THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 772/2021

In the matter between:

ROELOF LOUIS BARRY SLABBERT N O	**FIRST APPELLANT**
JORITHA WELMAN	**SECOND APPELLANT**
DIETER SCHUTTE LOCHNER N O	**THIRD APPELLANT**
HELEN RUTH KROES N O	**FOURTH APPELLANT**
(In their capacities as the duly appointed joint trustees of the Venezia Trust (IT 1817/96))	

and

MA-AFRIKA HOTELS (PTY) LTD T/A RIVIERBOS GUEST HOUSE	**RESPONDENT**

Neutral Citation:	*Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House* (772/2021) [2022] ZASCA 152 (04 November 2022)
Coram:	MOLEMELA, MAKGOKA and GORVEN JJA, and KGOELE and GOOSEN AJJA
Heard:	31 August 2022
Delivered:	04 November 2022

Summary: Contract Law – whether cancellation clause unfair or unreasonable – doctrine of *pacta sunt servanda.*

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (de Villiers AJ sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced with the following:

'2.1 The respondent is evicted from the premises known as Erf [....] Stellenbosch, situated at [....] H[....] Street, Stellenbosch, Western Cape.

2.2 The Applicant is authorised to have a writ of ejectment issued forthwith, in order for the eviction to be carried out by the Sheriff for the High Court, Stellenbosch or his deputy, assisted by the South African Police Service, if necessary, should the respondent fail to vacate the premises forthwith.

2.3 The respondent is ordered to pay the costs of Part A of the application.'

3. The cross appeal is upheld with costs.
4. The determination of Part B of the Application is remitted to the high court for adjudication.

JUDGMENT

Molemela JA (Makgoka and Gorven JJA and Kgoele and Goosen AJJA concurring)

Introduction

[1] This appeal concerns a dispute arising from a failure by Ma-Afrika Hotels (Pty) Ltd t/a Rivierbos Guest House (the respondent), to pay rental and related charges allegedly owing to the respondent, the Trustees of the Venezia Trust (the Trust), in terms of a lease agreement.

Factual Matrix

[2] The facts of this matter are largely undisputed. On 8 October 2018, the parties concluded a sale and leaseback agreement where the Trust purchased a certain erf in Stellenbosch (the property) for an amount of R15 500 000. The property was then leased back to the respondent to enable it to conduct the business of a guesthouse.

In addition to the leased premises, the respondent also trades in the hospitality industry from other premises. The lease agreement, which was envisaged in clause 18 of the Deed of Sale, was concluded on 12 February 2019. On the same day, the parties also agreed to the terms of an addendum to the lease agreement. The addendum, which allowed for the potential redevelopment of the property, is irrelevant for the purposes of this appeal. It was agreed that the lease would terminate ten years from the date of its commencement. In terms of the agreement, the permitted use of the property was as a guesthouse.

[3] The material terms of the lease agreement on which the Trust relies are:

'2. LEASE

The parties agreed that the Property is leased on a triple net basis and the Lessee will in addition to the rental be liable for all expenses, consumption, charges, taxes, Insurance, interior and exterior maintenance and any other cost related to the Property including the erf and the improvements forming part of it.

3. MONTHLY NET RENTAL

The Lessee shall pay a monthly net rental to the Lessor as indicated on the annexed schedule of payment marked Annexure "B"

4. PERIOD

4.1 The lease will commence on the first day of the month following the month during which the transfer of the property is registered in the name of the Lessor ("the Commencement Date") . . . The Lease shall endure ~~be~~ for a period of 10 (ten) years calculated from the Commencement Date.

4. PAYMENT OF AMOUNTS DUE

The Lessee shall pay without any deduction of setoff (for any reason whatsoever) the Monthly Net Rental as well as any increases in the monthly net rental and other amounts which may become due and payable in terms of this Lease, monthly in advance on or before the 1st day of each calendar month during the then ruling office hours of the Lessor, free of bank exchange and other charges, in South African currency, at the address of the Lessor stated below or such other address which the Lessor may from time to time notify the Lessee of in writing.

7. BREACH OF LEASE

7.1 Should the Lessee:

7.1.1 Fail to pay any amount owing by the Lessee in terms of this Lease on the due date thereof or –

. . .

7.2 In any of the abovementioned events the Lessor shall in addition to and without prejudice to all other rights available to the Lessor as a result thereof be entitled but not obliged notwithstanding and previous waiver or anything to the contrary herein contained either -

7.2.1 forthwith to cancel this Lease and to resume possession of the Property but without prejudice to its claim for arrears of rent and any other amount owing hereunder or for damages which it may have suffered by reason of the Lessee's breach of the Lease or of the premature cancellation in which case the Lessee shall pay to the Lessor over and above any rental and other monies which may be in arrears in terms of the Lease as at date of cancellation, the following amounts (if applicable).

. . .

12. PURPOSE FOR WHICH THE PROPERTY SHALL BE USED

12.1 The Property is let for the purpose of the Lessee carrying on business therein of a guest house trading as Rivierbos and for no other purpose without the written approval of the Lessor. The Lessee are will specifically not use the Property for any purpose that is not allowed in terms of the title deed, consent use and/or zoning of the property.

12.2 The Lessor does not warrant that the Property is fit for the purpose for which it is let or that the Lessee will be granted a licence for the conduct of his business on the Property or that any (sic) licence granted will be renewed, and the Lessor shall not be obliged to do any work or make any alterations or effect any repairs to the Property to comply with the requirements of any licensing authority.'

[4] It is common cause that on 15 March 2020, the advent of the Covid-19 pandemic caused the South African government to declare a National State of Disaster[1] in terms of s 15(1)*(aA)* read with s 23(8) of the Disaster Management Act, 57 of 2002 (the Act), with the Minister of Co-operative Governance and Traditional Affairs (the Minister) promulgating regulations in terms of the Act on 18 March 2020.

[1] This was published in Government Notice 312 of 15 March 2020.

Thereafter the Minister, acting in terms of s 27(2) of the Act, and as a further result of the Covid-19 pandemic, from time to time, made regulations embodying a national public health response to the Covid-19 pandemic (the Covid-19 regulations).

[5] On 23 March 2020, the President[2] announced a national 'lockdown' commencing on 26 March 2020 at 23h59. The 'lockdown' was defined as 'the restriction of movement of persons' during the period for which this regulation is in force and effect, namely from 23h59 on Thursday, 26 March 2020, until 23h59, 16 April 2020, and during which time the movement of persons is restricted. For that period, every person was confined to his or her place of residence except those performing an essential service, obtaining an essential good or service, collecting a social grant or seeking emergency, life-saving or chronic medical attention. Regulation 11B(1)*(b)* stipulated that all 'businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing, supply, or provision of an essential good or service'. The respondent's guest house business did not qualify as any business or entity involved in the manufacturing, supply, or provision of an essential good or service in terms of the regulations and was therefore prohibited from trading.

[6] The Covid-19 regulations were again amended on 26 March 2020 (in terms of Government Notice 419). Businesses and other entities, except for businesses or entities which were involved in the manufacturing, supply or provision of essential goods or services, were prohibited from operating, save for operations that were provided for outside of the Republic or could be provided remotely by a person from their normal place of residence. On 6 April 2020, the Covid-19 regulations were again amended (in terms of Government Notice 465), extending the period of the lockdown to 30 April 2020.

[7] On 29 April 2020, in Government Notice 480, new regulations were promulgated, repealing the original regulations. In terms of the new Covid-19 regulations, the Minister was empowered to declare various levels of restriction that would be applicable nationally or in a province, metropolitan area or district ('alert

[2] The President of the Republic of South Africa.

levels') to manage the Covid-19 pandemic during the national state of disaster. A five-level COVID-19 alert system was introduced to manage the gradual easing of the lockdown. That risk-adjusted approach was guided by several criteria, including the level of infections and rate of transmission, the capacity of health facilities, the extent of the implementation of public health interventions and the economic and social impact of continued restrictions. The following alert levels were declared:

11.1 Alert level 5 from 26 March 2020 to 30 April 2020;

11.2 Alert level 4 from 1 May 2020 to 31 May 2020;

11.3 Alert level 3 from 1 June 2020 to 17 August 2020;

11.4 Alert level 2 from 18 August 2020 to 20 September 2020;

11.5 Alert level 1 from 21 September 2020 to 7 December 2020.[3]

The operation of guest houses was permitted under alert level 2.

[8] On 22 February 2021, the Trust launched an urgent application against the respondent in the high court. In Part A of the Notice of Motion, the Trust essentially sought an order of ejectment in terms of which the respondent would be evicted from the premises in which the guesthouse was conducted, coupled with an order of costs. In Part B the Trust claimed arrear rental, interest thereon and costs.[4]

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[3] Different 'alert levels' entailed different levels of restriction upon movement of persons and the operation of businesses. 'Alert Level 1' indicated a low Covid -19 spread with a high health system readiness; 'Alert Level 2' indicated a moderate Covid -19 spread with a high health system readiness; 'Alert Level 3' indicated a moderate Covid -19 spread with a moderate health system readiness; 'Alert Level 4' indicated a moderate to a high Covid -19 spread with a low to moderate health system readiness; and 'Alert Level 5' indicated a high Covid -19 spread with a low health system readiness.

[4] The relief sought by the Trust followed was set out as follows in the notice of motion:

'**Part A**

1. That the forms and service provided in the Rules be dispensed with and that Part A of this application be heard as one of urgency in terms of Rule 6(22), in the FAST LANE of the THIRD DIVISION of the Honourable Court.
2. That the Respondent be evicted from the premises known as Erf 14144 Stellenbosch, situated at 1 Hannam Street, Stellenbosch, Western Cape ("the premises"), on a date to be determined by the Honourable Court.
3. That the Applicant be authorised to have a writ of ejectment issued forthwith, in order for the eviction to be carried out by the Sheriff for the High Court, Stellenbosch or his deputy, assisted by the South African Police Services, if necessary, should the Respondent fail to vacate the premises on the aforesaid date determined by the Honourable Court.
4. That the Respondent shall pay the costs of Part A of this application.
5. That such further and/or alternative relief be granted to the Applicant as the Honourable Court may deem fit.

Part B

6. The forms and service provided in the Rules be dispensed with and that Part B of this application be heard as one of urgency in terms of Rule 6(12), on the basis that, should it be opposed, Part B of this application be postponed for hearing on the **SEMI URGENT ROLL** of the **FOURTH DIVISION** of the Honourable Court.

[9] The Trust alleged that the respondent failed to pay the rentals provided for in the lease and that as of 31 December 2020 it was in arrears with its rental payments in the amount of R872 266.00. As a result, so the Trust averred, it was entitled to claim payment of the unpaid rentals without notice, cancel the lease in terms of clause 7.2.1 and compel the ejectment of the respondent from the premises. The Trust further asserted that between 1 March 2020, when the respondent's default commenced and 7 December 2020, when it issued a notice of cancellation of the lease, many discussions took place, and communications were exchanged between the parties in an attempt to resolve the matter amicably. This had been in vain.

[10] The high court dismissed the application for eviction.[5] It also ordered the respondent to pay the amount claimed as arrear rental with interest. Aggrieved by the order dismissing the application for eviction, the Trust sought and was granted leave to appeal that order. The high court also granted the respondent leave to cross-appeal the order directing it to pay the amount claimed plus interest. Before us, both parties agreed that the high court misdirected itself by considering Part B of the application, the hearing was limited to the issue of eviction. The central issue is whether the high court erred in dismissing the application for eviction.

The parties' contentions

[11] On behalf of the Trust, it was contended that given the fact that the lease in question contains the provisions that rentals are payable in advance without deduction whatsoever, the parties are bound by those terms and that defences such as reciprocity of performance are not competent.

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7. That the Respondent shall pay arrear rental of R872 266.98 to the Venezia Trust (IT 1817/96), represented by the Applicants.
8. That the Respondent shall pay interest, at the prescribed rate, to the Applicants, on the aforementioned amount, calculated from 1 January 2021 until date of final payment.
9. That the Respondent shall pay the costs of Part B of this application.'

[5] The high court granted the following order:
'27.1 The Respondent shall pay the arrear rental of R872 266.98 to the Venezia Trust (IT 1817/96);
27.2 The Respondent shall pay interest on the aforementioned amount at the prescribed interest rate calculated from the 1st of January 2021 to date of payment;
27.3 The remainder of the Applicant's (Venezia Trust) claims are dismissed.
28. In respect of costs, given the fact that the Applicants were only partially successful, the following order is made:
28.1 No order as to costs is made.'

[12] The respondent's primary defence was that due to the Covid-19 pandemic and the restrictions imposed by the government, it was impossible for it to perform its obligations in terms of the lease. It contended that under alert levels 5, 4 and 3 it was not permitted to operate its guest house business. Thus, from 18 August 2020, when alert level 2 was put in place until 20 September 2020, it was permitted to operate its guest house, subject to a restriction on the number of persons allowed to not more than 50 per cent of the available floor space, with patrons observing a distance of at least one and a half meters from each other. From 21 September 2020 to 7 December 2020 (the date the Trust purported to cancel the lease agreement), under alert level 1, it was permitted to operate its guest house at full capacity, with patrons observing a distance of at least one and a half meters from each other when in common spaces.

[13] The respondent alleged that over the period 1 April 2020 to 31 August 2020, it did not earn any revenue as its occupancy levels remained at zero. Although the respondent was permitted to operate under restricted circumstances from 18 August 2020, under alert level 2, no guests occupied the guest house, and it accordingly earned zero revenue over the period 18 to 31 August 2020. The respondent asserted that it achieved an occupancy rate of 8 percent for September 2020, 8 percent for October 2020, and 18 percent for November 2020. Historically, 47 percent of the respondent's guests are foreigners. The respondent averred that the prohibition on international travel to this country has severely affected the respondent's business. Its occupancy rate for December increased to 27.7 percent, mainly as a result of the lifting of the international air travel ban. While it continued to trade under restricted conditions, it remained totally exposed to the presence of the Covid-19 pandemic and the Government's response thereto.

[14] The respondent contended that due to its absolute or partial inability to trade on account of restrictions imposed by Covid-19 Regulations, it had no rental obligation towards the Trust for the months of April to August 2020. The total amount claimed from the respondent by the Trust for these months is the sum of R560 651.24. The respondent asserted that if this amount is deducted from the total allegedly owed on the date of cancellation, the balance was an amount of R332 555.47, which is less than the R403 503.85 which was paid over the relevant

period. As such, so the contention went, the respondent was not in arrears at the date of cancellation of the agreement; to the contrary, it was in effect in credit with the Trust in an amount of R70 948.38.

[15] In determining the application, the high court observed that the lease agreement did not contain a *vis major* provision. In addition, the high court expressed the view that a question that needed to be answered was whether the right to cancel the lease and claim eviction from the premises was also unaffected by the Trust's inability to perform. The high court found that the lease between the parties excluded reciprocity and that the respondent was obliged to persist in making the stipulated payments. It found that as of 31 January 2021, the respondent was indebted to the Trust in an amount of R872 266.98.

[16] In respect of the order of eviction, the high court found that it was not clear to what extent the effect of the regulations made in terms of the Act would have on the relief sought in Part A of the notice of motion. It accepted that the respondent was unable to perform its obligations to pay rentals during the various levels during the restrictive periods. It reasoned as follows on this aspect:

'[23] It may be that after payment of all the arrears, the Respondent shall institute a claim for a reduction or rather a repayment of rentals against the Trust. Without making any finding in this regard, the possibility remains that after a full ventilation of the issues by way of application or trial, it could be found that as a result of any impossibility, the Applicant was not entitled to cancel the lease. To my mind, the right to the remission of rentals and the right to cancel the agreement are two distinct rights.

[24] Whatever the circumstances may be, the possibility to fully trade and exploit the commercial potential of the premises were as a fact impaired (if not temporarily prevented), by the emergency regulations. I do not doubt that these circumstances would have made it impossible for the Respondent from properly, fully and timeously making the payments required in terms of the lease.

[25] In these circumstances, I find that the Trust, as a result of the Respondent's impossibility to perform in terms of the lease, could not invoke the provisions of clause 7.2 of the lease and summarily cancel the lease.

[26] In the light of this finding, it is not competent to evict the Respondent from the premises.'

[17] As stated before, the respondent contends that as a result of the Covid-19 regulations and its absolute inability to trade, it had no rental obligation towards the Trust for the months of April to 17 August 2020. In respect of the period 18 August 2020 to 7 December 2020, the date of the purported cancellation of the agreement, it claims there was a partial inability to pay. The Trust denies that the respondent had no beneficial occupation of the property at any stage. It contended that the respondent remained in possession of the property throughout the lockdown period and housed its computers in the building. The Trust also contended that clause 4 of the lease agreement altered the common law position and that the payment of rent was, therefore, not contingent on the Trust's prior performance.

Applicable legal principles

[18] As has been observed in a plethora of cases, a lease of immovable property is generally a reciprocal agreement between the lessor and the lessee in terms of which the lessor agrees to give the lessee the temporary use and enjoyment of the property in return for the payment of rent. The temporary use and enjoyment of the leased property is an essential ingredient of a lease.[6] Under the *exceptio non adimpleti contractus*, where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which it is entitled in terms of the lease, it can in appropriate circumstances be relieved of the obligation to pay rent, either in whole or in part.

[19] As authority for its stance that the *exceptio non adimpleti contractus* is not available to the respondent in this matter, the Trust relied on this Court's judgment in *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd (Baynes Fashions)*[7] as well as *Tudor Hotel and Brasserie and Bar (Pty) Limited v Hence Trade 15 (Pty) Limited (Tudor Hotel)*.[8] In *Baynes Fashions,* a dispute arose about

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[6] See AJ Kerr *The Law of Sale and Lease* 3 ed (2004) at 245 and WE Cooper *Landlord and Tenant* 2 ed (1994) at 2.
[7] *Baynes Fashions (Pty) Ltd t/a Gerani v Hyprop Investments (Pty) Ltd* 2005 JDR 1382 (SCA).
[8] *Tudor Hotel and Brasserie and Bar (Pty) Limited v Hence Trade 15 (Pty) Limited* [2017] JOL 38843 (SCA); [2017] ZASCA 111.

the entitlement of a lessee to withhold the rental payment or claim for losses to a business due to the lessor having interfered with the lessee's beneficial occupation by effecting building works on the property on which the leased premises were located. This Court acknowledged that the common law principle of reciprocity, which imposes reciprocal duties on the part of the lessor and lessee, and which underpins the *exceptio non adimpleti contractus*, would ordinarily entitle the lessee to claim a reduction of rent from the lessor for the deprivation of or interference with the former's beneficial occupation. It found, however, that a contrary intention appeared clearly from two clauses of that lease. One of the clauses stipulated that all rentals payable by the lessee in terms of the lease were to be paid 'monthly in advance without any deduction or set off'. Another clause (clause 24) stipulated that the tenant would not have any claim against the landlord 'by reason of any interference with his tenancy or his beneficial occupation of the premises' caused by repairs or building works. This Court found that the terms of the lease excluded the principle of reciprocity.

[20] In *Tudor Hotel*, this Court, relying on the principle laid down in *Baynes*, found that a lessee was not entitled to withhold rental on the basis of the exceptio *non adimpleti contractus* where the lease made it clear that the obligations were not reciprocal. It held as follows:

'[11] The agreement that the rent was payable 'monthly in advance' had the effect of altering the usual position, that in the absence of contractual provisions, rent is payable in arrear at the end of each period in the case of a periodical lease, after the lessor has fulfilled his obligation. The lease agreement therefore altered the reciprocal nature of the obligations of the lessor and the lessee. The obligation of the lessee to make payment of the rent was no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

[12] The application of the principle of reciprocity to contracts is a matter of interpretation. It has to be determined whether the obligations are contractually so closely linked that the principle applies. Put differently, in cases such as the present the question to be posed is whether reciprocity has been contractually excluded.

…

[17] The provision that the rental was to be paid 'on or before the first day of each month' had the effect that it was to be paid in advance by the appellant. The

obligation of the appellant to pay the rental was accordingly not reciprocal to the obligation of the respondent to provide beneficial occupation of the entire premises.' (Footnotes omitted.)

Discussion

[21] It is trite that where the performance of an obligation by a party to an agreement becomes impossible after the conclusion of the agreement, through no fault of its own, that party is discharged from liability if it was prevented from performing its obligation by *vis major*. On the respondent's version, the Covid-19 Regulations impaired its ability to fully trade and exploit the commercial potential of the premises and thus constituted *vis major*, thereby discharging it from the liability to pay rent during alert levels 4 and 5 and entitling it to partial payment of rental during alert levels 1 to 3. Regardless of the view that this Court may take of the defence raised by the respondent, the catastrophic effect of the Covid-19 pandemic on lives and livelihoods worldwide is indisputable, as this is attested to by various speeches made by the World Health Organisation. This Court is not oblivious to that impact. The justification for the promulgation of the Covid-19 Regulations in South Africa was aptly expressed as follows in *Santam Limited v Ma-Afrika Hotels (Pty) Ltd and Another*:[9]

'It is by now well-known that the Covid-19 pandemic has claimed the lives of millions of people worldwide. Governments throughout the world have taken measures to curb its effects. Our government, on 15 March 2020, responded by declaring a National State of Disaster in terms of s 27(1) of the Disaster Management Act 57 of 2002, with the responsible Minister, on 18 March 2020, promulgating regulations in terms of the Act. The National State of Disaster has since been extended from time to time, and the regulations promulgated in terms thereof have also undergone modifications to deal with prevailing conditions. In the main, the regulations contain measures designed to contain the spread of Covid-19 by curtailing movement and social interaction.'

Although made in the context of an indemnity insurance claim, these remarks are equally apposite in casu.

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[9] *Santam Limited v Ma-Afrika Hotels (Pty) Ltd and Another* [2021] ZASCA 141 para 10.

[22] Articulating the entitlement of a lessee to remission of rent in the face of *vis major* which impacts the beneficial occupation of the premises, this Court said the following in *Thompson v Scholtz*:[10]

'Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or casus fortuitus but also where it is due to the lessor's breach of contract, eg because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial . . . The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the *exceptio* [*non adimpleti contactus*], more particularly of the first proposition in *B K Tooling* [*B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)] (cf *Fourie NO en 'n Ander v Potgietersrus Stadsraad* 1987 (2) SA 921 (A)).'

[23] It bears mentioning that both parties cited the judgment of *Hansen, Schrader & Co v Kopelowitz (Hansen)*[11] as authority supporting their respective contentions. In that matter, the full court of the Supreme Court of the Transvaal (now known as the Gauteng Division of the High Court) recognised an entitlement to remission of rent in the face of a supervening impossibility of performance. It considered that remission of rent would be justified in circumstances where war prevented the lessee from subletting the property and customers from dealing with the lessee. It, however, held that to be entitled to remission of rent, a lessee's loss of beneficial occupation must be the direct and immediate result of the *vis major*, not merely indirectly or remotely connected therewith. It, therefore, refused to recognise a right to remission of rent merely because the lessee had suffered a loss because the country in which the leased property was situated was at war.

[24] The full court explained thus:

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[10] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 247A-D.
[11] *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707.

'If the lessee of a house leaves that house either through fear or prudence so as to escape the accidents of war or plague, he cannot bring an action for remission of rent. In this case *vis major* would not be the direct and immediate cause of his leaving the house. It was not a necessary effect of the outbreak of war that these particular bedrooms were not hired by persons. There were people in Johannesburg and bedrooms were occupied, only there were not enough people to occupy all the available bedrooms in the town. The war no doubt was the indirect cause of the dearth of tenants, and a heavy and continued fall in the market may also produce an exodus of people, and lessees of rooms may find themselves without sub-tenants, but the fall in stock will not be the direct, immediate and necessary cause of particular bedrooms not being let.'[12]

[25] For reasons that follow, I am of the view that it is not necessary for this Court to decide whether the restrictive regulations applicable during the period 26 March 2020 to 20 September 2020 constituted a supervening impossibility of performance that discharged the respondent from liability to pay the full amount of rental. At best for the respondent, *Hansen* may mean that the period during which the Covid-19 regulations prohibited or restricted trade (i.e. 26 March to 20 September 2020) is a direct and immediate cause of the inability to perform, thus comparable to the situation described as 'the first case' in *Hansen*, where the subletting of the property was unattainable as a direct result of the war. But the period after 20 September 2020 is on a different footing, as there was no government-imposed bar to trading at that stage. It stands to reason that even if it were to be accepted in the respondent's favour that the Covid-19 regulations which prevented or restricted trade were behind the respondent's default in the payment of rental, there was no justification for such default beyond 20 September 2020 despite the diminished commercial ability that may have resulted from the Covid 19 pandemic. As I see it, the doctrine of impossibility of performance could not conceivably have been triggered beyond 20 September 2020. I shall return to this aspect.

[26] Even on the acceptance for present purposes that the respondent was entitled to remission of rent during the period in which trade was prohibited or

[12] *Hansen* at 716.

restricted by the Covid-19 regulations, the inevitable question arising would be whether the respondent was entitled to withhold payment of rental based on its alleged entitlement to remission of rent. In *Ethekwini Metropolitan University (North Operational Entity) v Pilco Investments CC*,[13] this Court held that where remission of rent is applicable, a court must be approached for the computation of the remission if the amount of the remission is not promptly ascertainable. In such instances, the lessee may not simply deduct what it conceives to be an amount that represents the remission. The court said:

'Of course, because the plaintiff was, until early June 1997, deprived of the use of that portion of the property which was being used by the person making pre-cast fencing, the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property. If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.' (Footnotes omitted)

[27] Before us, both parties admitted that the amount of rent to be remitted, if remission of rent is applicable, is not promptly ascertainable given how the rental was structured. The only option would be for a court to determine the extent of the remission, if any. Given that the application was split into two parts, with the claim in respect of arrear rental being Part B of the application, it appears that the computation of the remission, if any, could be ascertained when Part B is adjudicated. It would appear therefore that the defence of the remission of rent is, as argued by the Trust, not competent in respect of Part A of the application.

[28] Notwithstanding all the aspects traversed earlier in this judgment, a fundamental difficulty for the respondent insofar as the relief for its eviction from the Trust's premises is this: clause 7.2.1 of the lease agreement entitles the Trust to 'forthwith cancel this lease and resume possession of the property' in the event of a failure to timeously pay the rental. According to the undisputed payment schedule attached to the papers, the respondent's last payment of rent was on 7 September

[13] *Ethekwini Metropolitan Unicity (North Operational Entity) v Pilco Investments CC* [2007] SCA 62; [2007] SCA 62 (RSA).

2020.Thus, even if the remission of rent for the period up to 20 September 2020 is factored in, the respondent was, at the date of the cancellation of the lease agreement, in arrears. On the computation that can be gleaned from the affidavits and the invoices filed, the arrear rental amounted to R43 847.11.

[29] It is plain that regardless of any considerations that could be made for remission of rent from April 2020 to September 2020 (on the acceptance that there was an impossibility of performance due to restrictions on trade), the respondent, in any event, failed to pay rent when it fell due on 1 October 2020, 1 November 2020 and 1 December 2020, thereby breaching clause 7.1.1 of the lease agreement. This entitled the Trust to cancel the lease agreement in the event of rent not being paid on due date. It was on the basis of that clause that the Trust cancelled the lease on 7 December 2020, pursuant to several warnings to the respondent about the Trust's intention to enforce its right pertaining to the payment of rent. Under these circumstances, the question raised for consideration by the high court, namely, whether the right to cancel the lease and claim eviction from the premises was unaffected by the Trust's alleged inability to perform (by providing beneficial occupation), simply does not arise.

[30] As regards the interpretation of clause 7.1.1 of the lease agreement, it is unnecessary to deal in any depth with the principles applicable to the interpretation of contracts; suffice it to state that the interpretation thereof is to be approached holistically, in other words, 'simultaneously considering the text, context and purpose'.[14] In considering clause 7.1.1 in the context of the parties' agreement, it must be borne in mind that the agreement in question is a triple net lease for commercial purposes, from which a business is conducted. Furthermore, it being a leaseback agreement, it was entered pursuant to the same parties having entered into a purchase and sale agreement in respect of the same premises, in circumstances where the payment of the purchase price was facilitated by registering a mortgage bond over the property. In terms of the lease agreement, the

[14] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC) para 65; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA); *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA);

respondent was not only liable to pay rental in advance but was also responsible for payment of the leased premises' rates and taxes, among other levies. Having considered all the relevant circumstances, I am unable to find any indication that the respondent's obligation to pay the rental was reciprocal to the obligation of the Trust to provide beneficial occupation of the entire premises.

[31] This Court in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (Mohamed Holdings)*[15] had occasion to deal with a dispute pertaining to the interpretation of a similar clause. As is the case in this matter, it was a material term of the lease concluded by the parties in that matter that should the lessee fail to pay the rental on the due date; then the lessor would be entitled to cancel the lease agreement and retake possession of the property. The business had been running for 35 years, and the lessee maintained regular and prompt payment during the lease period. It was common cause that the lessee had, apparently due to an error committed by its banker, failed to pay the rental when it was due. It failed to remedy the breach within the time stipulated, and the lessor cancelled the agreement and applied for the lessee's eviction from its premises. The high court had characterised the issue to be whether, in the circumstances of that case, the invocation of the cancellation clause was manifestly unreasonable and against public policy. It held that it was and dismissed the application for eviction.

[32] Before this Court, it was argued, inter alia, that the common law should be developed by interpreting the impugned clause through the prism of the spirit of the Constitution. And that the interpretation of that clause should be infused with good faith, ubuntu, and fairness, among others. The circumstances of the *Mohamed Holdings* case were, to a large extent, comparable to those in the present matter.[16] Having considered all the circumstances, this Court in *Mohamed Holdings* said:

'[30] The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There

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[15] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176; 2018 (2) SA 314 (SCA).

[16] These are set out in para 29 of that judgment.

is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question.

[31] The terms of the agreement made it clear that the appellant was entitled to enforce clause 20 in the event that the respondent fails to pay the rent on due date. A person who promised to pay rental on a certain date and upon failure to do so, faces the possibility of an eviction, cannot be heard to say he was not warned; he should remember his obligation. In this case the respondent was forewarned in June that any default in payment would result in the cancellation of the lease and possible eviction. This notwithstanding it failed to comply with its obligation.

[32] It must therefore bear the consequences of its agent's (bank) failure in paying the October rental on due date. Its defence was clearly to restrict the lawful reach of the contract and to limit what can be regulated by way of a contractual agreement between parties, in circumstances where the terms of the contract were clear and unambiguous. In this case the parties freely and with the requisite *animus contrahendi* agreed to negotiate in good faith and to conclude further substantive agreements which were renewed over a period of time. It would be untenable to relax the maxim *pacta sunt servanda* in this case because that would be tantamount to the court then making the agreement for the parties.'

[33] As was the case in *Mohamed Holdings*, the lessor in this case (the Trust) did not rush to evict the respondent. Correspondence was exchanged between the parties' attorneys for months, but the parties could not settle their differences. As mentioned earlier, this Court must also consider that the lease agreement is a triple net lease for commercial purposes, from which a business is conducted. Moreover, the considerations of fairness and good faith dictate that the hardships that the Trust had to endure due to non-payment of rent be taken into account. Sight cannot be lost of the fact that due to the respondent defaulting on the regular payment of the rental, the Trust ended up having to service the repayments of the mortgage bond from a loan to avert foreclosure. The circumstances of this matter oblige this Court to apply the same principle applied in *Mohamed Holdings* in this matter. Against that background, a proper interpretation of the parties' lease agreement leads to the ineluctable conclusion that the lease agreement was validly cancelled. It follows that

the Trust was entitled to evict the respondent from the leased premises. On this basis alone, the appeal ought to succeed. It is, therefore, not necessary to traverse the remainder of the arguments advanced on behalf of the respondent.

Cross appeal

[34] Both parties are agreed that the high court, in granting paragraphs 27.1, 27.2, and 28.1 of its order, erroneously pronounced itself in respect of the claim for arrear rental, which is relief falling under Part B of the orders sought in the notice of motion. This means that the ascertainment of the amount of remission of rental, if any, and its bearing on the amount of rent claimed are aspects that the high court will still need to determine under Part B. Accordingly, the parties agreed that the cross-appeal must succeed. I agree. In my view, the issues raised in the cross-appeal are not complex and therefore did not warrant the engagement of two counsel.

[35] For all these reasons, the following order is granted:

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced with the following:

‘2.1 The respondent is evicted from the premises known as Erf [....] Stellenbosch, situated at [....] H[....] Street, Stellenbosch, Western Cape.

2.2 The Applicant is authorised to have a writ of ejectment issued forthwith, in order for the eviction to be carried out by the Sheriff for the High Court, Stellenbosch or his deputy, assisted by the South African Police Service, if necessary, should the respondent fail to vacate the premises forthwith.

2.3 The respondent is ordered to pay the costs of Part A of the application.’

3. The cross appeal is upheld with costs.
4. The determination of Part B of the Application is remitted to the high court for adjudication.

M B Molemela

Judge of Appeal

Appearances

For appellants:	RB Engela
Instructed by:	De Klerk & van Gend Inc, Cape Town
	McIntyre Van Der Post Inc, Bloemfontein
For respondent:	G Elliott (with him G Samkange)
Instructed by:	Thomson Wilks, Cape Town
	Honey Attorneys, Bloemfontein