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Supervening impossibility and lease agreements buildings

Legal Brief
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What are the respective rights of the parties to a lease agreement at the expiration of the lease term when the lessee does not return the immovable property to the lessor and raises the defence of impossibility due to its sub-lessee holding over. Is it competent to raise a legal defence of incapacity due to a supervening impossibility or waiting for due process of the law to evict the sub-lessee, and can a lessor still claim damages in respect of the immovable property?

It is a trite principle of our law that contractual obligations may be extinguished by supervening events that occur after the conclusion of the contract which qualifies as a legally permissible basis for discharging a party from performing its contractual obligations. This will justify the failure to comply with a legal obligation such as returning the leased immovable property to the lessor.

Solomon JA in *Peters, Flamman & Co v Kokstad Municipality*, 1919 AD 427, held that the two factors or circumstances that would excuse non-performance are a *vis major* and *casus fortuitous*, although not every vis major and *casus fortuitous* will excuse the non-performance. Furthermore, Scott JA, in *Transnet Ltd v The MV Snow Crystal* 2008 (4) SA 111 (SCA) held that, *"In each case it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'".*

The common law position as described in *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) 198 B-E is that for one to rely on the defence of supervening impossibility, the obligation must be objectively impossible due to unforeseen events, and not merely frustrated or subjective. Thus, if returning the property becomes subjectively or relatively impossible for the lessee, the obligation is not affected, so that, the fact that returning the immovable property has become difficult will not release the lessee of its obligation

to do so. Furthermore, as held by Centlivres CJ in *Rex v Canestra* [1951] 2 ALL SA 407 (A), the defence of impossibility of complying with a legal rule cannot succeed where the accused himself was the cause of his inability to comply.

More recently, Lewis ADP in *Trustees, Oregon Unit Trust v Beadica* 2019 (4) SA 517 (SCA), held that, the endorsement for breach or failure to comply with the terms of a contract agreed upon in the lease is disproportionate and alien to South African contract law, meaning that to recognise it would be to undermine the principle of legality itself.

Opperman J in *Atlantis Property Holdings CC v Atlantis Excel Service Station* CC 2019 (5) SA 443 (GP) emphasises the point that, if the language used in the clauses in the lease agreement were unambiguous and clear and the parties 'expressly and irrevocably' agreed to them, and to add on, if these are standard clauses commonly found in leases, the lessor should be entitled to rely on clause. Reading that together the judgement of Gamble J in Cloete v *Edel Investments (Pty) Ltd* 2019 (5) SA 486 (WCC) who held that, there is nothing in principle to prevent the claimant from being placed in the position it would have been in but for it having been deprived of that to which it was entitled, and therefore, there is nothing preventing the lessor from being entitled to claim any of the losses it suffered.

Taking into account foreign law, the court of appeal in *Kel Kim Corp v Central Markets, Inc*., 524 N.Y.S.2d 384, 385 (N.Y. 1987) where a tenant sought a declaratory judgement that he was excused from performing a term of the contract; the court reasoned that the doctrine is *"applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate risks that might affect performance and that performance should be excused only in extreme circumstances."* *It further held that such a doctrine applies "only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible."*

Vally J in *Frajenron (Pty) Ltd v Metcash Trading Limited and Others* [2019] JOL 46364 (GJ) held that the lessee must bear the consequence of its sub-lessee's conduct, as it was the risk bearer and not the lessor. Vally J went further to hold that had the lessee not sought out a sub-lessee it would not have lead itself into the unenviable position of breaching its contractual obligation of returning the immovable property to the lessor. Concluding that the lessee's impossibility was self-imposed in this regard.

The lessor in *Frajenron* had succeeded in an eviction application against the sub-lessee. Whilst the lessee, in support of its defence of impossibility argued that the delay caused by following the due process of the law, resulted in its failure to evict the sub-lessee. Vally J in this regard held that, the fact that the operation of the legal process sometimes fails to move with the speed that meets the interest of a party does not constitute impossibility of performance.

Vally J's findings were confirmed in the unreported judgment in the *Frajenron* appeal on 10 November 2020 in a judgment by Twala J, who held that the impossibility of performance was foreseeable and nevertheless, the lessee took the risk to sublet the immovable property. Twala J held further that nothing turned on the fact that the lessor consented to the sublease as the duty still rested on the lessee for the conduct of the sub-lessee. Twala J's findings with respect to the defence of waiting for the due process of the law was that, *"the fact that litigation has its own delays is of no moment in this case except that no action was taken timeously to prevent the impossibility of performance by the appellant when it had the means to do so."*

It is evident that the principle of supervening impossibility in our law and taking into account public policy, entails that a performance needs to be impossible for all time and for all persons, and would not apply due to the lessee's subjective inability to redeliver the immovable property to the lessor, which could have been foreseen and guarded against when it specifically undertook that obligation in the sublease. Neither can the lessee raise the defence of waiting for the due process of the law, as that does not constitute impossibility of performance.

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