HARD LOCKDOWN AND COMMERCIAL TENANT-LANDORD OBLIGATIONS

Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and Another (2020/29927) [2021] ZAGPJHC 150 (25 August 2021)

Hard lockdown hit commercial tenants and their landlords without discriminating between the two. The court here was asked to find that a commercial landlord's cancellation of the lease was unlawful, due to the supervening impossibility, caused by lockdown, on the tenant's obligations. But the court warned that the answer has nuances, including that during hard lockdown both parties were prevented from performing, and that a continued failure to pay rental after the lifting of hard lockdown had to be addressed separately. It is a worthwhile read for commercial landlords and tenants.

The Judgment can be viewed here.

FACTS

Freestone Property Investment (Pty) Ltd ("Freestone") and Remake Consultants CC ("the CC") had entered into two commercial lease agreements in respect of premises owned by Freestone in a shopping mall. The CC traded from the leased premises in providing expertise in building, renovation and interior decoration.

In **November 2020**, Freestone cancelled the lease agreements due to the non-payment of rental and other charges.

Preceding this, a national state of disaster was declared on **15 March 2020** in terms of the Disaster Management Act, 2002 in response to the Covid-19 pandemic. At the time when the hard lockdown regulations (the period 15 March 2020 to 30 April 2020) were implemented, the CC had been trading from the premises.

The CC then ceased trading. However, although the hard lockdown ended on 30 April 2020, the CC only recommenced trading in **June or August 2020**.

In this matter, Freestone approached the court for an order ejecting the CC from the two commercial premises and for arrear rental and other charges. The CC defended the action, arguing that that the respective obligations of Freestone and itself, as landlord and tenant, were suspended for the period **March to June 2020**; and as a result, that Freestone was excused from tendering occupation of the premises and the CC was excused from paying rentals. The parties' respective obligations became incapable of performance because of supervening impossibility of performance as the declaration of the state of disaster with its associated regulations made it unlawful for both the lessor and the lessee to perform their obligations. So, it was argued, Freestone was not entitled to rentals for that period and was not entitled to terminate the lease agreements because of the CC's failure to pay those rentals.

The CC was in arrears with some R630K. Although there was some dispute regarding the precise period to which the arrears related, it was at least for the period **March to October 2020**.

HELD

- The arrears related to a period considerably beyond the hard lockdown period, i.e. 15 March to 30 April 2020 ('hard lockdown').
- The effect of the declaration of the state of disaster and its associated regulations on the lease agreements is addressed in the context of the doctrine of supervening impossibility of performance.

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The doctrine of supervening impossibility of performance

- If performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished. The doctrine is not absolute: For example, it may be overridden by the terms or the implications of the agreement in regard to which the defence is invoked, and it is also not available where the impossibility of performance is self-created.

- In the leading case of *Peters, Flamman & Co v Kokstad Municipality 1919* the appellant firm had contracted with the municipality to light the streets of Kokstad for twenty years. During the term of the contract, in war-time, the partners of the firm were interned as enemy subjects and their business wound up under the relevant war legislation. The liquidator terminated the agreement. The court had dismissed the municipality's subsequent claim for damages on the basis that the firm had been deprived by the State's war-time laws, of the power to carry out their obligations under the contract. As the contract had thus come to an end, there could *be no further breach thereof, and consequently no action would lie for damages for breach of contract*.

The doctrine in the context of the Covid regulations

- The defence of supervening impossibility of performance - in the context of the regulations passed pursuant to the state of disaster – must be seen from the perspective of both the lessor and lessee. (For example, in the *Peters, Flamman & Co* case, it was the firm that was unable to perform because its partners were interned as enemy subjects. The municipality remained willing and able to accept performance by the firm if the firm was able to perform. Similarly, in *Petersen v Tobiansky and Tobiansky* it was (only) one of the parties that was unable to perform. In that matter, the defendants were lessees of a store. The defendants were commandeered for military service as burghers of the then South African Republic. As the defendants had to report for military duty, they could not at the same time occupy the leased store. The court found that the defendants were prevented by *vis major* from occupying the leased premises and therefore were entitled to a remission of rent for the period that they could not take up occupation of the store. In that matter, the plaintiff as lessor was willing and able to continue to tender occupation of the store.)

- The implementation of the hard lockdown regulations gave rise to a more nuanced situation than where only one party is unable to perform. In fact, regulation 11B(1)(a)(i) at the time provided that for the period of the lockdown, *everyone was confined to his or her place of residence "unless strictly for the purposes of performing an essential service …*". Regulation 11B(1)(b) provided further that "all businesses … *shall cease operations, except for any business or entity involved in … an essential good or service*" during hard lockdown. It was further required that, subject to limited exceptions, retail shops and shopping malls had to stay closed.

  (The CC did not indicate exactly which regulations prevented the parties from performing their respective obligations under the lease agreements, but for purposes of the judgment it was assumed that it were the regulations that restricted the movement of persons.)

- Assuming in favour of the CC that:

  (i) Freestone was unable to conduct the trade of conducting a shopping centre and so was unable to tender lawful occupation of the leased premises; and

  (ii) the CC was unable to conduct the trade of providing expertise in building, renovation and interior decoration, and so unable to take up lawful occupation of the leased premises;

  the CC's predicament was that its landlord was in the same position as itself.

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- It would be over-simplistic to approach the predicament of parties to commercial lessees under the hard lockdown solely from the perspective that it was the tenants/lessees that were unable to perform. Lessors too may have been unable to perform.

- Rather, a more nuanced approach is called for - namely that a lessor's potential impossibility of performance in the form of being unable to tender lawful occupation must also be taken into account, alongside the lessee's inability to take up lawful occupation, irrespective of the lessee's commercial means. The terms of the lease agreement may also dictate the outcome, such as the lessee being required to pay rental in advance such as on the first day of the month, and before enjoying the applicable period of occupation corresponding to that rental payment.

Hard lockdown incapacitating both parties from performing their respective obligations

- From a more nuanced perspective, what can be said for the CC's reliance on supervening impossibility of performance caused by the 'hard lockdown' regulations on both its and the lessor's obligations to perform under the two lease agreements? The following: the CC cannot legally justify its failure to make payment of rentals and other charges for the protracted period of March to October 2020. Whatever restrictions there may have been that prevented Freestone and the CC from performing their respective obligations for the period of the hard lockdown until 30 April 2020, those restrictions did not persist until October 2020.

- From 1 May 2020, the lockdown regulations were progressively eased. Any supervening impossibility of performance did not endure for the entire period corresponding to the CC's non-payment of rentals. In *Hansen, Schrader and Co v Kopelowitz* our courts have already advised that there cannot be a remission of rent merely because the lessee had suffered a loss because the country in which the leased property was situated was at war. The court further found that the fact that a great number of people had left the country, so as to reduce the field from which the lessee could draw his custom, was also no ground for remission of rent, because the principle upon which the court grants the remission is that the *vis major* must be the direct and immediate cause of a lessee being deprived of the use of leased premises. It was said: *"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 premises 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 falling stock would not be the direct, immediate and necessary cause of particular bedrooms not being let."*

- Similarly in the present matter, the declaration of the state of disaster and the continued effect of the Covid 19 pandemic may have resulted in a dramatic decline of custom through the shopping centre in which the leased premises were situated, but did not afford a defence to the CC as lessee.

- The CC's decision not to open its doors for business after the regulations were eased sufficiently to legally permit it to recommence trading also does not constitute a defence. Its decision to keep its doors closed was not because the prevailing regulations prevented it from trading, and was thus not a direct consequence of a *force majeure*.

- Thus, whatever defence the CC may have that it was excused from paying rentals for the period of the 'hard lockdown', impossibility of performance did not relate to the <u>full period</u> for which it did not make payment. Freestone's cancellation of the lease agreements in November 2020 (based upon the CC's non-payment of arrears for a period that extended beyond when the regulations may have prevented the occupation of the premises) was lawful.

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CONCLUSION

Freestone was accordingly entitled to the ejectment of the CC from the two leased premises. (The decision on how to deal with the arrear rentals over the full period was referred.)

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