

# ANNEMARIE SWANPOEL ATTORNEYS

## The position of landlords and tenants during the nationwide lockdown



In this article we take a look at whether the Coronavirus (Covid-19) has any effect on the rights and obligations of parties to a lease agreement, under South African law. We first take a look at whether the Covid-19 pandemic qualifies as a force majeure event.

A force majeure (or vis major) event is an unforeseeable and super force event which is outside the control of the parties to a contract and which prevents contractual performance. It can be easily translated as an act of God.

From the definition above, it can be accepted that a qualifying event is one that is:

- a. unforeseeable (at the conclusion of the contract),
- b. Unavoidable in terms of occurrence or impact and
- c. Impossible to overcome.

It can therefore be said that the nationwide lockdown and Covid-19 fits into the above criteria and therefore qualifies as a vis major event in contractual law. Generally, in the event of a vis major event, the result is that one or both parties are excluded from liability and performance of contractual obligations. In a situation where a tenant refuses to pay part of or the entire rental amount, a landlord's response must be based on the principle of beneficial occupation.<sup>1</sup>

In terms of beneficial occupation<sup>2</sup>, a lessee who cannot use the property for the purpose for which it was let for is entitled to remission of rent and is under no obligation to use the property in a different way. Where the use and enjoyment of a property for the purposes that it was let for is prevented or hindered or prevented by a vis major event out of the control of both parties, the lessee may claim remission of rent in whole or part for the period during which use and enjoyment were hindered. A landlord will not be entitled to compel tenants to pay the full rental amount if they were forced to stop trading as a result of the lockdown. This is, however, different for tenants of residential premises as they will remain in occupation of the premises and therefore enjoy full beneficial occupation. There is no legal basis under which the tenants may refuse to pay rent.<sup>3</sup>

Can the security deposit be used in lieu of rent? Section 5(3)(g) of the Rental Housing Act 50 of 1999 clearly states that "on the expiration of the lease, the landlord may apply such deposit and interest towards the payment of all amounts for which the tenant is liable", it is therefore clear that the security deposit can only be used once the lease has been terminated (either by early cancellation or conclusion of the lease period). The security deposit cannot be used in lieu of rent.

It is also important to note that the regulations under The Disaster management Act 57 of 2002 provide that no one may be evicted during the period of the lockdown. Landlords and tenants are encouraged to find a feasible way to move forward. Tenants are advised to pay their rent as far as possible and landlords, where possible, assist their tenants with reasonable payment plans<sup>4</sup> during this difficult time.

<sup>1</sup> Marlon Shevelew. 2020. 'Lockdown: how to deal with rent and levies'. Property Professionals. 26 March 2020. Available at <https://propertyprofessional.co.za/2020/03/26/lockdown-how-to-deal-with-rent-and-levies/> (Accessed on 19 April 2020)

<sup>2</sup> Nicolene Schoeman-Louw. 2020. '#Covid19-What are landlords and tenants to do now?'. Go Legal. 09 April. Available at <https://www.golegal.co.za/covid19-remission-rent/> (accessed on 19 April 2020)

<sup>3</sup> Liad Hadar. 2020. 'Explainer: What if I can't pay my rent during the lock down?'. News 24. 27 March. Available at <https://m.fin24.com/Opinion/explainer-what-if-i-can't-pay-my-rent-during-lockdown-2020327-2> (Accessed on 19 April 2020)

<sup>4</sup> Liad Hadar (Explainer: What if I can't pay my rent during the lock down?)