

The impact of the COVID-19 regulations on rent obligations

Sue-Mari Viljoen

BComm (Law), LLB, LLD (University of Stellenbosch)

Associate Professor, Department of Private Law, University of the Western Cape

SUMMARY

The COVID-19 pandemic has led to the introduction of a range of regulatory measures, which has had a detrimental impact on the rights of South Africans, in general, and specifically the ability of commercial lessees to trade. A large number of commercial lessees were forced to close their businesses for lengthy periods of time, which effectively meant that they were deprived of the use and enjoyment of their leased premises. It is unclear whether such lessees, who have been either partly or absolutely deprived of the use of their premises, should continue to make rental payments. The common law is explored to cast light on this issue, taking account of the use of *force majeure* clauses and the operation of the lockdown measures as a form of *vis maior*. The common law position regarding *vis maior* and its impact on rent obligations is further considered with reference to regulatory measures that were specifically introduced to assist parties that were negatively affected due to the lockdown measures in the commercial rental sector.

1 Introduction

The COVID-19 pandemic has led to the introduction of a range of regulatory measures in South Africa. These regulatory measures, which are commonly known referred to as the COVID-19 lockdown measures, have placed severe restrictions on both individuals' rights and the ability of businesses to trade and/or carry on business within the country. In the landlord-tenant context, a significant percentage of lessees have been prohibited from engaging in everyday commerce. This has culminated in numerous lessees closing their businesses for lengthy periods of time. These lessees, under discussion, have been adversely affected by the COVID-19 lockdown measures due to the deprivation of all use and enjoyment of the leased premises which can be attributed to the lockdown measures implemented in the country.

The article sets out to determine the residual position in the case where a lessee is deprived of partial or complete use and enjoyment of a leased premises due to *vis maior*. This determination is undertaken subsequent to defining *vis maior*, with reference to the COVID-19 pandemic and the COVID-19 lockdown measures. The paper also considers the legal position where parties to a commercial lease included a *force majeure* clause, specifically, whether and in what circumstances such a clause can offer protection to either of the parties.

With reference to these common law principles, some newly introduced regulations – in addition to what might be considered “generous initiatives” that are construed to offer rent relief for lessees – are analysed to remark on the suitability thereof. Overall, the article finds that the residual position is geared to protect lessees in the event of *vis maior* by way of rent reductions, whereas a *force majeure* clause in the context of leases might be more inclined to protect lessors against overly burdensome rent restrictions. Regulatory measures that have been introduced to offer “rent relief” amid the lockdown should arguably be interpreted to rather urge ongoing negotiations between contracting parties to provide relief for both parties, instead of suggesting that such measures are necessary to offer relief for lessees. This latter interpretation is arguably misconstrued, because the common law offers wide-scale protection for lessees in the event of *vis maior* and regulatory impositions are generally not required to offer rent relief.

2 COVID-19 regulatory measures

The COVID-19 pandemic¹ has affected many countries globally, including South Africa. On 26 March 2020, all South Africans were compelled into a nation-wide lockdown² with the effect that numerous businesses had to close down, albeit temporarily awaiting further guidelines from the government; the majority of the country’s workforce were compelled to work from home; whilst a significant percentage of South Africans had to face pay cuts or job losses.³ The purpose of the lockdown was to ensure that the majority of South Africans would stay at home and refrain from interacting with each other. This is generally referred to as “social distancing” and it was implemented to prevent the uncontrollable spread of the virus. It should be stressed that the mere existence of the novel coronavirus, as well as the inevitable spreading thereof, was not the direct cause of these events, but rather the governmental decision to introduce a lockdown by way of the Disaster Management Act 57 of 2002 and subsequent, fact-specific regulatory measures.⁴ The initial lockdown measures limited individuals’ rights quite drastically and after which the measures were eased to allow for businesses to re-open in a gradual manner.⁵

1 COVID-19 is defined by the World Health Organization (WHO) as the infectious disease caused by the coronavirus, which emerged in Wuhan, China in December 2019: World Health Organization (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (2020-06-09)).

2 The lockdown was effectuated with the gazetting of GG 11062 of 2020-03-25, in terms of s 27(2) of the Disaster Management Act 57 of 2002.

3 See specifically the GG 11062 of 2020-03-25, read with Omarjee “Coronavirus: SA business alliance expects 1 million job losses, economy to contract by 10 %” *Fin24* (2020-04-14).

4 For instance, GG 11062 of 2020-03-25.

5 See for instance GG 43364 of 2020-05-28.

Overall, the closure of businesses and general loss of income for many South Africans has had a detrimental impact on lessees in both the commercial and residential landlord-tenant sectors. Roughly 32 per cent of all residential lessees were unable to pay their full rent in April 2020,⁶ whereas some lessees in the commercial sector simply ceased to pay their rents or opted to pay a remitted rent.⁷ The legal position for some retail tenants is specifically regulated in terms of the newly introduced COVID-19 Block Exemption for the Property Retail Sector, which was published by the Minister of Trade on 24 March 2020.⁸ The purpose of the regulation is to enable the property retail sector to minimise the detrimental impact of the lockdown in relation to their financial obligations.⁹ In terms of the regulations, retail tenants¹⁰ and retail landlords are allowed to enter into the following agreements:¹¹

- i. payment holidays and/or rent discounts for tenants;
- ii. limitations on the eviction of tenants; and
- iii. the adjustment of lease clauses that restrict retail tenants from undertaking measures that would protect their viability during the lockdown.

Moreover, to actively manage the impact of restrictions of trade, or even the forced closure of some businesses, the Property Industry Group (PI Group), consisting of the South African REIT Association, the South African Property Owners Association and the South African Council of Shopping Centres, on 6 April 2020, announced an industry-wide “relief package” for retail tenants.¹² The “relief package” focuses on small,

6 The impact of the COVID-19 lockdown on the residential landlord-tenant sector will not be explored further, simply because the lockdown does not impair residential lessees’ ability to use and enjoy their leased premises. The lockdown does therefore not constitute *vis maior* in the residential sector, at least not on a large enough scale to deliberate the impact thereof. Parties to residential leases should arguably negotiate terms and conditions to mitigate the impact of the lockdown on lessees’ ability to pay rent in such a way as to ensure that both parties’ financial interests are protected, in the long run. It is likely also prudent for residential lessors to rather keep lease agreements intact since the entire landlord-tenant market is under strain due to economic conditions. It might not be as straightforward for lessors to simply find new lessees as it used to be before the impact of COVID-19.

7 See specifically *Business Insider SA* “A third of tenants haven’t paid their full rent this month – and May could look much worse” (2020-04-21).

8 GG 43154 of 2020-03-24.

9 The regulations will remain intact for as long as the pandemic subsists as a national disaster (and declared as such in terms of the Disaster Management Act 57 of 2002) or until they are withdrawn by the Minister.

10 Designated tenants include (1) clothing, footwear and home textile retailers; (2) personal care services; and (3) restaurants: Annexure A to the regulations.

11 Agreements of this kind would usually be prohibited in terms of the Competition Act 89 of 1998.

12 The full statement is available at <https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf> (2020-06-29).

medium and micro enterprises (SMMEs).¹³ The PI Group has specifically offered increased and extended rent relief for most of the retail lessees, including Pepkor, Truworths and Woolworths (overall represented by the Clothing Retailer Group).¹⁴ Regardless of ongoing negotiations, these groups have failed to reach an agreement, after which the PI Group called on government to act as a mediator to resolve the impasse regarding retailers' obligations to pay rent during the COVID-19 lockdown.¹⁵

The purpose of the initiative, as offered by the PI Group, is to provide assistance and relief to SMMEs, as well as other large retailers that are either heavily affected by the trade restrictions or unable to trade during the lockdown. The type of assistance is mainly in the form of rent relief, although the essence of the announcement is to offer guidelines and support to landlords and tenants in order for them to reach amicable solutions that are economically sound. "The proposal allows landlords the flexibility and discretion to make an informed decision on the appropriate 'relief' offered to tenants, but also gives tenants an indication of what they can expect when entering into discussions with their landlords."¹⁶ In the press release statement from the PI Group, the following is stated in unequivocal terms:

"The initiative targets preserving jobs – for retailers, their suppliers and service providers. To qualify for the relief benefits, retail tenants will need to undertake not to retrench staff during the relief period. Significantly, the package stipulates that all tenants whose accounts were in good standing at 29 February 2020, can be assured that there will not be any evictions for the next two months ... For April and May 2020, retail landlords will offer relief in the form of rental discounts where rental will be waived partially or fully and interest-free rental deferrals where the deferred rental will be recovered later over six to nine months from 1 July 2020 onwards. Rental includes rent operating costs and parking rental but excludes all rates and taxes recoveries and utility cost recoveries, as well as insurance, which all tenant will be required to pay in full for April and May 2020."¹⁷

This "initiative" clearly assumes from the outright that the residual position is in favour of lessors and that lessees are generally expected to continue with their rental payments during the COVID-19 lockdown, regardless of the fact that the majority of commercial lessees, including lessees in the retail sector, were partially or completely deprived of the use and enjoyment of the leased premises as a direct result of the

13 A SMME is generally an entity that has an annual turnover of up to R80 million.

14 See specifically *BusinessTech* "South African landlords announce relief for retail tenants" (2020-04-08).

15 Naidoo "Property industry wants government mediation in retail rent dispute" (2020-04-28) *Moneyweb*. See also Wilson "SA's biggest clothing retailers and landlords don't see eye to eye on paying rent under lockdown" (2020-04-24) *Times Live*.

16 Krige & Rhoadie "Lease agreements and COVID-19" (2020-04-22) *Corporate & commercial and dispute resolution alert CDH* 1-6 6.

17 The full statement is available at <https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf> (2020-06-29).

lockdown measures. The ongoing debate between landlord-tenant groups as well as the introduction of various measures, such as the COVID-19 Block Exemption for the Property Retail Sector, call into question such sweeping assumptions as well as the aptness of such measures with reference to basic property and contract law principles.

The point of departure in all contractual agreements is that the parties should first consult the contract to determine whether a specific issue is already dealt with in the contract. Importantly, the impact of COVID-19 on lessees' rent obligations will be regulated by way of a *force majeure*¹⁸ clause as stipulated in the lease or,¹⁹ in the absence thereof, the residual rules of the South African common law will prevail.²⁰ A *force majeure* clause typically excuses the performance of contractual duties upon the occurrence of unforeseeable events, such as *vis maior*.²¹ Such a clause ensures that the failure by a party to abide by the terms of the agreement, due to *vis maior*, will not be regarded as a breach of contract. *Force majeure* is globally used to excuse contractual obligations "where causes beyond a party's control create an inability for a party to perform."²² A *force majeure* clause usually requires that the other party be notified in order to allow for the suspension of the relevant duty, after which the party will be relieved from having to perform such an obligation.²³ Importantly, a *force majeure* clause will not automatically entitle a lessee to a partial or complete rent remittal; the unforeseeable event must be adequately captured by the specific terms of the clause, which are usually construed strictly.²⁴ A *force majeure* clause is included in a contract for the parties to know exactly what types of occurrences, also known as acts of God, will amount to an impossibility to perform.²⁵ It should be stressed that if a *force majeure* clause does not specifically define the

18 *Force majeure* is generally defined as a supervening force: Sniffen "In the wake of the storm: Nonperformance of contract obligations resulting from a natural disaster" 2007 *Nova Law Review* 552.

19 If that is not the case, parties are generally advised to negotiate a settlement, although this is not compulsory: *BusinessTech* "What happens if you can't pay rent during lockdown?" (2020-04-08).

20 See part 3 below.

21 See part 3 below for a discussion of *vis maior*.

22 Sniffen 2007 *Nova Law Review* 554.

23 See *Joint Venture Between Aveng (Africa) Pty Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd* 2019 3 *All SA* 186 (GP) par 92 for an example of a typical *force majeure* clause.

24 Katsivela "Contracts: Force majeure concept or force majeure clauses?" 2007 *Uniform Law Review* 112.

25 Sniffen 2007 *Nova Law Review* 555. In US law, which is likely also the legal position in South African law, "when a devastating force majeure event occurs, the language in the contract is important to the parties trying to escape liability because not all delays causing nonperformance will be excused and the clause will inform a party as to whether the performance of obligations under the contract are suspended, delayed, or terminated all together": 558.

unforeseeable event, it will be interpreted narrowly and construed against the drafter.²⁶

“In both civil and common law jurisdictions, contracting parties are free to define the contours of force majeure clauses in their contracts and those contours dictate the application, effect and scope of force majeure. Indeed, if contracting parties have contemplated what constitutes a force majeure event and what its consequences may be, the courts will apply the logic of the parties and will not consider common law or civil law doctrines.”²⁷

The COVID-19 lockdown consists of the governmental decision to invoke the Disaster Management Act and introduce a range of regulatory measures that are intended to curb the spread of the novel coronavirus. One of the effects of this governmental decision is the restriction of trade, for many businesses, including commercial lessees. In order for a lessee to rely on a *force majeure* clause, to, for instance, argue that rent should be remitted during the period of the lockdown and for so long as she is unable to do business, she will have to prove that the *force majeure* clause was indeed drafted and included in the contract to allow for this form of relief due to the specific unforeseeable occurrence, namely the governmental decision to restrict trade – to temporarily shut down businesses – by way of legislative measures.²⁸ Where the *force majeure* clause does not specifically cover legislative interferences with the ability to do business, the clause will be interpreted narrowly. It should be stressed that a *force majeure* clause will not necessarily be drafted in such a way as to protect lessees. It is rather typical in landlord-tenant agreements for a *force majeure* clause to exclude the lessee’s claim for rent remission against the lessor as a result of an unforeseen event.²⁹ A clause of this kind may be contrary to public policy and therefore unenforceable if the burden imposed on the lessee is excessive.³⁰ Nevertheless, the inclination to phrase a *force majeure* clause to benefit lessors upon the occurrence of unforeseeable events calls into question the residual position; is the common law more inclined to protect lessees or rather lessors?

The subsequent section explores the concept of *vis maior* in the context of commercial leases to determine whether the COVID-19 lockdown regulations constitute *vis maior* and, if so, what the legal position of the parties would be if they failed to include a *force majeure* clause or if the clause does not cover the COVID-19 lockdown

26 Sniffen 2007 *Nova Law Review* 559. This is the legal position in US law and likely also South African law.

27 Katsivela 2007 *Uniform Law Review* 110.

28 It is highly unlikely for a force majeure clause, included in a commercial lease, to cover this type of occurrence.

29 Krige & Rhodie “Lease agreements and COVID-19” (2020-04-22) *Corporate & commercial and dispute resolution alert CDH 1-6 3*.

30 Krige & Rhodie “Lease agreements and COVID-19” (2020-04-22) *Corporate & commercial and dispute resolution alert CDH 1-6 3* mention clauses that prohibit deductions from rent, absolutely, as an example.

regulations.³¹ Even though the concepts of *vis maior* and *force majeure* are often used interchangeably, the latter is mostly used in the context of contractual agreements.³²

3 The impact of *vis maior* in landlord-tenant law

3.1 Defining *vis maior*

The subject matter of a lease agreement is the undertaking by a lessor to let the lessee use and enjoy property for an agreed period of time; this undertaking is known to be the subject and substance of a lease.³³ The lessor is also obliged to maintain the leased premises in a proper condition to the extent that it will remain suitable for the purpose for which it was let, throughout the term of the lease.³⁴ The lessee's *commodus usus*, which can be defined as the "snugness and benefit of his occupation"³⁵ can be disturbed by the lessor, a third party or the operation of natural forces (also termed *vis maior*, *vis divina* or "Act of God").³⁶ *Vis maior* occurs in the form of uncontrollable natural forces or disasters, for instance "earthquakes, floods, torrential storms, conflagrations or shipwrecks not caused by human intervention and 'to which human infirmity could offer no resistance'".³⁷ Contrarily, *vis maior* has also been defined as "some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only the acts of nature, *vis divina*, or 'act of God', but also the acts of man."³⁸ *Casus fortuitus*, on the other hand, is generally considered a species of *vis maior* and includes direct acts of nature, the violence of which cannot reasonably be foreseen or guarded against.³⁹

31 "Force majeure does not have its closed-enumerative legal definition and usually means unforeseen and unexpected event outside the control of the parties, which makes performance of the contract substantially impossible ... consequence of *force majeure* is exclusion of liability of a party for non-performance of the contract": Bortel "Vis maior (basic *ius commune* remarks)" 2004 *Acta Juridica Hungarica* 50. At 51 Bortel includes "governmental or judicial actions, epidemics or other abnormal natural events" as illustrations of *force majeure*.

32 The term *force majeure* can be used to describe an event, an occurrence or a legal concept: Sniffen 2007 *Nova Law Review* 552.

33 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC* 2005 ZAWCHC 88 par 45.

34 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 48.

35 *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 2 SA 738 (A) 748G-749A.

36 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 49. Another category is added as fortuitous or accidental circumstances (*casus fortuitus*), which is defined as an "inevitable accident": par 49-50.

37 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 51.

38 Du Bois et al *Wille's Principles of South African Law* (2007) 849.

39 *New Heriot Gold Mining Co Ltd v Union Government (Minister of S.A.R. & H)* 1916 AD 415 433.

Casus fortuitus is concerned with an exceptional, extraordinary, unforeseen event, which human foresight could not anticipate.⁴⁰

In the event of *vis maior*, which essentially gives rise to “impossibility of performance”, contractual commitments may be dismissed by operation of law.⁴¹ Stated differently, *vis maior* is generally considered to be an example of supervening impossibility, which has the effect of quenching a contract partly or completely.⁴² This is however not always the case and it remains necessary to carefully consider the contract, the relationship between the parties and the nature of the impossibility to determine whether performance should be excused.⁴³

In *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Limited*⁴⁴ the court held the following in the context of *vis maior* and the impact thereof on leases:

“The enjoyment of the property may be lost by *vis maior* affecting the tenant personally, or affecting the property itself. The tenant may himself be deprived of possession by being driven away by the incursion of a hostile army or through a well-grounded fear of a hostile invasion; or the use of the property may be hindered by landslip or flood; or the crops on the ground may be destroyed by a passing army, or by extraordinary heat or blight, or the ravages of birds or locusts ... I think that the principle to be gathered from the *Digest* is that there must be some cause acting directly either upon the lessee or upon the property itself, which prevents either totally or to a very great extent the enjoyment which the parties contemplated the lessee should have.”⁴⁵

Even more importantly, and specifically relevant to the impact of Covid-19 on leases, Wessels J decided the following in *North Western Hotel Ltd v Rolfes, Nebel & Co.*⁴⁶

“It is perfectly clear by the Roman-Dutch law ... that if a lessee has no beneficial occupation of the property leased either because the property has been completely destroyed, or destroyed to such an extent as to be useless for the purposes let, then the lessee can claim remission of rent. The same principle applies where the lessee has been driven out by *incursus hostium*, or by an irresistible power, or, as the law books express it, by *vis major*, *vis divina*, *damnum fatale*, or *casus fortuitus*. Now the expulsion of the lessee by

40 *Mountstephens and Collins v Ohlssohn's Cape Breweries* 1907 TH 56 59.

41 *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC supra* par 50.

42 Cooper *Landlord and tenant* (1994) 200. This was confirmed in the recent case of *Wilma Petru Kooij v Middleground Trading* 251 CC 2020 ZASCA 45 par 33.

43 *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal* 2008 3 All SA 255 (SCA).

44 1903 TH 286.

45 *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Limited supra* 292-293.

46 1902 TS 324.

any superior power is considered to be *vis major*, and the act of the sovereign power, whether *de jure* or *de facto*, falls under *casus fortuitus*.⁴⁷

In *Bayley v Harwood*⁴⁸ the then Appellate Division confirmed that “an act of legislation has the characteristic of *vis major* in that it cannot be resisted”.⁴⁹ What remains to be considered is the issue of whether the legislation in the given scenario ought to have been foreseen and guarded against by the affected party. Similarly, if a law has the effect of destroying the subject-matter of an agreement, the contract itself will cease to exist.⁵⁰ “The difference between supervening impossibility due to, among others, the destruction of the *merx* or failure of the intended source of supply, on the one hand, and supervening illegality, on the other, is one of substance and importance. The latter brings to the fore considerations of public policy.”⁵¹ In addition, the case law suggests that state action can in fact constitute *vis maior*, which can lead to an absolute impossibility of performance, resulting in the extinction of both the contract as well as the parties’ obligations.⁵²

The COVID-19 lockdown, consisting of the governmental decision to invoke the Disaster Management Act and introduce the range of restrictive legislative measures, can undoubtedly be defined as *vis maior*. With reference to the case law, and specifically *Bayley v Harwood*, acts of legislation, which would include supplementary regulatory measures, will amount to *vis maior*. In the context of commercial leases, the lockdown measures are the direct cause of lessees’ inability to trade; the measures prohibit trade, which prevents lessees from using and enjoying the leased premises for the purpose for which they were let.⁵³ It is also highly unlikely that parties to a commercial lease agreement will foresee and somehow guard against such restrictive legislative measures that effectively forbid trade, in most instances, absolutely.

3 2 Rent remission

The duty to pay rent is generally considered to be the lessee’s primary obligation,⁵⁴ although lessees are often entitled to a remission of rent, provided that such remission is authorised by law. The parties can also agree to restrict the lessee’s common law right to remission of rent and

47 *North Western Hotel Ltd v Rolfes, Nebel & Co supra* 331.

48 1954 3 SA 498 (AD).

49 *Bayley v Harwood supra* 510A. In this case, the lessee was effectively deprived of beneficial occupation of the leased premises due to an amendment to legislation governing the use of the property.

50 *Witwatersrand Township, Estate and Finance Corporation Ltd v Rand Water Board* 1907 TS 231 240-241.

51 *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1997 1 All SA 11 (A) 25.

52 *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG supra* 26. See specifically also *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd* 2013 ZASCA 91 (SCA) par 22-23 where the Supreme Court decided that a court order interdicting a development (due to the gazetting of a land claim) amounted to *vis maior*.

53 This is clearly not the case in the residential sector.

such a clause will be interpreted restrictively.⁵⁵ If a lessee's use and enjoyment of leased premises is disturbed due to *vis maior*, the general rule is that the lessee is entitled to a *pro rata* remission of rent, regardless of the fact that the lessor was not in breach of the contract.⁵⁶ Importantly, Naude points out that if the lessee derives no use and enjoyment from the leased property, he/she is entitled to a complete rent remittal.⁵⁷ Bradfield and Lehmann explain as follows:

“[I]f the lessor's obligation to protect the lessee in the use and enjoyment of the property let becomes wholly or partially impossible to perform, the lessee's reciprocal obligation to pay the rent is also extinguished or reduced. This is in accordance with the principles of the law of contract governing supervening impossibility of performance.”⁵⁸

In *Hansen, Schrader & Co v Kopelowitz*⁵⁹ the court held that a lessee is entitled to a remission of rent, wholly or in part, if his use and enjoyment of the property was impaired (completely or to a considerable extent) as a result of *vis maior*, provided that the unforeseen incidence was the direct cause of the lessee's diminished use. The lessee must prove that *vis maior* caused such diminished use.⁶⁰ The diminished use must also be direct and immediate due to the interference.⁶¹ The remitted rent amount can be set off against the lessor's claim for rent if the amount is ascertainable and the loss is substantial.⁶² If the amount is not ascertainable, the full rent amount should be paid after which the lessee can claim the remitted amount.⁶³ If the rent was paid in advance, the lessee can reclaim the remitted amount by way of the *condictio sine causa*.⁶⁴ Rent can generally not be remitted if the loss was caused by the

54 Bradfield & Lehmann *Principles of the law of sale and lease* (2013) 155. This duty is also reflected in s 4(5) of the Rental Housing Act 50 of 1999. The central obligation of the lessor is give the lessee undisturbed beneficial use and enjoyment of the leased property: Naude “The principle of reciprocity in continuous contracts like lease: What is and should be the role of the *exceptio non adimpleti contractus* (defence of the unfulfilled contract)?” 2016 *Stell LR* 323.

55 Viljoen *The law of landlord and tenant* (2016) 289.

56 Viljoen 189. Naude 2016 *Stell LR* 324 includes *casus fortuitus* as an occurrence that can justify a reduction of rent.

57 Naude 2016 *Stell LR* 324.

58 Bradfield & Lehmann 155.

59 1903 TS 707 718-719.

60 *New Heriot Gold Mining Co Ltd v Union Government (Minister of Railways and Harbours) supra* 438; *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal supra*.

61 *Hansen, Schrader & Co v Kopelowitz supra* 719; *Transnet Ltd t/a National Ports Authority v Owner of mv Snow Crystal supra*.

62 Kerr *The law of sale and lease* (2004) 350; Pothier (transl Mulligan) *Pothier's treatise on the contract of letting and hiring* (1953) par 156.

63 *Lester Investments (Pty) Ltd v Narshi* 1951 2 SA 464 (C) 468-469; *Bhima v Proes Street Properties (Pty) Ltd* 1956 1 SA 458 (T) 460.

64 *Holtshausen v Minnaar* (1905-1910) 10 HCG 50; *Hughes v Levy* 1907 TS 276. See also *Bayley v Harwood supra*.

lessee or if the lessee knowingly took the risk upon herself.⁶⁵ Importantly, parties can negotiate matters that concern remission of rent, although complex cases are generally interpreted in favour of the lessee.⁶⁶ The court also clarified that mere loss of income or custom due to *vis maior* will generally not entitle the lessee to remission of rent; instead, *vis maior* must be the direct cause of the lessee's deprived use of the leased property. If a lessee decides to vacate the leased property "through fear or prudence so as to escape the accidents of war or plague, he cannot bring an action for remission of rent."⁶⁷

In *Bayley v Harwood*⁶⁸ the Court held that, with reference to the specific circumstances, when leasehold conditions change due to *vis maior*, the following three possibilities emerge:

- i. if the change is "trifling" the lessee should generally not be allowed to claim remission of rent;
- ii. if the change is significant, but it does not justify termination of the lease, the lessee should be able to claim remission of rent proportionate to the diminished use; and
- iii. if the lessee is deprived of beneficial use and enjoyment to such an extent that the property cannot be used for the purpose for which it was let, the lessee should be able to withhold the full rent amount.⁶⁹

Where a lessee withholds the full rent amount when she was only entitled to withhold a reduced amount, the lessee will be in breach of contract.⁷⁰ However, Naude interprets *Botha v Rich*⁷¹ to imply the following:

"[I]f the lessee did pay a reduced rent, but erred somewhat on the proper extent of the justified reduction, it may be contrary to good faith for the lessor to exercise his or her right to cancel under a cancellation clause given a *bona fide* dispute on the exact extent of the reduction, which requires an imprecise estimation based on fairness."⁷²

A lessor should rather approach a court for a decision in the case where the parties agree that rent should be remitted, whilst they differ on the extent of the remittal. It is not clear whether the *exceptio non adimpleti contractus* ("the *exceptio*") would allow the lessee to withhold the full rent amount in the case where she enjoyed partial use of the leased property. In terms of the *exceptio*, such a lessee, who received partial use and enjoyment, would not be in breach of the contract if she withholds the

65 See specifically *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Capital Waste Paper Co (Pty) Ltd v Magnus Metals (Pty) Ltd* 1964 3 SA 286 (N) 289-290; *Morris v Mappin & Webb Ltd* 1903 TS 244.

66 Kerr 356-357.

67 *Hansen, Schrader & Co v Kopelowitz supra* 716, citing Troplong (*Louage* sec 226).

68 *supra*.

69 *Bayley v Harwood supra* 503A-G, 507H-508B.

70 Naude 2016 *Stell LR* 325.

71 2014 4 SA 124 (CC). The case recognised that a cancellation clause should be interpreted in line with principles of fairness and good faith.

72 Naude 2016 *Stell LR* 325.

full rent amount.⁷³ If the *exceptio* applies in such an instance, the lessor would be forced to approach a court and claim that it should exercise an equitable discretion to award a reduced rent to the lessor.⁷⁴ However, recent case law suggests that a lessee would not be permitted to withhold the full rent amount if her use and enjoyment was partially impaired due to the lessor's breach or acts of a third party.⁷⁵ Therefore, it seems that the *exceptio* would not be relevant in the case of partial deprivations in the context of lease.⁷⁶ Moreover, it seems that the *exceptio* is only available to a lessee as a means of enforcing the lessor's counter performance.⁷⁷

Naude suggests two approaches with reference to the application of the *exceptio* in the context of lease, the first entails that the remitted rent must be proportionate to the diminished use (the full rent amount cannot be withheld in the case where the lessee's use was partially impaired), whereas the second allows "the lessee who received partial use to withhold the full rent until the lessor restores full use and enjoyment."⁷⁸ The latter approach captures the essence of the *exceptio*, which is essentially an enforcement mechanism in the context of reciprocal agreements.⁷⁹ Furthermore, the operation of the *exceptio* should still be reasonable in the circumstances and reflect concepts of good faith and fairness.⁸⁰ It is doubtful whether the *exceptio* should be available to the lessee to withhold the full rent amount where a lessee's use and enjoyment is impaired without any fault of the lessor. Naude argues that it would be contrary to good faith if a lessee raises the *exceptio* in a case where proper performance by the lessor is no longer possible.⁸¹ Arguably, the same argument should hold where the lessor never

73 Naude 2016 *Stell LR* 325. In support of this view, see specifically Sharrock *Business transactions law* (2011) 325-326.

74 Naude 2016 *Stell LR* 326, referring to *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

75 *Ethekwini Metropolitan Unicity Municipality (North Operational Entity) v Pilco Investments CC* 2007 ZASCA 62 (SCA) par 22; *Loch Logan Waterfront (Pty) Ltd v Carwash 4U (Pty) Ltd* 2012 ZAFSHC 32 par 18; *Thompson v Scholtz* 1999 1 SA 232 (SCA) 247.

76 Naude 2016 *Stell LR* 331, referring to *Thompson v Scholtz supra*. This was also confirmed in *Dormell Properties 282 BK v Edulyn (Edms) Bpk* 2012 ZAWCHC 244 par 17. In support of this view, see specifically Du Bois et al 916; Knoetze "The lessee's right to use and enjoy the leased premises" 1997 *Obiter* 116; Piek & Kleyn "'n Huurder se aanspraak op vermindering van huurgeld terwyl hy in besit van die huursaak is" 1983 *THRHR* 382; Cooper 105. Contrarily, see Lubbe "A system in search of a lost cause: Reflections on the principle of reciprocity in South African contract law" in Dirix, Stijns, Pintens & Senaevae (eds) *Liber Amicorum Jacque Herbots* (2002) 221.

77 *Ntshiqqa v Andreas Supermarket* 1997 3 SA 60 (Tks) 67H-I; *Thompson v Scholtz supra* 244. See also Lubbe 221; Naude 2016 *Stell LR* 335-336.

78 Naude 2016 *Stell LR* 335.

79 Naude 2016 *Stell LR* 344 points out that "the *exceptio* should only be used as an enforcement mechanism where the aggrieved party seeks to uphold the contract and proper performance remains possible."

80 Naude 2016 *Stell LR* 343.

81 Naude 2016 *Stell LR* 351.

breached the agreement. The *exceptio* should therefore not be available to lessees during the COVID-19 lockdown to withhold the full rent where they had partial use, because the lessees' impaired ability to trade cannot be attributed to any fault of the lessors. The essence of the *exceptio*, which operates as an enforcement mechanism, is consequently unfounded in the case of *vis maior*.

Interestingly, Kerr mentions that it is not entirely clear what the position is when the lessee can physically take occupation of the premises let, although *vis maior* obstructs the use of the premises for the purpose for which they were let.⁸² With reference to case law he argues that in such an instance rent should be remitted from the date on which *vis maior* took effect; if the lessee took occupation an amount of rent should be paid, proportionate to the utilisation of the premises.⁸³ *Vis maior*, which is a form of supervening impossibility of performance, terminates a contract or suspends some or all of the obligations of the parties, by operation of law.⁸⁴ However, Ramsden explains that temporary impossibility of performance suspends a party's duty to perform if he is temporarily disabled from carrying it out. In such an instance, the party is neither in default of performance, nor is he guilty of breach of contract.⁸⁵ "Temporary impossibility neither terminates an obligation nor gives rise to a right to terminate an obligation. It merely suspends the duty to perform the obligation thus rendered temporarily impossible, while the impossibility continues."⁸⁶ Due to the fact that leases are reciprocal agreements, the party deprived of the benefit of performance can withhold counter performance. Upon termination of the interim impossibility of performance, the parties should examine the situation to determine whether the original obligation can still be performed in full or in part.⁸⁷ If the original obligation cannot be performed, at all, the previous impossibility will have become absolute.⁸⁸

3 3 Reflection

Overall, it seems that the residual position is more inclined to protect lessees where their use and enjoyment are impaired due to *vis maior* by

82 Kerr "The effects on leases of supervening impossibility of performance" 1977 SALJ 391.

83 Kerr 1977 SALJ 391, citing *North Western Hotel Ltd v Nebel & Co supra* 333; *Goldberg v Nante* 1903 TH 150. See specifically also *Petersen v Tobiensky and Tobiensky* 1904 TH 73 77 where the court held that the lessees were entitled to a remission of rent from the date that *vis maior* took effect. In this instance the lessees were ordered to serve on the military, a duty that they were forced to abide by. In consequence, this duty was incompatible with them remaining in their store and carrying out their trade.

84 Kerr 1977 SALJ 393, citing *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (AD) 952A; Ramsden "Temporary supervening impossibility of performance" 1977 SALJ 162.

85 Ramsden 1977 SALJ 167.

86 Ramsden 1977 SALJ 170.

87 In such an instance the creditor is obliged to accept performance: Ramsden 1977 SALJ 171.

88 Ramsden 1977 SALJ 170-171.

allowing a rent remittal. In terms of the case law, and supporting literature, the point of departure is that a lessee's rent obligation is suspended for the period of *vis maior*. This suspension applies either absolutely or to the extent that the lessee can in fact use and enjoy the leased property. Based on this principle, a commercial lessee who is wholly deprived of the use and enjoyment of the leased premises will be entitled to a complete rent reduction until such time as the COVID-19 lockdown regulations are eased. If they are eased in part, the lessee will subsequently be entitled to a rent remission, proportionate to the extent of her permissible use of the premises. Based on the principle of reciprocity, the alternative rationale is to argue that both parties are excused from complying with their obligations; lessors are prohibited from actually providing lessees with the use and enjoyment of the leased premises, which arguably relieves lessees from having to make rental payments. The *exceptio non adimpleti contractus* should arguably not feature in the case of *vis maior*, because it mainly operates as an enforcement mechanism. It will likely amount to undue hardship if a lessee relies on the *exceptio*, and withholds the full rent amount, even though she has partial use and enjoyment of the premises, where the interference results from *vis maior* and not breach of the lessor.

The majority of commercial leases that are affected by the COVID-19 lockdown regulations will suffer from a temporary interference, which means that the parties' duties to perform will be suspended temporarily, until such time as the restrictions are eased. Failure to perform will not amount to a breach of contract, entitling the other party to terminate the lease, nor will the parties' obligations simply terminate.

With reference to the residual position, it is important to reflect on the purpose of some of the newly introduced regulatory measures, such as the COVID-19 Block Exemption for the Property Retail Sector. If the common law is already geared to allow rent remittals in the case of *vis maior*, which would most likely include the COVID-19 lockdown regulations, why would the regulations also offer rent relief? One explanation is simply that the regulations might be directed at offering relief for lessees in the case where a *force majeure* clause excludes rent remission, although a limited number of commercial leases would include such a clause, stipulating statutory restrictions of trade as *vis maior*. Alternatively, the regulations have been passed to override the residual position and offer clear, unequivocal rent relief for lessees in the retail sector. It should however be added that the regulations are not only intended to protect lessees, they also encourage the parties to negotiate terms and conditions that would aid both parties. This suggests that the regulations, and specifically the COVID-19 Block Exemption for the Property Retail Sector, are mainly intended to protect the financial stance of lessors, whilst also protecting lessees that might be prejudiced due to a *force majeure* clause. If a commercial lease is not covered by the newly introduced regulations, the residual position will prevail, and the lessee will be entitled to a rent remittal in accordance with the extent of her use and enjoyment.

Importantly, the COVID-19 Block Exemption for the Property Retail Sector should not be misconstrued (either directly or indirectly) to mean that commercial lessees require protection by way of legislative intervention. Moreover, statements made by powerful property interest groups, such as the PI Group, should be interpreted with caution and full awareness of the common law. Even though the initiative that has been proposed by the PI Group in the retail industry to offer rent relief and other benefits to commercial lessees can be interpreted as deceptive in that it creates the false illusion that lessees are at the mercy of commercial lessors, an interpretation of this kind is not only in contravention of the purpose of the Block Exemption but also counterintuitive, considering the bigger picture in having to meaningfully mitigate a national disaster. Instead, it is perhaps more sensible to agree with the following sentiments as stated by the PI Group:

“[W]e don’t believe that litigation provides either side with timeous solutions needed to get through this unprecedented time. We need to stand together and find workable solutions that will benefit the country, protect jobs, and sustain our businesses through this challenging time.”⁸⁹

4 Concluding remarks

The COVID-19 pandemic and the subsequent lockdown measures has had a detrimental impact on South Africans’ livelihoods, including numerous lessees’ ability to trade and do business. This article finds that the lockdown measures, consisting of the enforcement of the Disaster Management Act and the introduction of wide-scale regulatory measures, are the direct cause of these impositions, more so than the existence and inevitable spreading of the novel coronavirus. Moreover, these measures constitute *vis maior* because commercial lessees are deprived, wholly or in part, of the use and enjoyment of their leased premises as a result of the lockdown measures. If a *force majeure* clause does not specifically include statutory restrictions of trade as *vis maior*, the clause will be interpreted narrowly. However, it seems that clauses of this kind are usually included to restrict lessees’ vast rent remittal rights in the event of *vis maior*, which suggests that the residual position is rather geared to protect lessees.

The article confirms that this is indeed true, the common law protects lessees where *vis maior* is the direct cause of interferences with the use and enjoyment of the premises. In such an instance, a lessee will be entitled to a rent reduction, proportionate to her actual diminished use. A complete rent remittal would be justified where the lessee has no use and enjoyment of the leased premises. A number of regulatory measures, in addition to the lockdown laws, have been introduced in the landlord-tenant sector, and specifically the retail industry, to mitigate what might be perceived as a lopsided legal position. These measures

89 The full statement is available at <https://www.sapoa.org.za/media/5593/property-industry-group-statement.pdf> (2020-06-29).

should arguably be interpreted to urge ongoing negotiations between parties in commercial lease agreements to promote financial viability for both parties. However, it should be noted that the regulations pertaining to the retail industry are mainly intended to assist lessors against overly burdensome rent remittals, regardless of the fact that the regulations are phrased in such a manner as to suggest that lessees are in need of legislative intervention to provide rent relief and other forms of assistance.