

DISPUTES

COVID-19 regulations and how commercial landlords may survive

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The COVID-19 national lockdown restrictions ("the lockdown restrictions") are having a devastating impact on commercial landlords, as national tenants are deciding not to pay their full or any rental due. The question which presents itself is whether landlords have any rights under these circumstances.

A lease agreement should be interpreted by always keeping in mind the parties' right to autonomy and the sanctity of contract. Reciprocal obligations are created in terms whereof the landlord undertakes to provide the tenant with beneficial occupation and the tenant undertakes to pay the rent.

The lockdown restrictions prevents one or both parties from fulfilling their obligations and this constitutes a *force majeure* event which is defined as *"an extraordinary event or circumstances beyond the control of the parties or an event described by the legal term 'Act of God' that prevents one or both parties from fulfilling their obligations under the contract"*.

Where the *force majeure* event is provided for contractually, the consequences stipulated in the contract will take precedence over the common law, as held in **Airports Company of SA Limited v BP Southern Africa (Pty) Limited**^[1]. This clause has become trade practice in South Africa and suspends the contract until the event ceases. The interpretation of this event however depends on the agreement concluded between the parties. Importantly, a party cannot unilaterally decide to cancel the agreement or renege on the terms thereof, but must prove that the event falls within the *force majeure* clause, as defined in the agreement.

The tenant must prove that the Covid-19 impossibility rendered it unable to perform in terms of the lease and that it does not have the financial ability pay the rental payments due, as a result of the lockdown. The court will consider the nature of the lease, the relationship between the parties, the circumstances of the case and the nature of the impossibility to determine the risk allocation, whether express or tacit, where the lease agreement contains a *force majeure* clause.

Where the lease agreement is silent on the effects of a *force majeure*, then the common law principle of supervening impossibility will govern the situation, if the tenant's use and enjoyment of the property is disturbed by a superior force over which the parties have no control. The landlord's obligation to provide beneficial occupation has become partially or wholly impossible and the tenant's reciprocal obligation to pay the rent is reduced or extinguished accordingly.

The party relying on this principle bears the onus of objectively proving that performance is impossible, not merely difficult or more costly, and that the occurrence was unavoidable, as held in **Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal**^[2]. Moreover, the tenant's loss of occupation must be substantial and a direct and immediate result of the *force majeure*, in which event the landlord is obliged to afford the tenant a substantial or complete rent remission for the duration of this period.

In the event that the parties' obligations are reciprocal, the innocent party is generally entitled to refuse performance and raise the *exceptio non adimpleti contractus*. The tenant will withhold payment of rent as a counter-performance, until the landlord has performed in full, by providing the tenant with undisturbed possession and occupation of the leased premises.

The *exceptio* can, however, not be raised where the landlord's failure to perform is excused by law, or where the tenant bears the risk of impossibility of performance. The lockdown regulations imposed in terms of the Disaster Management Act excuses the landlord's performance by law.

If the tenant acts unilaterally by withholding the payment of rental, utilities or storage, (also by raising the *exceptio*), the landlord may have a claim for unjustified enrichment (compensation for their performance) upon proving that the other contracting party was unjustifiably enriched in the circumstances. The parties will then have an obligation to return whatever was performed or benefitted under the contract.

CONCLUSION

Each case must be decided on its own merits. The interpretation of the lease and its clauses is pivotal to the enquiry of whether a tenant is entitled to a remission of rent. The blanket automatic granting of rental remissions should not be the norm under the lockdown restrictions and similarly, refusals not to pay rent or to engage on the issue should be avoided, as far as may be economically practical. Mass scale evictions based on breaches of the lease may, however, also not be appropriate. It is uncertain how courts will interpret the parties rights and reciprocal obligations under the lockdown.

Landlords are advised to engage with tenants on a case by case basis, by determining the rights available to each party under the specific lease agreement, the economic impact which the lockdown has had on the parties and the extent of the remission requested. The most commercially prudent advise would be for the parties to reach a mutually acceptable agreement.

[1] [2015] JOL 34127 (GJ)

[2] [2008] 3 All SA 255 (SCA) (27 March 2008), para 28



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