REMISSION OF RENT DUE TO COVID: REMEDY AVAILABLE FOR SUB-TENANT?

Trustees for the time being of the Bymyam Trust v Butcher Shop and Grill CC (11877/2020) [2021] ZAWCHC 240 (19 November 2021)

In our law, in specific instances, a tenant may claim remission of rental, in whole or in part, due to vis maior. However, would the lessee's claim for a remission succeed where it has sub-let the leased premises? The tenant here relied on a 1902 judgment to argue that it was entitled to rental remission from the landlord for its sub-tenant's losses resulting from the legislated lockdown.

The court found in the present matter that the 1902 judgment was distinguishable from the facts before it and was not authority that a lessee may withhold rental where the loss of use and enjoyment of the leased premises is that of the sub-lessee.

The Judgment can be viewed here.

FACTS

(The judgment dealt with many aspects of the relationship between the parties. For purposes of this publication, only the aspects relating to the lease agreement itself and the grounds for remission of rental are recorded.)

The Butcher Shop and Grill restaurant had been operating a restaurant as sublessee at premises in Green Point. The main lease agreement between the landlord and tenant was concluded in 2014. The entities of the lessee and subtenant were intertwined to some extent.

The restaurant occupied the bulk of the leased premises, at least 90% thereof. The premises also comprised a wine shop, butchery and deli.

Until March 2020, prior to the declaration of the national state of disaster, the tenant had paid the full rental and operational charges to the landlord timeously. However, for the period March to August 2020 and other extended periods where the restaurant business was prohibited from operating, the tenant denied that the full amount was due and owing. It continued to pay for ancillary charges for rates, taxes, utilities and the like in these periods.

On 23 June 2020, the landlord was informed that the tenant ceased the operation of its restaurant business on 26 March 2020 due to the government's imposition of the COVID-19 regulations and indicated that it would continue to do so dependent on amendments to those regulations. Furthermore, that as a result of the changed circumstances arising from legislative prohibitions, which made performance of its obligations impossible, it (the tenant) was excused from its contractual liability and obligation for as long as such regulations existed. In addition to the above, it was alleged that a supervening event made performance impossible and thus there was no beneficial use of the leased premises for the purpose for which it was intended.

The tenant's case was further that the closure of the restaurant was directly related to the regulations imposed and that the applicant was likewise precluded from providing beneficial occupation of the premises to the tenant. The tenant argued that it was entitled to a rental remission for the entire period for which the regulations prohibited its use of the leased premises because the COVID-19 pandemic and its concomitant regulations were examples of *vis maior* which made performance objectively impossible. The payment of part of the rental was tendered.

The landlord disagreed and stated that "beneficial occupation" was defined in the lease agreement as "the physical

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possession and control of the leased premises". As such, contending that it had provided beneficial occupation and that it was not required in terms of the lease to provide that the lessee must be able to trade and operate its commercial business from the premises.

HELD

(As stated above, the judgment dealt with many aspects of the relationship between the parties. For purposes of this publication, only the aspects relating to remission of rental are recorded.)

Remission of rental claim based on loss of beneficial occupation due to *vis maior/casus fortuitus*

- Our case law and common law principles can be summarised as follows:
    - a lessee is entitled to claim rental remission where there is a deprivation of or lack of beneficial use or occupation *commodus usus*), 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;
    - an act of legislation has been found to constitute *vis maior* and it thus follows that the COVID-19 regulations passed in terms of the Disaster Management Act would amount to *vis maior* or *casus fortuitous*;
    - the rental remission may be set off against the lessor's claim (for non-payment of rental) if it is capable of speedy and prompt ascertainment;
    - the landlord has the obligation to provide beneficial occupation of the leased premises to the lessee;
    - while the authorities recognize reciprocity between the two parties, where the rental is payable in arrears, the lessor's reciprocal obligation to provide beneficial occupation to the lessee may be affected; and
    - the lessee's obligation to pay rent in terms of the lease is not discharged (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.
- In addition, context should be added to these principles: Each matter where rental remission - due to *vis maior, casus fortuitus* or impossibility of performance as a result of the effect of the COVID-19 regulations - is claimed, must be considered within the context of the merits of the specific matter.
- The context would include consideration of 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, quite importantly, the terms of the parties' lease agreement. As to the latter, it is especially relevant whether or not provision was made in a lease agreement for the risk in the eventuality of *vis maior, casus fortuitus* or impossibility of performance. 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.

The position if it is a sub-lessee that is deprived of beneficial occupation?

- The above principles cannot be applied where the claim is from the lessor but it is the sub-lessee whose

beneficial occupation, loss or enjoyment of the leased premises is disturbed.

- Thus, in this matter it was the respondent (the lessee) that was not in occupation of the property. In principle, a lessee cannot avail itself of the common law claim for an abatement or remission of rent in circumstances where its use, enjoyment and beneficial occupation was not deprived or disturbed.

CONCLUSION

The lessee's lack of physical occupation of the leased premises and failure to prove on a balance of probabilities, a lack of beneficial occupation, had the result that it was not entitled to claim rental remission from the lessor.

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