LEGAL MATTERS

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Legal update

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CAN YOUR TENANT CLAIM A LOCKDOWN RENTAL REMISSION?

"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." (Extract from judgment below)

The Covid-19 pandemic and its associated lockdowns and restrictions have impacted negatively on many businesses, and there has been much uncertainty as to whether commercial tenants of leased property are entitled to claim a remission of rental if their trading activities are curtailed.

A recent High Court decision throws some light on this knotty question, and with the pandemic showing no signs of letting up, all commercial landlords and their tenants should be aware of it.

The steakhouse closed by lockdown regulations

- The Greenpoint Butcher Shop and Grill, a well-known premium steakhouse restaurant, was forced to close during the hard lockdown period.

- Sued by its landlord for just under R3m in arrear rental, the tenant raised as one its defences that the lockdown regulations had closed its doors for the duration of the hard lockdown, with only

reduced trading possible as restrictions thereafter eased. This had rendered it impossible for it to perform its obligations in terms of the lease, plus a supervening event made performance impossible and thus there was thus no beneficial use of the leased premises for the purpose for which it was intended. The landlord, it said, had been unable to give it beneficial occupation and it was entitled to a remission of rental accordingly.

- The landlord replied that in terms of the lease, all amounts due had to be paid free of deduction and set-off, the tenant's problems arising from the lockdown regulations did not excuse it from paying rental, and the full amount was still due.

- Before we get to the eventual outcome of this case, the Court's analysis of our law on the matter provides some useful and practical advice for both landlords and tenants.

Firstly, let's understand "the Latin bits"

A basic understanding of these two terms is important for landlords and tenants, particularly as you may well come across them in the Ts and Cs of a lease in the context of supervening impossibility of performance.

- Vis maior (or vis major), means superior force … some force, power or agency which cannot be resisted or controlled by the ordinary individual.

- Casus fortuitus, or inevitable accident, is a type of vis major, which imports something exceptional, extraordinary, or unforeseen, and which human foresight cannot be expected to anticipate, or which, if it can be foreseen, cannot be avoided by the exercise of reasonable care or caution.

When is rental remission allowed?

- Our law is that a lessor's duty is to deliver the leased property in a proper condition and that the property is to be placed at the disposal of the lessee for its undisturbed use or enjoyment.
- Thus, the general rule is that, unless the lease specifically provides otherwise, a tenant can claim rental remission where there is a deprivation of or lack of beneficial use or occupation, 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.

- Critically, the Court in this case held that the COVID-19 regulations passed in terms of the Disaster Management Act would amount to vis maior or casus fortuitous.

- A tenant can set off a rental remission against the landlord's claim for non-payment of rental only if it is capable of speedy and prompt ascertainment.

- Each matter must be considered in light of all the facts – 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 the provisions of the lease. This last is a critical point - the tenant's obligation to pay rental remains, 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.

Which brings us to…

The sub-tenancy that sank this tenant's defence

In the end, however, the tenant was ordered to pay the full amount of rental outstanding. Its problem was that it had effectively sub-let the premises to another legal entity. In a case of sub-lease, held the Court, the landlord's obligations are towards the tenant, not towards the sub-tenant. The steakhouse being a sub-tenant, it could not claim rental remission from the landlord. Neither could the tenant claim remission of rental because it was not itself in possession and control of the premises. An appeal against this aspect of the judgment is pending.

There is much discussion in the judgment around an old 1902 Transvaal Supreme Court (TSC) case. A hotel had been forced to close after the government of the time had prohibited the sale of liquor by hotels and bars, and it had re-opened only temporarily when forced to house military forces during the war. The TSC allowed rental remission even though a sub-lease was involved, apparently on the basis that the tenant and sub-tenant in that matter were one and the same. In contrast, in our 2021 steakhouse case the tenant and sub-tenant were found to be totally separate legal entities, so the 1902 case was in the end of no help to the tenant. Nevertheless, the principle has been established that in certain cases a sub-tenant may be able to argue for remission.

The Court's advice to commercial landlords and tenants

As the Court put it: "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."

Landlords - have your leases checked immediately to ensure that you are covered against any possible rental remission claims.

Tenants - you will want to negotiate any such clause to give you some leeway should disaster strike. Otherwise, be ready to bear the consequences if the pandemic, or any other unforeseen disaster, should suddenly force you to close your doors. Also think of tying this in with some form of business interruption insurance.

DIRECTORS AT WAR: TERMINATING EMAIL ACCESS

"All is fair in love and war…and business is war." (Jasmine Kundra)

When company directors are locked in dispute, one of them may be tempted to cut off the other's access to emails and to the business server – a tactic likely to have immediate and serious consequences for the director thus cut off.

Its appeal as a tactic to force the other director to the negotiating table is obvious, but the question is whether the director thus deprived has any legal remedy available to force immediate restoration of access.

A recent Supreme Court of Appeal matter saw a director in that exact position trying to get his access back urgently with a spoliation order application.

"Cut off his email and server access"

When the two directors fell out, one (let's call him 'A') applied for liquidation of the company on the grounds of deadlock. Director B opposed this application, and, alleging that A had resigned his directorship, instructed the web hosting entity hosting the company's server and email addresses to cut off A's email and company network/server access with immediate effect.

A, denying hotly that he had resigned, immediately applied to court for a spoliation order restoring his email and server access to him.

Spoliation – A quick and effective way to get back possession, but only if...

- The spoliation process is designed to stop disputing parties from taking the law into their own hands and provides a quick and effective way of regaining possession of something if you have been wrongfully deprived of it. It's a quick and effective remedy because the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. In other words, you can get an immediate spoliation order without having to prove your right to possession of the thing – all you have to prove is the wrongful dispossession.

- So that would have been an ideal outcome for A, giving him immediate restoration of his access to his emails rather than having to fight his way slowly through a full trial proving his rights to email and server access. But it was not to be. His problem was that, in order get a spoliation order, one of the first things you must prove is that you were in peaceful and undisturbed possession of something.

- Now A would have been able to prove such possession if he had for example been wrongfully deprived of use of a company car or even of an incorporeal right to use property (such as quasi-possession of a right of access under a servitude). But he was unable to convince the Court that his email/server access fell into any such category.

- As the Court put it: "Thus only rights to use property, or incidents of occupation, will warrant a spoliation order." A's prior use of the email address and server was not an incident of possession of movable or immovable property, it is purely a personal right enforceable, if at all, against the company.

- In a nutshell, A must now prove his legal right to email and server access – perhaps he will be advised to apply for an ordinary interdict, perhaps he will sue for damages and/or re-instatement, but whichever course he chooses he will need to accept the inevitable delays. In other words, if B's tactic was to put immediate and substantial pressure on A in the short term it worked – at least for now.

Don't, however, take any action like this without professional advice. It could come back to bite you badly if it misfires

DIVORCE: CLAIMING INTERIM MAINTENANCE AND A CONTRIBUTION TO LEGAL COSTS

Even if your marriage is collapsing around you, you might be afraid to sue for divorce because you have no money to survive on, plus you know that a hotly contested divorce might take years to finalise while your breadwinner spouse fights you tooth and nail every step of the way.

How will you support yourself and your children until the case is finalised? How will you pay your lawyer to run the case for you? Must you wait for the end of the case before you see a cent?

Luckily the answer is "no" in that you have a relatively quick and simple remedy in the form of asking the court for interim relief in respect of:

- An order that your spouse pays you:
    - Maintenance (for children and / or for yourself) pending finalisation of the divorce

- A contribution towards your costs in the divorce proceedings

- Interim care of, and contact with, your children (if there is any dispute over this aspect)

You may well hear this form of relief referred to in High Court divorces as a Rule 43 application (or, if your divorce is in the Regional Court, as a Rule 58 application), whilst the technical term for the maintenance is maintenance pendente lite (maintenance pending the litigation).

At this stage, the Court isn't interested in recriminations, or blame-finding, or the itemised details of your and your spouses' financial positions. Those enquiries come later, during the actual divorce litigation. At this stage all it wants to know is how much you need, and how much your spouse can afford to pay.

A recent High Court judgment illustrates.

A "coy about his wealth" spouse ordered to pay up – now

- The warring spouses here are a senior banking executive and his wife, who qualified as a teacher but gave up that career to become a homemaker and mother to the couple's two children

- She asked the Hight Court for interim maintenance for herself and the children and for a contribution to her legal costs

- In assessing these requests, the Court laid out some of the general principles involved:

  - Unless the care and residence of children is involved the issues are straightforward, relating to "the applicant's reasonable needs, and the respondent's ability to meet those needs. The applicant's entitlement to maintenance must be assessed having regard to the standard of living enjoyed by the parties during the marriage." This should be "a simple and straightforward calculation of needs and means"

  - The aim is to avoid substantial prejudice to either party pending divorce. It is not to provide a precise account of what is due to or from either party, according to the parties' or the court's sense of morality, propriety, the blameworthiness of the parties' conduct during the marriage, or their habits of living after the separation. The case should be cast in practical rather than moralistic terms, and the emotional heat of a separation should be kept out of it.

How much money could you be awarded?

Every case will be different, but where the parties have, as in this case, enjoyed a high standard of living, the figures can be substantial.

Here for example the Court's awards were sizeable, commenting that the husband is coy about his wealth, but there is little doubt that he has a substantial income - just under R7m in the previous year - with considerable resources and an estimated net worth of just over R40 million. Moreover, the couple had enjoyed a very comfortable lifestyle together.

The end result is that the husband must pay substantially what his wife asked for in the form of R1.6m immediately and thereafter R108k p.m.

- The R88 701.69 p.m. for the wife and children's interim maintenance, plus school fees, extra mural activity costs, medical aid and medical costs

- Rental of up to R20]000 p.m., plus cost of utilities
- R of up to R20 000 p.m., plus cost of utilities
- R1 572 945.80 as a contribution towards the wife's interim legal costs

A VICTIM OF SEXUAL HARASSMENT MUST REPORT IT "IMMEDIATELY"

"…sexual harassment is a heinous and horrendous conduct since it undermines the dignity of women and the values enshrined in our Constitution." (Extract from judgment below)

Employers have a strong duty to provide a safe workplace for their employees, and to protect them from harm, including sexual harassment. An employer who fails in this faces claims for damages and compensation, but as a recent Labour Court judgment shows, the victim must first follow procedure correctly, and without delay.

Delayed reporting kills a claim

A female employee claimed a just and equitable compensation from her employer after she was sexually harassed by two male superiors.

Her claim failed, the Court finding that her reporting of the incidents to her employer (two years in one case and three in the other) were too delayed.

The correct procedure, and the required timing

The employee's claim was based on an allegation that her employer had contravened section 60 of the Employment Equity Act (EEA), which deems an employer guilty of a contravention and liable for the offending employee's conduct unless it takes the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act and is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

The Court set out the required steps by the victim as:

- Allege a contravention at the workplace
- Report the contravention immediately
- Prove the alleged contravention
- Allege and prove failure to take the necessary steps

The victim, this this case, had no trouble in proving that the incidents of sexual harassment had taken place, but she failed to convince the Court that she had brought the incidents to her employer's attention immediately, as required by the section. The Court referred to a previous decision of the Labour Appeal Court suggesting that the word "immediate" be given a sensible meaning. In that case a two-month delay in reporting was found to be acceptable as a "limited delay". However, the Court's comment that "In my view, a delay is an antithesis of the word as literally defined" is a clear warning to victims – report incidents to your employer without delay!

In any event, held the Court, the victim's delays in reporting meant she had failed to report immediately as required.

The Court was equally unimpressed with her suggestion that she had indeed reported the incidents to her employer in time by discussing them with colleagues and managers. That, held the Court, was not enough: "As I see it, to my mind, the reporting must be to an employer through the mechanism in its adopted policy." She had not done that, so there's another clear

lesson for victims there – make a formal report to the correct person/s in terms of your employer's policies.

Finally, said the Court, the employer had as soon as it received the reports, promptly investigated them and complied with its obligations in terms of the EEA.

Claiming from the offenders themselves

On a related note the Court mentioned that the victim would have a claim direct against the two employees who harassed her. Once again, however, time is of the essence for victims – quite apart from the risk of the claim prescribing, the earlier formal reports are made the greater the credibility likely to be given to them.

According to Joubert Galpin Searle Director and Labour Attorney, Leon van Staden, "The reported decisions suggest that it is in the best interest of victims of sexual harassment to report it to their employers without unreasonable and unjustified delays. By doing so, the victim's version of what transpired will not be questioned to the extent that it will be where unreasonable delays occur."

For any questions regarding sexual harassment in the workplace, please feel free to contact our Labour directors:

- Rowan Willcock - +27 41 396 9226 / rw@jgs.co.za
- Leon van Staden - +27 41 396 9223 / lvs@jgs.co.za
- Marco Boyens - +27 41 396 9255 / marcob@jgs.co.za

For more information, please feel free to contact our offices on +27 41 396 9200