IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION/ MAFIKENG

CASE NO.: UM224/220

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

KAKAPA SKILLS DEVELOPMENT INSTITUDE CC Applicant

(Reg. No: 2[...])

And

THE TRUSTEES OF THE INDEPENDENT DEVELOPMENT TRUS (IN THEIR CAPACITY AS THE DULY APPOINTED TRUSTEES OF THE INDEPENDNAT DEVELOPMENT Respondent

(Trust Reg: IT No: 6[...])

JUDGMENT

MAKOTI AJ

INTRODUCTION

[1] This application was divided into 2 (two) fragments. Part A dealt with urgent interdictory relief that was aimed against the removal of the Respondent's movable properties from the Applicant's premises. This is Part B which is the application that is before me today. The urgent application came before me on **17 November 2020** when I dismissed the application for urgent interdict.

[2] The main relief sought by the Applicant is a declaratory to the effect that a lease agreement[1] that was concluded between the parties and its addendum that was executed on **28 June 2019** for a period of three years had not been validly terminated. The leased premises are situated at No. 4[...] J[...] Street, Mafikeng, North West Province (hereafter, *'the premises'*).

[3] The parties are *ad idem* about the existence and validity of the lease agreement. Also, they are in agreement that the Respondent sought to terminate the said lease agreement through a letter dated **14 August 2014**. It is the purported termination of the lease agreement that gave rise to this matter. The Respondent attributed the termination of the lease agreement to the lock-down caused by pandemic COVID-19. The allegation is that the Respondent is no longer able carry out its obligations in terms of the lease.

[4] As indicated, there is no dispute with regard the conclusion and validity of the lease agreement between the parties. What is at stake in this matter is the question whether the lease agreement was terminated or could be terminated by the Respondent on the grounds of *force majeure* indicated in its letter of **14 August 2020**. Parts of the letter explaining the reasons for the decision to terminate the lease agreement read:

> *"[3] Since the commencement of the ("National Lockdown") by the President of the Republic of South Africa on 26 March 2020, ADT has been severely or negatively affected by the lock down.*
>
> *[4] The aforementioned negative effect is slightly to continue for the foreseeable future and as a result of the aforementioned negative effect, ADT was forced to consider implementing a number of urgent measures to reduce costs to try to avoid job loses."* (Emphasis added)

---

[1] Agreement was concluded on 30 November 2016 and extended for a period of three years on 28 June 2019. The extended agreement is set to expire on 31 June 2022.

[5] There are two important facts that may be deduced from the paragraphs of the letter quoted above. The first is that the country's lock-down situation has had a negative effect on the Respondent's financial position. And the second is that the Respondent was forced to adopt austerity measures to salvage the situation, including opting out of leases in a number of provinces.

[6] It deserves emphasis that the position that was adopted by the Respondent was that, due to the pandemic and the national lock-down, a situation of *force majeure* was created and that it has been rendered incapable of fully meeting its contractual obligations towards the Applicant. Its option was to terminate the lease agreement. The Applicant considered the termination of the lease agreement as amounting to a repudiation, and rejected it.

ISSUES FOR DETERMINATION

[7] The first issue that this matter calls for determination relates to the question of *force majeure*. The question is whether, given what was expressed in the letter, the Respondent was justified to terminate the lease agreement. A party seeking to rely on *force majeure* to terminate or opt out of an agreement is required to prove an objective impossibility of performance.[2]

[8] Where provision is not made in a contract by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in in all cases of force majeure.

[9] In the case of **MV Snow Crystal Transnet t/a National Ports Authority v Owner of MV Snow Crystal**[3] the Court said the following:

---

2 MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) para 28.

3 Ibid.

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

[10] The provisions of paragraph 7 of the letter by the Respondent explained that it had become difficult for it to meet the terms of the lease agreement. What the Respondent expressed in this paragraph is not an impossibility of performance,[4] but just a difficulty. When then followed was that it resolved to introduce measures to bring its financial situation under control, which included terminating some of its lease agreements in select provinces. In other words, the Respondent elected to introduce what may be referred to as austerity measures caused by its challenging financial situation.

[11] In a bid to explain its financial difficulties, the Respondent mentioned that because it had not been operating during the period of level 5 and 4 of the lock-down, it has suffered significant financial loses which render it enable to continue for the foreseeable future. How the Respondent generates its revenue was not explained, though the legislation in terms of which the Respondent was established suggests that it derives funds from serving as an agent of State departments.[5]

---

4 Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

5 The IDT is a Schedule 2 state owned entity which manages the implementation and delivery of critically needed social infrastructure programmes on behalf of government. The organisation reports to the Minister of Public Works who is the Shareholder representative. The IDT National

[12] The explanations proffered by the Respondent were not accepted by the Applicant, which basically seeks to hold the Respondent to the terms of the lease agreement. In its letter dated **21 September 2020**, the Applicant made it known to the Respondent that the purported termination of the lease agreement amounts to a repudiation. As alluded to above, it then indicated to the Respondent that it did not accept the repudiation.

[13] What stands to be determined in this matter is the question whether the Respondent's termination of the lease agreement was justified and should be upheld. Before dealing with that question, it seems apposite to reflect on a technical point that was raised by the Respondent in the replying affidavit. In paragraph 2 (two) of the replying affidavit the Respondent took issue with the authority of the Respondent's Acting Senior Manager for Legal Services, one Tshepo Clifford Rapetsoa (*'Rapetsoa'*), who deposed to the answering affidavit on behalf of the Respondent.

[14] It is to be noted from the answering affidavit that the said Rapetsoa alleges that he has the requisite authority to depose to the answering affidavit and to oppose the application on behalf of the Respondent. Such authority, according to Rapetsoa, is derived from the fact that he sits in the position of Acting Senior Manager for Legal Services. To support of this allegation, Rapetsoa appended to the answering affidavit a document referred to as the Delegation of Authority Framework which authorises a Manager Legal for Services to sign Court papers and to oppose applications of this nature.

[15] The delegation of authority framework was last approved by the Respondent's Board of Trustees (*'Board'*) on **28 May 2014**. It thereafter became effective on **01 June 2014**. On the first page document it is indicated that it was to be reviewed by the Board after three years, on **01 April 2017**. There is no indication that the document was ever reviewed,

---

Office is located in South Africa's capital, Pretoria, and has regional offices in all of the country's nine provinces.

raising the question whether it is still applicable.

[16] As indicated above, the Delegations of Authority Framework provides that an Executive Manager responsible for Legal Services is authorised to sign legal documents such as affidavits, settlement agreements or any document that maybe used in Court, other statutory or legal forum, or in a tribunal.[6] It was on that basis that Rapetsoa signed the answering affidavit opposing the relief sought by the Applicant, and the authority to sign the affidavit is impugned.

[17] The problem with this document does not arise from the scope of powers or authority that is bestows various officials, but on whether it remains applicable. The wording of the delegation of authority is clear enough to indicate that a manager responsible for legal services, being the position currently held by Rapetsoa, is indeed authorised to depose to an affidavit and to represent the Respondent in any litigation. The Applicant has challenged Rapetsoa's reliance on the framework for authority to depose to the answering affidavit, and this is a difficulty that the Respondent is facing.

[18] On its face, it seems that this document encompassing delegation of authority to various persons was intended to operate for a period of 3 (three) years, after which it would be reviewed in order to be given new life span. The review did not take place, bringing to question whether this document can continue to be utilised in the manner that Rapetsoa sought to do. I am willing to accept, however, that the delegation of authority framework is still applicable and that Rapetsoa had the necessary authority to depose to the answering affidavit. I accordingly admit the answering affidavit and will determine this application with due consideration of the contents of that affidavit also.

[19] The Respondent is a State Owned Entity which is listed in Schedule 2 (two)

---

6 Paragraph 8.3.5.

of the Public Finance Management Act, 1999.[7] It reports to the Minister responsible for Public Works. The entity's main business or function is to manage the implementation and delivery of critically needed social infrastructure programmes on behalf of government. In the performance of its functions the Respondent issues grants for the construction of infrastructure for schools, clinics etc.

[20] The pleadings do not explain how the Respondent generates its revenue. Such information was simply not pleaded. The Court is left to speculate as to what the was the real cause of the Respondent's alleged inability to continue with the lease, and what impact did the lock-down have on its income generation. It was incumbent on the Respondent to plead such information so that the Court is enabled to determine whether the pleaded case of *force majeure* did indeed prevail. As indicated, onus rested on the Respondent to prove a supervening impossibility to perform in terms of the lease agreement.

PRINCIPLES OF FORCE MAJEURE

[21] Our legal authorities dictate that, to escape liability, the impossibility must be absolute or objective as opposed to relative or subjective.[8] Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation. Similarly, a change in financial position does not on its own constitute a force majeure, and may not extinguish contractual obligations. The Court in **Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd**[9] ('Unibank') held that:

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

---

7 Act No 1 of 1999.

8 Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC (18549/2015) [2016] ZAGPJHC 373 (29 July 2016) para 7. See also, Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W).

9 Ibid.

unaffordable." (Emphasis added)

[22] In this case the Respondent never suggested that it would be impossible to ever have sufficient income and to comply with the terms of the lease agreement. All what it said was that it was going to be difficult. In fact, the context of the Respondent's letter suggests that it would take some time for it to recover from the financial slump. This is exactly the situation which in terms of the authority in **Unibank** does not terminate the contractual obligations.

[23] The Respondent has not made out a case to be released from the terms of the lease agreement. In other words, a case for *force majeure* purportedly resulting from levels 5 and 4 lock-down simply does not exist. One may not contend that the Respondent is not facing some financial difficulty, but that alone does not establish a case of *force majeure*.

[24] The next issue is to determine if the contract contains a force majeure clause, in the absence of the common law principles will apply. When present in a contract, such clause essentially frees parties from liability or obligation when an extraordinary event or circumstance beyond their control arises.

[25] The lease agreement between the parties does not deal with the situation as expressed by the Respondent. This is because in terms of paragraph 15 of the lease agreement the parties may be released from liability only in the event where the leased premises are destroyed. Apart from that, the contract is completely silent as to what other circumstances may exonerates the parties from their respective contractual obligations. This presents another insurmountable difficulty for the Respondent.

[26] The Respondent is seeking to escape liability and has to show that there was no fault on its part.[10] It unilaterally chose to terminate the lease

---

[10] Grobbelaar N.O. v Bosch 1964 (3) SA 687 (ECD) at 691 D – E.

agreement. No one forced it to do so. It did this because it thought that this would present to it some financial relief from the situation that it alleged to be facing. But temporary impossibility, as the context of the Respondent's termination letter suggests, does not bring a contract to an end.[11]

[27] Because the lease agreement is silent on *force majeure* or no written contract is in place, the need arises to follow the stringent common law principles. Before a party can be excused from compliance with its contractual obligations, there are conditions to be fulfilled in order for an unexpected eventuality to trigger impossibility to perform. The conditions that have to be satisfied are the following:

[27.1] the impossibility must be objectively impossible;

[27.2] it must be absolute as opposed to probable;

[27.3] it must be absolute as opposed to relative, in other words if it relates to something that can in general be done, but the one party seeking to escape liability cannot personally perform, such party remains liable in contract;

[27.4] the impossibility must be unavoidable by reasonable person;

[27.5] it must not be the fault of either party; and

[27.6] the mere fact that the disaster or vent was foreseeable does not necessarily mean that it ought to have been foreseeable or that it is avoidable by a reasonable person.

[28] The onus rests on the Respondent, as a party wishing to be released from its contractual obligations, to proof impossibility of performance in terms of

---

11 World Leisure Holiday (Pty) Ltd v Georges 2002 (5) SA 531 (W) at 533 F – 534 G.

contract.[12] It has not, in my view, been able to show that it is truly unable or incapable of performing its contractual obligations. What it has rather stipulated in its letter is that it would be difficult for it to perform its obligations. As a mitigation of the difficulty, the Respondent then decided to close certain of its offices including one in the North West Province where at the leased premises are situated.

[29] The fact that the Respondent has lost certain of its revenue in, possibly, management fees for overseeing projects on behalf of its clients, does not mean that it has no other means of generating finances. As indicated earlier, the Respondent has not come forward to indicate the budgetary constraints for the Court to take into account when determining whether or not the Respondent is truly unable to continue with this lease agreement.

[30] It is also not clear as to the criteria that was used to close the Respondent's offices in select provinces whilst others are to continue operating. Although the Court is not entitled to instruct the Respondent as to which offices to close or to keep running, it is not to be taken for granted that simply because the Respondent has elected to close this particular leased premises, it did so on account of a situation of impossibility. Furthermore, it is not clear what other mitigation steps did the Respondent take other than to not add or increase salaries of its employees.

[31] On the full facts of this matter there can be no conclusion other than that the purported termination of the lease agreement by the Respondent, basing it on force majeure cannot be justified. This therefore means that the application must succeed.

COSTS

[32] A determination of costs is a matter that falls within the discretion of the Court, which discretion is to be judiciously applied. The default position is

---

[12] Dale Hutchison and Chris-James Pretorius (eds) in *The Law of Contract in South Africa* 2ed (Oxford University Press 2012).

usually that costs of litigation follow the suit, save in circumstances where the Court may find justification to deviate from this general principle. I find no reason for the costs in this matter not to follow the outcome. In the premises, the Respondent has to be ordered to pay the costs of this application.

ORDER

[33] The following orders are made:

a) The application succeeds.

b) It is hereby decaled that the lease agreement between the parties has not been terminated by the Respondent's purported termination on **14 August 2020**.

c) The Respondent is ordered to pay the costs of this application.

M Z MAKOTI
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

REPRESENTATIONS

DATE OF HEARING	**:**	**11 MARCH 2021**
DATE OF JUDGMENT	**:**	**20 MAY 2021**
For Applicant	**:**	**Adv J Klopper**
Instructed by	**:**	**Maree & Maree Attorneys Mahikeng**
For Respondent	**:**	**Adv T Ramatsekisa**
Instructed by	**:**	**Modiboa Attorneys In Klerksdorp**