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REAL ESTATE ALERT



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'supervening impossibility of performance.'*

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CLIFFE DEKKER HOFMEYR

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A 'hard lockdown' on the timespan of 'supervening impossibility of performance.'

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On 25 August 2021, the Gauteng Local Division of the High Court delivered a judgment in the matter of *Freestone Property Investments Proprietary Limited v Remake Consultants CC and Another (2020/29927)* [2021] ZAGPJHC 150, which shone a judicial spotlight on these concepts and the application thereof on commercial lease agreements.

Freestone Property Investments Proprietary Limited (lessor) and Remake Consultants CC (lessee) concluded two lease agreements for commercial premises in a shopping centre.

In November 2020, the lessor terminated both lease agreements due to non-payment of the monthly rental and other charges from March 2020 to October 2020, and subsequently approached the court for a summary judgment for the lessee's ejection from the commercial premises and payment of the arrear rental and other charges.

The lessee's focal defence was founded on the doctrine of supervening impossibility of performance, claiming that, as a result of the lockdown measures implemented between March 2020 and June 2020, both the lessor's and the lessee's respective obligations under the lease agreements were suspended as the lessor was unable to tender lawful occupation of the leased premises to the lessee and the lessee was unable to lawfully occupy the leased premises. To this end, the lessee claimed that the lessor was not entitled to the monthly rentals for that period and was therefore not entitled to terminate the lease agreement due to the non-payment of the monthly rentals and other charges.



A 'hard lockdown' on the timespan of 'supervening impossibility of performance.'

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The application of the doctrine of supervening impossibility of performance must still be strictly applied to only that period of time when the performance of the respective parties' obligations under the lease agreements were impossible.

Determining supervening impossibility of performance

The court was primarily tasked with determining whether the doctrine of supervening impossibility of performance applied to this matter, and in doing so, highlighted several issues.

In March 2020, a "hard lockdown" was implemented during which all businesses (save for those involved in the manufacturing, supply or provision of an essential good or service) had to cease operations and every person was to be confined to his or her place of residence (save for those performing an essential service). The "hard lockdown" ended on 30 April 2020. However, the lessee only recommenced trading from the commercial premises in June or August 2020 and did not pay any monthly rental from March 2020 to October 2020.

The court highlighted that although the doctrine of supervening impossibility of performance may find application during the period of the "hard lockdown", it cannot serve as a defence for the period thereafter. The fact that the lessee chose to not reopen for business after it was legally permitted to do so did not constitute a defence. Even though there may have been a dramatic decline in foot traffic through the shopping centre, or trading may have become economically onerous, it is trite law that these factors do not constitute a *force majeure* event and cannot be relied on when applying the doctrine of supervening impossibility of performance.

The court further highlighted that even though the COVID-19 pandemic constitutes an extraordinary event that necessitates a more nuanced approach to matters, the application of the doctrine of supervening impossibility of performance must still be strictly applied to only that period of time when the performance of the respective parties' obligations under the lease agreements were impossible. It therefore stands to reason that although the lessee had an arguable defence in respect of at least a portion of the arrear rentals, this defence did not extend beyond the point that the lessee became entitled to recommence trading.

The court accordingly found that the lease agreements were lawfully terminated by the lessor and granted summary judgment for the ejection of the lessee from the leased premises, within one week of the court's order.

As the lessor did not provide sufficient detail pertaining to the amount of rental and other charges due during only the "hard lockdown", the court was unable to sever such amount from the arrears claimed, and accordingly granted the lessee leave to defend the lessor's claim for the payment of the arrears and related interest.

**Joloudi Badenhorst and
Muneerah Hercules.**

OUR TEAM

For more information about our Real Estate practice and services in South Africa and Kenya, please contact:



Muhammad Gattoo
Practice Head
Director
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com



Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com



Bronwyn Brown
Director
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com



Nayna Cara
Director
T +27 (0)11 562 1701
E nayna.cara@cdhlegal.com



Mike Collins
Director
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com



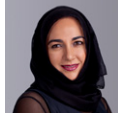
Werner de Waal
Director
T +27 (0)21 481 6435
E werner.dewaal@cdhlegal.com



Lucia Erasmus
Director
T +27 (0)11 562 1082
E lucia.erasmus@cdhlegal.com



Simone Franks
Director
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com



Fatima Gattoo
Director
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com



Andrew Heiberg
Director
T +27 (0)21 481 6317
E andrew.heiberg@cdhlegal.com



Simone Immelman
Director
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com



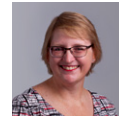
William Midgley
Director
T +27 (0)11 562 1390
E william.midgley@cdhlegal.com



Muriel Serfontein
Director
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com



John Webber
Director
T +27 (0)11 562 1444
E john.webber@cdhlegal.com



Natasha Fletcher
Senior Associate
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com



Marlene Heppes
Senior Associate
T +27 (0)11 562 1580
E marlene.heppes@cdhlegal.com



Samantha Kelly
Senior Associate
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com



Janke Strydom
Senior Associate
T +27 (0)11 562 1613
E janke.strydom@cdhlegal.com

OUR TEAM

For more information about our Real Estate practice and services in South Africa and Kenya, please contact:



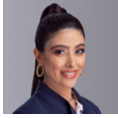
Joloudi Badenhorst
Associate
T +27 (0)11 562 1272
E joloudi.badenhorst@cdhlegal.com



Sune Kruger
Associate
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E peter.mutema@cdhlegal.com



Fatima Essa
Associate
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com



Lulama Lobola
Associate
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com



Bridget Witts-Hewinson
Associate
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com



Lutfiyya Kara
Associate
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com



Brian Muchiri
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E brian.muchiri@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

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KIETI LAW LLP, KENYA



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