

LEASES, REMISSION AND COVID: MURKY WATERS

Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House (772/2021) [2022] ZASCA 152 (4 November 2022)

This is yet another judgment dealing with the devastating effect that Covid and the lockdown provisions had on businesses. The hotel group, as tenant, failed to maintain the rental payments and the landlord validly cancelled the lease and was entitled to an order for the eviction of the tenant. Of note was the Court's confirmation that, as far as the hotel group's argument regarding its entitlement to remission of rent was concerned, even if it was found to be warranted, it is not for a tenant to decide the amount thereof and to withhold it. The parties must agree thereto or a Court must be asked to determine it.

In addition, and importantly, the Court re-iterated that when a lease agreement stipulates that rental is payable at the beginning of a month, this may be indicative of an intention of the parties to contract out of the principle of reciprocity that generally applies to lease agreements. This means that the obligation of the tenant to make payment of the rent is no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises. The result? A tenant can then not argue that because it did not have beneficial occupation of the property, it is not liable for rental.

The Judgment can be viewed [here](#).

FACTS

During October 2018, Ma-Afrika Hotels (Pty) Ltd t/a Rivierbos Guest House ('Ma-Afrika') and the Venezia Trust ('the Trust') concluded a sale and leaseback agreement in terms of which the Trust purchased a property in Stellenbosch for some R15,5 million, and the property was then leased back to Ma-Afrika to enable it to conduct a guesthouse from the premises.

The material terms of the agreement that is relevant here, are as follows:

"4. PAYMENT OF AMOUNTS DUE

The Lessee shall pay without any deduction of set-off (for any reason whatsoever) the Monthly Net Rental ... monthly in advance on or before the 1st day of each calendar month ...

...

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 the Lessor shall in addition to and without prejudice to all other rights available to the Lessor ...be entitled but not obliged ... 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 ...).

...

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.... "

On 15 March 2020 the advent of the Covid-19 pandemic caused the South African government to declare a National State of Disaster. Shortly thereafter, the President announced a national 'lockdown' commencing on 26 March 2020 at 23h59, which restricted movement of persons during the period to his or her place of residence, except those performing an essential service. The guest house business did not qualify as an essential service. The Covid-19

regulations were again amended from time to time thereafter, the prohibition on businesses to operate remaining in place. Towards the end of April, criteria for alert levels were issued as follows:

1. Alert level 5 from 26 March 2020 to 30 April 2020;
2. Alert level 4 from 1 May 2020 to 31 May 2020;
3. Alert level 3 from 1 June 2020 to 17 August 2020;
4. Alert level 2 from 18 August 2020 to 20 September 2020;
5. Alert level 1 from 21 September 2020 to 7 December 2020.

The operation of guest houses was permitted only under Alert level 2 and onwards.

Ma-Afrika was in arrears with the rental payment from 1 March 2020 to 7 December 2020, being the date on which the Trust cancelled the lease. As a result, in February 2021, the Trust launched an urgent application in the High Court for an order evicting Ma-Afrika from the premises and for payment of the arrear rental and costs.

The Trust asserted that it had in the default period issued a notice of cancellation of the lease and that subsequently many discussions took place and communications were exchanged, but the matter could not be resolved amicably.

The High Court dismissed the application for eviction but ordered Ma-Afrika to pay the arrear rental. Aggrieved by the order dismissing the application for eviction, the Trust appealed to the Supreme Court of Appeal.

The parties' contentions

- The Trust contended that, given the fact that the lease contained a provision that rental is payable in advance without deduction whatsoever, the parties were bound by those terms and that defences such as reciprocity of performance are not competent. The Trust stated that Ma-Afrika had beneficial occupation at all times and remained in possession throughout the lockdown period. The Trust contended that, as clause 4 of the lease agreement altered the common law position relating to reciprocity, payment of rental was not in any event contingent on the Trust's prior performance.
- Ma-Afrika's primary defence was that due to the Covid-19 pandemic and the restrictions imposed by the government 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 and that the rent obligation had to reflect this.

HELD

The rental issue

- A lease of immovable property is generally a reciprocal agreement between the lessor and the lessee: The lessor agrees to give the lessee the temporary use and enjoyment of the property in return for the payment of rent.
- 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.
- However, as the Trust argued correctly, our courts have held that the principle of reciprocity, which imposes reciprocal duties on the part of the lessor and lessee, and which underpins the *exceptio non adimpleti*

contractus, can be altered by agreement. For example, by including a clause that the rental must be paid 'monthly in advance without any deduction or set off', the principle of reciprocity can be excluded: The obligation of the lessee to make payment of the rent is then no longer reciprocal to the obligation of the lessor to grant beneficial occupation of the premises to the lessee.

Full or partial impossibility and remission of rent

- 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, either in whole or in part.
- It is not necessary in this matter 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 Ma-Afrika from liability to pay the full amount of rental.
- Nonetheless, at best for Ma-Afrika, there may be grounds for remission of rent for the period during which the Covid-19 regulations prohibited or restricted trade (i.e. 26 March to 20 September 2020). But the period after 20 September 2020 is on a different footing, as there was no government-imposed bar to trading at that stage. The doctrine of impossibility of performance could not have been triggered beyond 20 September 2020.
- This matter deals with the appeal regarding refusal to issue an eviction order.
- Even on the acceptance - for present purposes - that Ma-Afrika was entitled to remission of rent during the period in which trade was prohibited or restricted by the Covid-19 regulations, the question arising would be whether Ma-Afrika was entitled to withhold payment of rental based on its alleged entitlement to remission of rent. 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, as in this instance. A lessee may not simply deduct what it conceives to be an amount that represents the remission.

Eviction

- The fundamental difficulty for Ma-Afrika insofar as the relief for its eviction from the Trust's premises was this: clause 7.2.1 of the lease agreement entitled the Trust to 'forthwith cancel this lease and resume possession of the property' in the event of a failure to timeously pay the rental. Ma-Afrika's last payment of rent was on 7 September 2020 and it was, at the date of the cancellation of the lease agreement, in arrears.
- This entitled the Trust to cancel the lease agreement in the event of rent not being paid on due date, and reciprocity as argued, is not relevant in the circumstances.
- In considering clause 7.1.1 in the context of the parties' agreement, it must be borne in mind that the agreement in question was a triple net lease for commercial purposes, from which a business is conducted. (A triple net lease is a lease that absolves the landlord of risk of any net lease. The costs of structural maintenance and repairs are paid by the lessee in addition to rent, property taxes, and insurance premiums.)
- Furthermore, it was a commercial leaseback agreement, pursuant to the same parties having entered into a purchase and sale agreement in respect of the same premises. In terms of the lease agreement, Ma-Afrika 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. In these circumstances, it cannot be found that Ma-Afrika's obligation to pay the rental was reciprocal to the obligation of the Trust to provide beneficial occupation of the entire premises.

- The terms of the agreement made it clear that the Trust was entitled to enforce the terms thereof if rental was not paid on the due date.

CONCLUSION

The lease agreement was validly cancelled. It follows that the Trust was entitled to evict Ma-Afrika from the leased premises.