***North Western Hotel*** to be binding authority in the circumstances.

108. In conclusion, the respondent's lack of physical occupation of the leased premises and failure to prove on a balance of probabilities, a lack of beneficial occupation, has the result that it is not entitled to claim rental remission from the applicant and accordingly therefore its counter application as further amended is

[86] *Kerr's Law of Sale and Lease, Fourth Edition, G Glover, p 534*

dismissed. There is no basis, in light of the dismissal, to consider the alternative relief in the counter application.

**Applicant's main claim (as amended)**

109. The only disputes in this respect related to the amounts due in circumstances where part payment of rental was made, payment of staff charges and interest. In light of the dismissal of the counter application, the conclusion is that the respondent, still bound by the lease agreement, was required to comply with its terms and pay the full rental, operating and staff costs[88] plus VAT and interest. The amount of **R 277 653,94** received after the invoices *BNG24* were presented for payment, is admitted by the applicant and should be deducted from the ***R2 980 845,11*** claimed in the amended application. In conclusion, I am satisfied that the applicant has made out a case for the relief sought and is successful with its main application.

**Costs**

110. As to costs, clause 41.8 provides for attorney and client costs and I see no reason why the parties should not be held to this clause in respect of the main claim. As to the striking out applications, the respondent is entitled to its costs of both applications and this is a matter where the employment of two counsel was not unwarranted. Lastly, costs in respect of the counter application does not, in my view, warrant a special nor punitive costs order.

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[87] See *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd 1999 1 SA 796 (W) at 800E-F*

[88] BNG2, par 7, p42

**Orders**

111. I accordingly grant the following orders:

(a) The applications to strike out are dismissed with costs including costs of two counsel where so employed.

(b)(i) The respondent is ordered to make payment to the applicant of **R2 703 191, 17** representing all amounts due by the respondent to the applicant as at 1 June 2021 pursuant to the terms and provisions of the lease agreement concluded between the parties dated 20 February 2014.

(b)(ii) The respondent is to pay interest on the above amount from 1 June 2021 to date of payment of all amounts due at a rate equivalent to the prime rate of interest of ABSA Bank Limited.

(b)(iii) The respondent is ordered to pay the applicant's costs on a scale as between attorney and client, plus VAT.

(c) The counter application as further amended is dismissed with costs.

(d) Costs of 15 June 2021 shall be costs in the cause.

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**M PANGARKER**

**ACTING JUDGE OF THE HIGH COURT**

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| For applicant: | Mr P Corbett SC |
| Instructed by: | Van Rensburg & Co. |
| | Per Mr L J Van Rensburg |
| For respondent: | Mr J Muller SC |
| | Mr L Kelly |
| Instructed by: | Werksmans Attorneys |
| | Per Mr R Gootkin |