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Can Your Tenant Claim a Lockdown Rental Remission?

"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." (Extract from judgment below)

The Covid-19 pandemic and its associated lockdowns and restrictions have impacted negatively on many businesses, and there has been much uncertainty as to whether commercial tenants of leased property are entitled to claim a remission of rental if their trading activities are curtailed.

A recent High Court decision throws some light on this knotty question, and with the pandemic showing no signs of letting up, all commercial landlords and their tenants should be aware of it.

The steakhouse closed by lockdown regulations

- The Greenpoint Butcher Shop and Grill, a "well-known premium steakhouse restaurant", was forced to close during the "hard lockdown" period.

- Sued by its landlord for just under R3m in arrear rental, the tenant raised as one its defences that the lockdown regulations had closed its doors for the duration of the hard lockdown, with only reduced trading possible as restrictions thereafter eased. This had rendered it impossible for it to perform its obligations in terms of the lease, plus "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." The landlord, it said, had been unable to give it "beneficial occupation" and it was entitled to a remission of rental accordingly.

- The landlord replied that in terms of the lease, all amounts due had to be paid "free of deduction and set-off", the tenant's problems arising from the lockdown regulations did not excuse it from paying rental, and the full amount was still due.

- Before we get to the eventual outcome of this case (spoiler alert – it doesn't end well for our unhappy tenant) the Court's analysis of our law on the matter provides some useful and practical advice for both landlords and tenants.

Firstly, let's understand "the Latin bits"

Apologies for inflicting legalistic Latin terms on you but a basic understanding of these two is important for landlords and tenants, particularly as you may well come across them in the Ts and Cs of a lease in the context of "supervening impossibility of performance" –

- Vis maior (or vis major), means 'superior force … some force, power or agency which cannot be resisted or controlled by the ordinary individual'.

- Casus fortuitus, or "inevitable accident", is a type of vis major, which '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'.

When is rental remission allowed?

- Our law is 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".

- Thus the general rule is that, **unless the lease specifically provides otherwise**, a tenant can claim rental remission "where there is a deprivation of or lack of beneficial use or occupation …, 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".

- Critically, the Court in this case held that "**the COVID-19 regulations passed in terms of the Disaster Management Act would amount to vis maior or casus fortuitous**" (emphasis supplied).

- A tenant can set off a rental remission against the landlord's claim for non-payment of rental only "if it is capable of speedy and prompt ascertainment".

- Each matter must be considered in light of all the facts – "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 the provisions of the lease. This last is a critical point - the tenant's obligation to pay rental remains, 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**" (emphasis supplied).

Which brings us to…

The sub-tenancy that sank this tenant's defence

In the end however, the tenant was ordered to pay the full amount of rental outstanding.

Its problem was that it had effectively sub-let the premises to another legal entity. In a case of sub-lease, held the Court, the landlord's obligations are towards the tenant, not towards the sub-tenant. The steakhouse being a sub-tenant, it could not claim rental remission from the landlord. Neither could the tenant claim remission of rental because it was not itself in possession and control of the premises. An appeal against this aspect of the judgment is pending.

As an interesting side note (which could be of use to you if you are a sub-tenant or have sub-let to one) there is much discussion in the judgment around an old 1902 Transvaal Supreme Court (TSC) case. A hotel had been forced to close after the government of the time had prohibited the sale of liquor by hotels and bars, and it had re-opened only temporarily when forced to house military forces during the war. The TSC allowed rental remission even though a sub-lease was involved, apparently on the basis that the tenant and sub-tenant in that matter were "one and the same". In contrast, in our 2021 steakhouse case the tenant and sub-tenant were found to be totally separate legal entities, so the 1902 case was in the end of no help to the tenant. Nevertheless the principle has been established that in certain cases a sub-tenant may be able to argue for remission.

The Court's advice to commercial landlords and tenants

As the Court put it: "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."

Landlords - have your leases checked immediately to ensure that you are covered against any possible rental remission claims.

Tenants - you will want to negotiate any such clause to give you some leeway should disaster strike. Otherwise be ready to bear the consequences if the pandemic (or indeed any other unforeseen disaster) should suddenly force you to close your doors. Think also of tying this in with some form of business interruption insurance.