It's all about the content of the lease

In April, SAPOA held a series of webinars on lease agreements, with Ben Groot, Director at GVS Law, as the convener. We spoke to him after the series

Ben Groot, Director at GVS Law

With the global pandemic impacting many industries in South Africa, and the country's resulting lockdown, many tenants are finding it difficult to trade, and are consequently seeking relief from their landlords.

While the lease agreement webinars' aim was to provide advice to landlords, the content also applied to tenants, with discussion centred around relevant lease clauses and the general principles of the law of contracts.

The general principle of the law of contracts

Groot outlined the principles of the law of contracts as it relates to the COVID-19 government-imposed lockdown that's currently in place.

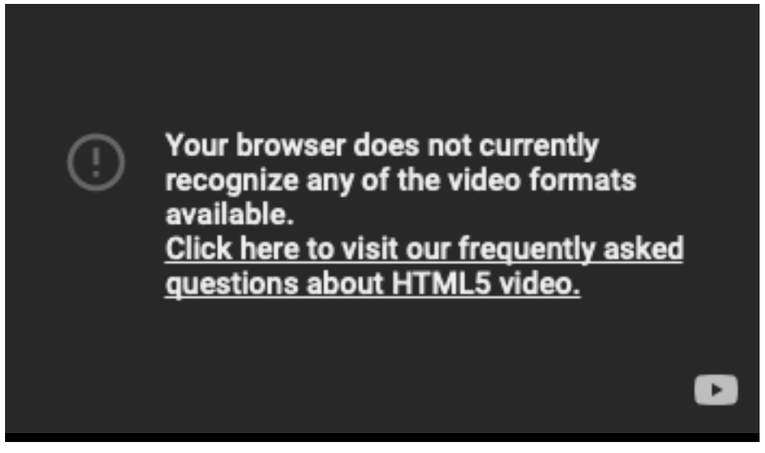
In general, whenever there is a case of supervening impossibility, a party to a contract who is negatively impacted as a result of that impossibility may be excused from performing in terms of that contract. In cases where a vis major (a superior power or force that cannot be resisted or controlled) is involved, a party will be excused from performing in terms of an agreement.

Casus fortuitus – which is an incidence of vis major – is defined as an exceptional or extraordinary occurrence that was not reasonably foreseeable. It has been held that plague is an example of casus fortuitus – and in Groot's view, the present COVID-19 outbreak is analogous, with the resulting government bans constituting vis major.

Where a tenant wishes to rely on vis major or casus fortuitus as a reason to be excused from having to perform in terms of an agreement, that tenant bears the onus to prove that it did not have beneficial occupation of the leased premises for the duration of the non-payment period.

Furthermore, the tenant has to prove that the occurrence was unforeseen and uncontrollable, and that it was the direct cause of its inability to perform. If the circumstances ought to have been foreseeable, in the specific circumstances of the specific tenant, no remission of rent will be granted.

Under the present circumstances, traditional court litigation might not necessarily be the answer to resolving disputes.



Watch Ben Groot discuss supervening impossibility.

It is important to note that the tenant's failure to have beneficial occupation of leased premises *must* be the direct and immediate result of the casus fortuitus.

Therefore, a tenant will only be entitled to claim a loss of beneficial occupation of leased premises due to casus fortuitus if the outbreak of disease itself led to the closure of business.

As an example, it has been held that a tenant who conducted a stationery business was not allowed a rent remission where war had caused a drop in trade, but that it would have been so entitled if war had prevented the customers from dealing with the tenant.

Alternative way to settle

When it comes to lease agreements, Groot has suggested that during the time of lockdown, it may be prudent to re-examine various clauses.

To put the situation into context, landlords are currently faced with many tenants already having refused – or having indicated that they intend to refuse – to make payment of rent and/or other lease charges specifically for April 2020, in light of the allegation that they have been deprived of beneficial occupation of their leased premises due to vis major and/or force majeure.

It is important to note that few of these tenants' lease agreements contain a clause allowing them to suspend their lease obligations due to force majeure.

In Groot's view, this failure to pay constitutes a breach of contract – and such a breach entitles the landlord to take the necessary legal action for the recovery of the amounts it believes are due and owing by the tenant.

Under the present circumstances, traditional court litigation might not necessarily be the answer to resolving these disputes. Some of the reasons include the following:

a) The courts are currently also in lockdown, and only certain specified urgent matters are being dealt with. These include family violence, the rights of children and bail applications. Commercial disputes are not included in the specified list of urgent matters.

b) Only once the state of disaster comes to an end will the courts return to their usual way of functioning. This may take some time – and even once it happens, Groot anticipates that the courts will be chaotic, with hearings to catch up on, actions that have piled up to be instituted, and everyone trying to get their case heard as soon as possible.

c) Litigation itself is generally a slow and expensive process. It can be accepted that, if action is instituted against these tenants, the matters will be defended – and it can then take between 18 months and two years for the matters to be finalised.

A better way?

As an alternative to the above, Groot suggests that serious consideration be given to referring the present disputes to arbitration.

It is important to note that a matter can only be referred to arbitration by agreement between the parties involved. In general, lease agreements contain arbitration clauses which state that all (or certain) disputes will be referred to arbitration – but that in the absence thereof, the parties may agree to refer a specific dispute to arbitration, once such a dispute has arisen.

In arbitration, the parties may choose their presiding officer – the arbitrator. Generally speaking, the lease agreement will specify the arbitrator's qualifications; these usually include that he or she must be an attorney, an advocate or a senior advocate with a certain number of years of experience.

The arbitrator usually has wide powers as to the conduct of the matter, and most often the agreement will state that the arbitrator will have the same powers as a judge of the High Court.

Whereas our taxes generally pay for the court buildings as well as the judges' salaries, in arbitration the parties pay the arbitrator's fee and other related costs. This tends to make arbitration more expensive than court litigation. The parties will likely share the initial costs of arbitration equally, with the arbitrator eventually making an award as to costs, usually in favour of the successful party. As a result, the successful party will be able to recover the costs it had already paid from the losing party.

What the parties lose in monetary terms, however, they gain in terms of time. Arbitration can usually take place much faster than litigation as the parties may agree on shorter time periods, and because the allocation of hearing dates is not contingent on a court diary. In addition, interlocutory matters are often dealt with via conference calls and/or after hours, in order to save further costs and time. And many arbitration clauses provide for the prompt resolution of the matter at hand: some of these clauses include the words "as expeditiously as possible", while others require the process to be completed within a period of between 21 and 30 days.

Arbitration awards do not set precedents, the way that judgments of the High Court do. Thus one arbitrator is not bound by the decision of another, although any prior awards may have persuasive power.

When the arbitrator issues an award, that award is binding on the parties – and, unless the parties have agreed otherwise, there is no right of appeal.

If the losing party does not comply with the order resulting from the arbitration, the winning party has to apply to court to make that award an order of court, whereafter normal execution steps may follow. This is usually not a long process.

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