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Property Services Team

Legal Update
5 May 2020

Our Cox Yeats Property Services Team is committed to keeping you informed on developing legal issues.

THE OBLIGATION TO PAY RENT : CONSEQUENCES OF COVID19 ON COMMERCIAL TENANTS AND LANDLORDS

The coronavirus ("Covid-19") has had a significant impact on society and on commerce in general the world over. During this time, many people have had to reconsider the contracts they have concluded. The South African government took extraordinary measures to ensure the safety of the public's health including, but not limited to, the declaration of a state of emergency in terms of the Disaster Management Act, 2002 ("the Act"), and the issuing of regulations which placed restrictions on the movement of people, largely confining them to their homes, instructing all retail shops to close and manufacturers to cease operations, except retail shops which traded in essential goods and services and manufacturers which manufactured goods required for essential services.

A question that frequently arose is what the impact of these measures would be on commercial leases concluded between commercial landlords and their tenants. Particularly pertinent is whether the measures taken by the state to safeguard public health would constitute an act which would allow a tenant to avoid paying rent, or claim a reduction in rent, for the period they were not able to fully utilize the leased premises. We recently issued a **Circular** dealing with some of the initiatives that the government was proposing to aid the property sector during this time and briefly discussing the impact that the declaration of a state of emergency would have on leases concluded between tenants and landlords. This circular seeks to focus on aspects of that circular in more detail and provide more general context on factors the courts will take into account when deciding whether it will allow a tenant to avoid paying rent, or claim a reduction in rent.

Generally, the courts prefer not to intervene and alter the obligations of parties to a lawful contract and only do so in very limited circumstances and in the least invasive manner possible. In all instances one would need to look at the restrictions placed on the parties by the regulations, and at the provisions of the lease, which will be key in determining the position.

In the context of leases generally, the obligation of a landlord is to provide uninterrupted use and enjoyment of the leased premises and its necessary amenities, such as water and electricity, to the tenant. The tenant's obligation is to pay the landlord rent and, depending on the terms of the lease, perform certain other duties. Section 11B(1) (b) and (c) of the

regulations issued in terms of section 27(1) of the Act specifically provided that all business and other entities were to cease operations during the lockdown period and that most retail shops and shopping malls were to close.

Vis Major

Where the commercial lease concluded between the parties contains a clause expressly dealing with events which constitute a Vis Major and casus fortuitus, a remission in rent could be claimed, subject to the terms of the lease. Vis major and casus fortuitus are latin terms for an irresistible force or unforeseeable accident. Generally, what is required is that the use and enjoyment of the property for the purposes for which it was let must be hindered or prevented by some event of vis major or casus fortuitus, without the default, actual or constructive, of either party.

Supervening impossibility

In the absence of a clause expressly dealing with events which constitute a Vis Major in the contract of lease, tenants can rely on the common law and could argue that the state's response to Covid-19 made it impossible during the period of the lockdown for tenants, who provide nonessential services, to lawfully access and make use of the leased premises together with their amenities, for the purposes provided for in the lease, namely trade and operations. This made it impossible for the tenant to fully utilise the premises that has been leased. This is known as the doctrine of supervening impossibility.

Generally, a contracting party seeking to rely on the doctrine of supervening impossibility must be able to show that the performance of the parties' contractual obligations is impossible as assessed by the courts. Importantly, the court will not grant an order based on an event causing supervening impossibility if the court deems the impossibility to have been created by the party seeking to rely on the doctrine to escape their liability in the lease.

The party relying on the impossibility must show that:

1. It took all reasonable steps to mitigate the effect of the event and the advent of a supervening impossibility to perform. In the instance of the state of the emergency declared due to Covid-19, the tenant needs to show they took reasonable steps to prevent harm caused to them due to the limitations occasioned by the declaration. The mere fact that fulfilling a contractual obligation has become uneconomical or substantially more burdensome by the parties does not mean that the performance of the act is regarded as impossible. Many tenants will be able to access certain infrastructure located on the lease premises, such as servers and other technology, remotely which would then enable the tenant to continue some or all of their operations remotely. However, the broad restrictions on movement occasioned by the Covid-19 regulations operate strictly to prevent various tenants engaged in nonessential work from accessing their leased premises and using the premises more generally to conduct business operations. In addition, the speed in which the Covid-19 regulations came into force resulted in many tenants being unable to access uneconomical or substantially more burdensome measures to access the lease premises and continue their operations.

2. The event that caused the performance to be impossible must have been foreign or reasonably unforeseeable and unavoidable with reasonable care. In this regard, it may be arguable that the intervention of the South African government to deal with Covid-19 which affects the operation of a lease, whether by legislation or by executive action, is such an occurrence. It makes no difference whether the government's act takes the form of legislation passed in the usual way or is in the nature of an emergency decree by the executive.

   The courts have held that there is no warning in the case of a change in the law. Any such change affecting the operation of a contract has the quality of an intervention from outside by a body which has no association with the subject matter

of the contract but whose expressed will is law and must be obeyed. The state's legislatures, whether supreme or subordinate, make laws on such subjects and in such terms as they deem fit and their acts are in a real sense unpredictable up to the moment when they are expressed in law. It cannot be said of the parties to a contract that they ought to have foreseen, or must be taken to have foreseen, a change in the law merely because laws can always be changed by the lawgiver; and it makes no difference if the legislation were of a type or kind that was well-known and might be expected to be introduced from time to time and in one form or another. In this regard the courts have made a distinction between acts that occur frequently by legislated decision makers exercising a narrow discretion, which occur from time to time and can be reasonably foreseen - such as a decision to refuse the grant of a trading license, and those that are extraordinary in nature. Such narrow and frequent acts are generally not considered to result in vis major and supervening impossibility. It is unlikely however, that the issuing of a state of emergency due to Covid-19 and the gazetting of the necessary declarations prohibiting movement, is an act which can be characterized as one arising frequently and that ought reasonably to have been foreseen by parties to a lease concluded prior to the declaration.

There are exceptions to the general rule and in each case the court will consider the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the party in question to determine whether the general rule ought to be applied, in the particular circumstances of the case.

In summary, in order to comply with the directives of the state in relation to Covid-19, many tenants are prohibited from accessing and using premises they have leased for purposes the parties to the lease anticipated. Accordingly, depending on the circumstances of the case and the particular terms of the lease, a tenant may have a strong case to call for a remission or reduction in the rental or a deferment of the rental. However, each situation and lease will need to be evaluated according to its own merits. What is clear is that both tenants and landlords must work together to try to deal with the changes occasioned by the state's response to the Covid-19 virus in a manner that is reasonable.

Cox Yeats Attorneys has a team of expert commercial and property lawyers that can assist any landlord and tenant who requires further legal advice on this issue.

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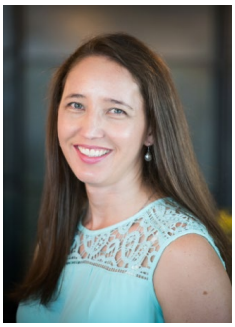

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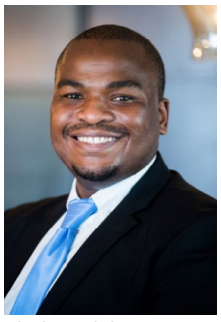

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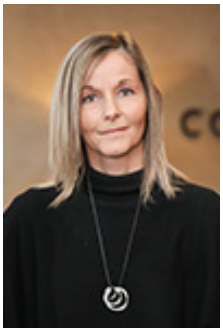

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