REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A52/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

_____ _____
Date Signature

In the matter between:

HENNOPS SPORTS (PTY) LTD APPELLANT

And

LUHAN AUTO (PTY) LTD RESPONDENT

Summary: Appeal against a judgment of the Magistrate's Court. The appellant is claiming arrear rental and penalties arising from a written lease agreement. Parties concluded a lease agreement, in terms of which the appellant (lessor) leased certain premises to the respondent (lessee) in order to conduct a motor vehicle dealership business. During March 2020, the Government of South Africa issued regulations in order to manage the outbreak of a COVID-19 pandemic. In these regulations, it was proclaimed that all non-essential businesses were to cease operations during a lockdown period. The business (motor vehicle dealership) ran by the lessee was a non-essential business and it

closed down as regulated. Resultantly, the lessee was unable to generate income to afford the agreed rental amount. A compromise was reached between the lessor and the lessee to reduce the rental amount for a certain period.

That notwithstanding, the lessee fell into arrears. Accordingly, as agreed, the lessor unilaterally cancelled the compromise. In due course, the lessor instituted a claim for the payment of arrear rental and penalties in the Court *a quo*. The lessee raised a defence of *causus fortuitus* or supervening impossibility of performance; sought a novation of the agreement; sought an amendment of the agreement; as well as rectification of the agreement in order to reflect a reduced rental amount. The Court *a quo* upheld the defence and granted the reliefs sought by the lessee. Additionally, the Court *a quo* ordered the lessee to pay 50% of the reduced rental for the period June and July 2020. The lessee was also ordered to pay costs on attorney and client scale. Aggrieved thereby the lessor launched the present appeal.

The findings of this Court are that the Court *a quo* erred in concluding that COVID-19 restrictions constituted a supervening impossibility of performance for the lease agreement. Given the nature of the contract involved herein the cessation of operations did not fundamentally change the nature of the contract as concluded by the parties. The operation of the lease agreement was not destroyed by the introduction of the regulations.

The lease agreement was not amended since the provisions of clause 8 of the agreement were not met. The parties agreed on a non-variation clause. Therefore, the rental amount clause cannot be amended contrary to the non-variation clause. All what the parties reached is a compromise, which was for a specific period, and such did not amount to an amendment of an agreement. The agreement was not novated either. The lease agreement was not replaced by a new lease agreement. The requirements of the relief of replication were not established and the relief was wrongly granted. The requirements of section 3 of the Conventional Penalties Act (Penalties) as pleaded were not established by the lessee. The lessee bore the *onus* to establish the disproportion between the penalties and the prejudice suffered by the lessor. The lessee was not entitled to a reduction of rental for the period of June and July 2020.

Held: (1) The appeal is upheld. Held: (2) The judgment and order of the Court *a quo* is set aside barring the costs order, which was not impugned, by any of the parties. Held: (3) It is replaced with an order that (a) The lessee is to pay the lessor an amount of R292 437.23 for arrear rental and penalties; (b) The lessee to pay interest on the amount ordered with effect from 10 July 2020 to date of payment; and (c) The lessee to pay the costs of the appeal on a scale of attorney and client as agreed to in the lease agreement.

JUDGMENT

CORAM: MOSHOANA, J (with CAJEE AJ concurring).

Introduction

[1] This is an appeal against the whole judgment and order, barring the costs order, made by the learned Magistrate Dangalazana on 21 January 2022 out of the Magistrate Court for the District of Tshwane Central held at Pretoria (Court *a quo*). The Court *a quo* dismissed the arrear rental claim brought by the appellant before Court; granted the lessor 50% remission for rental for the months of June and July 2020; and; rectified the lease agreement concluded by the parties.

[2] The appeal was duly opposed by the respondent, with no cross-appeal launched.

Background facts

[3] Pertinent to this appeal, on 26 July 2017, and at Pretoria, Hennops Sports (Pty) Ltd (Hennops), the lessor, and Luhan Auto (Pty) Ltd (Luhan), the lessee, concluded a written agreement, in terms of which Hennops leased an immovable property, *to wit*, the remaining extent of Erf 173 Gezina Township situated at 522 Ben Swart Street, Gezina (Premises) to Luhan in order for it to conduct a business of a motor

vehicle dealership. The agreed rental for the use of the premises was set at R77, 000.00 a month payable in advance for a fixed period of five years.

[4] On or about 25 March 2020, the Government of the Republic of South Africa, promulgated regulations, which prescribed that during a lockdown period, all businesses that were not considered essential businesses in terms of the regulations should cease operations. Luhan was not an essential business and was compelled to cease business operations from the premises. Resultantly, Luhan failed to pay rental for the period April to July 2020. The arrear rental inclusive of the 10% penalty amount came to an amount of R292 473.23, as reflected in the tax invoice. In February 2022, Luhan and Hennops met to consider a proposal to reduce rental due to the financial constraints faced by Luhan. A compromise was reached, where rental was reduced on a month-to-month basis until Hennops decides otherwise. On 26 March 2020, the Government of the Republic of South Africa issued restrictive regulations. Since rental was, in terms of the lease agreement, due in advance, the rental for the month of April 2020, fell due in March 2020. On 31 March 2020, Hennops demanded payment of the compromised amount, failing which the agreed amount of R77 000.00 will be due and payable. Luhan failed to pay the reduced amount. On 3 April 2020, Luhan, as agreed, terminated the compromise and demanded the rental as agreed in the lease agreement. On 30 April 2020, Luhan responded to the demand and raised a dispute over the rental amount. On or about 10 July 2020, Hennops gave Luhan a notice of breach within the contemplation of the lease agreement. That notwithstanding, Luhan failed to rectify the breach.

[5] On or about 30 July 2020, Hennops issued summons claiming the arrear rental plus penalties as well as other ancillary claims. Luhan opted to defend the action and also instituted a counterclaim, in terms of which, it sought rectification of the lease agreement. Luhan alleged that with effect from 1 March 2020, it became the common intention of the parties that the rental amount payable by it to Hennops be reduced from the agreed amount of R77 000.00 to an amount of R66 125.00 and that Hennops is to invoice Luhan in such lower amount of rental as the rental due, in accordance with the invoice for 1 March 2020. Hennops disputed the

counterclaim. As part of its defence to the claim, Luhan pleaded *casus fortuitus*. Luhan alleged that COVID-19 prevented its commercial activity, as a result, performance of its obligations was temporarily made impossible by the restrictions ordered by Government, and that there was no fault on its side.

[6] According to Luhan, the rental term was reduced and after having made payments in the amount of R49 334.68, the balance owing to Hennops was R82 915.32. It apparently made, a with prejudice offer, which offer was not accepted. Strangely, the Court *a quo* did not even deem it necessary to enter a judgment in favour of Hennops with respect to the owed and admitted amount. As at the time of the institution of the action, Luhan was still in occupation. However, in its plea, it tendered to vacate the premises. Luhan prayed for the claim of Hennops to be dismissed with costs.

[7] At the trial of the action, both parties tendered oral testimony of a witness each (Ms Tertia Botha for Hennops and Mr Lucas Venter for Luhan) as well as other documentary evidence. It became common cause during the trial that due to COVID-19 restrictions, Luhan could not conduct or operate its business at the premises.[1] It also became common cause that a compromise was reached to reduce rental for some period of three months. It also became common cause that an amount of R49 334.68 was paid in respect of the rental for June and July 2020.

[8] After hearing evidence, the Court *a quo,* on 21 January 2022, handed down a judgment which is the subject of this appeal.

Analysis

[9] The pith of this appeal and the legal question in it is whether supervening impossibility of performance occurred in respect of the lease agreement entered into between the appellant and the respondent. Laden in this appeal is also the question whether COVID-19 restrictions in terms of the regulations imposed by the

[1] During argument, Mr Britz appearing for Luhan submitted that this amounted to the admission that use and enjoyment was lost. Mr Louw disagreed, correctly so, with this submission.

Government during the relevant times constitutes supervening impossibility proper in respect of a lease agreement. In our view, the apt name for the doctrine of supervening impossibility is the doctrine of frustration. It is apt in our view because veritably, what happens or should happen is the frustration of the terms of the agreement of whatever nature as between the parties. The dictionary meaning of the word frustration is an act of hindering someone's plans or efforts. On the other hand, the word impossible when used as a noun, it means that something that cannot be done; and as an adjective, it means not capable of occurring or being accomplished or dealt with.

[10] In light of the above, the most appropriate bestirring point to consider, is what the essential legal requirements of a lease agreement are. This bestir will swiftly navigate this Court to the pith of the end point; namely; does failure to make profit or earn income, affect the continuation of a lease agreement or not? A default position, we find, is as always consideration of the Roman law (Civil law), when it comes to issues of this nature. In Roman law, a lease agreement, as a reciprocal agreement, was known as a *locatio conductio*. The term *locare* as a Latin verb means, "*to put into position, to place*". *Locare rei* means to place an object with another – suitable for a hiring of a thing or object. *Conductio,* in Latin means taking or taker. Thus, when someone takes or hires a thing or object then a *locatio conductio rei* (contract of lease or hire) happens.

[11] Having outlined the Roman law position, then it is important to consider what actually a lease agreement is. Mercifully, this question arose in *Ferndale Crossroads Share Block (Pty) Ltd and Others v Johannesburg Metropolitan Municipality and Others (Ferndale)*[2]. Briefly, in this case, a walker's facilities were caused to be erected outside the wall enclosing a taxi rank. The municipality caused a portion of the wall to be demolished. The appellant took a view that a valid lease agreement came into being and the respondent municipality took a divergent view. In answering the question, the Supreme Court of Appeal had regard to the writings by the much celebrated author, AJ Kerr. In his work *Law of Sale and Lease*[3], the learned author stated that a contract of lease is entered into

[2] 2011 (1) SA 24 (SCA)
[3] 3 Ed (2004) 245.

when parties who have the requisite intention agree together that the one party called the lessor, shall give the use and enjoyment of an immovable property to the other, called a lessee, in return for the payment of rent. In *Kessler v Krogmann*[4]*,* it was held that the essentials of a lease agreement are that there must be an ascertained thing and a fixed rent at which the lessee is to have the use and enjoyment of that thing.

[12] Therefore, in common law, parties enter into a contract of lease (*locatio conductio rei)* when they agree that the one party, the landlord, will give the temporary use and enjoyment of an immovable property to the other party, the tenant, in return for the payment of rent.[5] In the final analysis, a lease agreement is constituted when the following essential legal requirements are met; *viz*;

13.1 There must be a lessor – *locatio;*
13.2 There must be a lessee – *conductio;*
13.3 There must be a thing (movable or immovable);
13.4 There must be a use and or enjoyment of the thing - (*usus rei)*;
13.5 There must be a fee; price of the use of the thing (rental) – (*merces, pretium*)

[13] Put differently, the above are the essential terms of a lease agreement. Destruction of any of those terms spews moribund to the lease agreement. Having unwrapped the required terms to breathe life into a lease agreement, it is thus appropriate to now consider the meaning of the phrase, 'supervening impossibility'.

What is the meaning of supervening impossibility?

[14] When parties conclude an agreement, each awaits performance of the terms of an agreement as undertaken. In a lease situation, the lessee awaits the delivery of the thing leased and the lessor awaits payment for the use of the thing. In short, the lessee must be given *vacuo possessio* – undisturbed possession of the thing and the lessor must be paid his/her rental. However, once the parties conclude an

[4] 1908 TS 209 at 297 quoted with approval in *Ferndale*.
[5] See *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (AD).

agreement and the thing to be hired is destroyed, then the agreement is discharged. As indicated earlier, the best term to describe this phrase is frustration as opposed to impossibility. The reason for that is simply that when parties agree to hire to each other a thing, they do so in the circumstances where the thing is in existence. However, if the thing disappears after the agreement, the disappearance frustrates the plans of the parties. It may well be that the frustration may be removed in due course, by, for instance, a replacement of the thing.

[15] Nevertheless, nothing much turns on the above description. The best case to have unpacked the principle is that of *Taylor v Caldwell (Taylor)*[6]*.* Briefly the parties had on 27 May 1861 entered into a contract by which the defendant agreed to let the plaintiff have the use of the Surrey Gardens and Music Hall on four days then to come, for the purposes of giving a series of four grand concerts, and a day and night fetes at the gardens and hall on those days respectively; and the plaintiff agreed to take the gardens and halls on those days and pay 100 pounds for each day. After the conclusion of the agreement and before the first day on which the concert was to be given, the hall was destroyed by fire. In consequence of the destruction, the concerts could not be given as intended.

[16] In dealing with the dispute, the Court had regard to the Civil law as outlined by Pothier who stated that the debtor is freed from his obligation when the thing has perished, neither by his act, nor neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.[7] Thereafter, the Court relied on a long line of cases in order to explain the principle[8]. Ultimately, the Court reached the following apt conclusion:

> "*In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find*

[6] 122 Eng. Rep. 310 (Q.B. 1863)
[7] Pothier: *Traite des Obligations, partie 3, chap. 6, art 3 & 668.*
[8] See in this regard*, Williams v Lloyd 179; Coggs v Bernard Raym 909; Rugg v Minett (11 East 210); Hall v Wright (E.B 746,749)* cited in *Taylor.*

that the parties contracted on the basis of the continued existence of the Music Hall at the time the concerts were to be given; that being the essential to their performance. We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendant from performing their promise to give use of the Hall and Gardens and other things…"[9] *[Own emphasis].*

[17] What emerges from *Taylor* is that if the thing to be rented and or enjoyed in return of payment is damaged the legal implications thereof are that both parties and not one party are excused from the performance of the obligations contractually attracted. The same principle was followed in *Krell v Henry (Krell)*[10] where the coronation did not take place after the plaintiff agreed to hire out the Pall Mall flat for that purpose. Interestingly, in *Krell* the Court recognised the fact that both parties did recognise that they regarded the taking place of the coronation procession on the days originally fixed as the foundation of the contract. As it shall later be discussed, in *casu*, although the lease agreement specifies that the immovable property will be used to conduct a motor vehicles sales business, the lease agreement was not founded on the successful sales of the motor vehicles, but it was founded on the physical housing of the vehicles. In due course, we shall return to this topic, with a view to demonstrate that there is a disconnection between *vacuo possessio* and profitable sales in a lease agreement.

[18] The case of *Herne Steam Boat v Hutton (Hutton)*[11], perspicuously illuminates the disconnection principle. In this case, the Royal naval review was planned to take place in Spithead on 28 June 1902. The parties agreed that the steamship named *Cynthia* would be at the other party's disposal on 28 and 29 June to take passengers from Herne Bay for the purpose of viewing the naval review and for day's cruise around the fleet. On 25 June, the naval review was cancelled. The other party refused to pay the balance of the rental of *Cynthia.* Stirling LJ refused to apply the *Taylor* principle and reasoned thus:

[9] Para 32 *Taylor*.
[10] [1903] 2 KB 740.
[11] [1903] 2 KB 683.

"*I am unable to arrive at that conclusion. It seems to me that the reference in the contract to the naval review is easily explained; it was inserted in order to define more exactly the nature of the voyage, and I am unable to treat it as being such a reference as to constitute the naval review the foundation of the contract so as to entitle either party to the benefit of the doctrine in Taylor v Caldwell… "*

[19] Of significance, in *Hutton* three separate, but concurring judgments were written. Interestingly, Romer LJ felicitously stated the following:

"The case cannot, in my opinion, be distinguished in principle from many common cases in which, on the hiring of a ship, you find the objects of hiring stated. Very often you find the details of the voyage stated with particularity, and also the nature and details of the cargo to be carried… But this statement of the objects of the hirer of the ship would not, in my opinion, justify him in saying that the owner of the ship had those objects just as much in view as the hirer of the ship. The owner would say "I have an interest in the ship as a passenger and cargo carrying machine, and I enter into the contract simply in that capacity; it is for the hirer to concern himself about the objects." [Own emphasis]

[20] In much similar spew of sagacity; Vaughan Williams LJ concluded thus:

"*On the contrary, when the contract is properly regarded, I think the purpose of Mr. Hutton, whether of seeing the naval review or going round the fleet with a party of paying guests, does not lay the foundation of the contract within the authorities….*

I will content myself with saying this, that I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain [Own emphasis]

[21] A survey of the above authorities depicts that what matters is the foundation of a contract as opposed to the one-sided object of contracting. If the one-sided object of contracting is dashed, the contract is not hit by supervening impossibility nor can

it be said that the contract performance is frustrated so as to discharge parties of their respective obligations. It is on the basis of the above exposition that this Court finds no merit in the submission by Mr Britz that the purpose for which Luhan wished to hire the premises for is the foundation or the use and enjoyment, as it were, of the immovable property, and once dashed, the obligations dissipates. Use and enjoyment in the context of a lease agreement is the usability of a leased thing. By way of an example, a lessee may hire a particular vehicle from a vehicle leasing company in order to travel to destination A. In hiring a particular vehicle, it was the wish of the lessee, expressed or unexpressed to the lessor, to arrive at the destination, at a specific time. During his travel, the traffic packs up and becomes heavy to a point that the lessee reaches destination A outside the specified time. The fact that the wishes of the lessee were dashed, does not transmute into a loss of the use and enjoyment of the leased vehicle. However, the contrary may be true, if upon leaving the vehicle leasing company premises, the vehicle is completely consumed by fire.

[22] Commercial impossibility does not give rise to the principle of supervening impossibility. A party cannot be discharged from performing a contract because it is non-profitable for that party. In due course, in this judgment, this Court shall revert to this issue when discussing the impact of COVID-19 regulations.

[23] On the facts of this case, there was no supervening impossibility, which would have discharged Luhan from its contractual obligations to pay for the usage of the immovable property. The immovable property remained intact in order to be used to house the motor vehicles to be sold. As it shall later be demonstrated, during the hard lockdown, the regulations did not prevent parties to lease out immovable properties. The regulations did not render it illegal to house motor vehicles in an immovable property. There is nothing in the regulations that prevented conclusion of lease agreements. In a lease agreement, performance takes place if the lessor give the lessee the usage and enjoyment of a thing. I pause to mention that the use and enjoyment is of the thing leased and not the purpose for which it was leased. If the lessor gives, as it was the case in this matter, the lessee usage and enjoyment of the thing leased, then rental payment becomes an awaited

performance. The regulations did not render it illegal to give usage and enjoyment of an immovable property, neither did it render it illegal to pay rental. Legal impossibility arises if performance of an obligation is prohibited by legislation[12]. The *Kokstad*[13] case provides a perfect example of legal impossibility. There a firm was contracted by the municipality to light the streets of Kokstad. During wartime, the partners of the firm were interned as enemy aliens and their business was wound up under the relevant war legislation. The conclusion to reach, in *casu*, is that the regulations may have diminished the profitability of Luhan but did not render it illegal for Luhan to pay rent. So much so that Luhan could have sourced income from elsewhere in order to pay rent for the place where it had housed its stock. If affordability to pay rental was a foundation of all lease agreements, in all probabilities, demonstration of financial strength would have been an *essentialia* of a lease agreement. What connects payment of rental to the usage and enjoyment of a thing, is not the affordability to pay rental. In a typical lease agreement negotiations, a lessee would approach a lessor and express a wish to use and enjoy a thing, be it movable or immovable. In retort, the lessor would express the availability of the use and enjoyment of the thing. When proposing rental for the use and enjoyment of the thing, the lessor does not say, on condition, you can afford R100.00 a month to make the use and enjoyment of the thing available. As it is always the case, and it was the case herein, rental is made payable in advance. In other words, a lessee uses and enjoys the thing after having paid for it upfront.

[24] It must have been so that the purpose of renting the immovable property was to house Luhan's stock to be sold or keep the stock safe. That purpose was never rendered illegal by any legislation. One imagines a situation where there is an economic recession. Can it be said that due to the economic recession, the decline in sales of stock housed in various premises on the strength of lease agreements, affects the continuation of the housing of the stock? In my view, that cannot be said. It is like saying, because a person has no money to buy food due to being unemployed (caused by a closure of a factory manufacturing hanging ropes, following a declaration that a death penalty is unconstitutional), eating food would

[12] *Bayley v Harwood* 1954 (3) SA 498 (A) and *Peters, Flamman & Co v Kokstad Municipality (Kokstad)* 1919 AD 427.
[13] Footnote above.

suddenly become unlawful. Eating food will remain lawful even if unaffordable for the unemployed persons.

Is COVID-19 Regulations the legal basis to invoke supervening impossibility?

[25] Since the advent of COVID-19 pandemic and the legislative intervention for the management thereof, a debate arose in various circles as to whether the restriction regulations, particularly during what was known as hard lockdown, brought to the fore *vis major*, which would have entitled parties to be discharged from their contractual obligations. A number of legal pronouncements were made, some in conflict of each other regarding the correct legal position on the debate.

[26] In this appeal, the learned magistrate, influenced by some authorities binding on her Court, reached a conclusion that the restrictions during the hard lockdown discharged Luhan from its obligation to pay rental for the leased premises and limited the obligation in respect of certain months. Although, the learned magistrate also reached a conclusion, which shall be dealt with later, that the rental obligation was amended or novated, in the main, the defendant received a reprieve from rental obligation due to the restrictions under the hard lockdown.

[27] It suffices to state upfront that a supervening impossibility affects the performance of the terms of the contract. In this regard, the impossibility must be one that affects the performance of the agreed terms of a lease contract. The Romans used the word *solutio* to cover not only the payment of money but also the delivery of the thing or the performance or non-performance of an act in discharge of a contractual obligation[14]. In a lease agreement, performance means (a) delivery of the thing – obligation of the lessor; and (b) payment of rental – obligation of the lessee. It is only proper performance that will discharge the contract. A lease agreement is a reciprocal agreement, the lessor delivers the thing and the lessee pays for the thing or *vice versa*. The principle of *exceptio non adempleti contractus* finds application.[15] During hard lockdown, in terms of the regulations, certain businesses were to close down unless they rendered what was known as essential

[14] D50 16 176. See also Christie's *The law of contracts in South Africa* 6th edition p419.
[15] See *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

services. It is common cause that the business that Luhan operated was that of sales of motor vehicles. It is also common cause that it was not an essential business and was forced to close down during the hard lockdown period. In exact terms, Regulation[16] 11B (1) (b) read as follows:

> *"11B. (1) (a). For the period of lockdown –*
> *(b) All businesses and other entities shall cease operations during the lockdown, save for any business or entity involved in the manufacturing supply, or provision of an essential good or service." [Own emphasis]*

[28] It is important to note that what the legislation sought to do was to cease operations. In practical terms, this meant that operations must be stopped. Given the definition of a lockdown, which meant, restriction of movement of persons, it must follow that operations that relied in persons moving in and out of the premises needed to cease. However, of paramount importance, the regulations did not affect virtual manner of conducting business. As it became a norm, a large contingent of businesses started operating virtually and continued to earn an income albeit at a minimized level. Nevertheless, pertinent to this appeal, the restrictions did not imply that no vehicles and or stock shall be kept and or housed inside an immovable property. Further, it did not imply that those who attract financial obligations must not honour those obligations. Therefore, it must follow that ceasing of operations did not imply a *hiatus* of lease agreements. Certainly, during the hard lockdown, premises continued to be hired and rent continued to be paid. There was nothing unlawful about that process. Performance in respect of a lease agreement was not made impossible.

[29] In *Nogoduka-Ngumbela Consortium (Pty) ltd v Rage Distribution (Pty) Ltd t/a Rage (Rage)*[17], the erudite Acting Justice Pretorius in refusing a claim for summary judgment on the claim for arrear rental, he reached certain conclusions, which influenced the findings under appeal. On application of the *stare decisis et movere* principle, this Court is bound to consider those conclusions unless it finds that those were clearly wrong. In any event being a decision of a single judge, this

[16] RG N0 11062 Vol 657 25 March 2020 No 43148.
[17] (37587/2020) [2021] ZAGPJHC 568 (19 October 2021).

Court is not bound to follow it. In his judgment, Pretorius AJ found that performance in terms of the lease was prohibited by the promulgation of the Regulations and, as such, the inability to perform constitutes objective legal impossibility.[18] With considerable regret, we disagree with this finding. As indicated above, nowhere in the Regulations lies a prohibition of performance awaited in a lease agreement (make a leased property available for use and enjoyment and payment of rent in return of the usage and enjoyment). In our considered view, the conclusion that performance was prohibited is a wrong one in law.

[30] Again, this Court disagrees with a conclusion that the March 2020 Regulations deprived lessees wholly of the use and enjoyment of the properties leased and constituted a *vis major* event[19]. As indicated earlier, in a lease agreement the use and enjoyment of the property means using the property for the purpose it was hired. In *casu*, the property was hired to house the motor vehicles. It may have been the underlying object of Luhan to at the same time run a profitable outfit at the premises. However, that could not have been the object of Hennops. It must have been the object of Hennops that the premises must provide the required hired square mile to house the stock of Luhan. Undoubtedly, what the Regulations thwarted is the profitability of Luhan. However, the lease agreement was not concluded with the purpose of making Luhan profitable. Profitability was not the basis of the lease contract. *Vacuo possessio* simply means an undisturbed possession of the leased property. Of significance, notionally it must be the lessor who must not disturb possession. The remedy of *mandament van spolie* does exist to remedy disturbed possession. Nevertheless, the property leased was not destroyed. It existed and on the uncontested evidence, the stock of Luhan remained safely secured during the lockdown period – there lies performance on the part of the appellant. The reciprocal performance by Luhan ought to have been payment of rent. Payment of rent was not rendered impossible by the Regulations. For an example, in instances where Luhan did not make profit in order to meet its obligations financially, there was nothing to have prevented Luhan to seek other financial interventions like a loan at a financial institution or being afforded an overdraft. That being a possible option, how then does performance – payment of

[18] Para 41 of the judgment.
[19] Paragraph 45 of the judgment.

rent – become impossible? In our view, an impossibility and or frustration did not manifest itself. An impossibility is not one to affect one party to the contract, it must be one that affect both parties, and importantly, the performance of the terms of the contract.

[31] In rounding off the findings made by the learned Acting Justice in *Rage*, this Court disagrees with a conclusion that the act of the Government in promulgating the March 2020 Regulations, and the effect thereof on the obligations of the parties in terms of the lease constituted a supervening legal impossibility[20].

[32] Sadly, in our considered view, the SCA missed the golden opportunity to settle authoritatively so this conundrum in the matter of *Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House.*[21] The SCA under the pen of the erudite Molemela JA, stated the following:

> "*For reasons that follow, I am of the view that it is not necessary for this Court to decide whether the restrictive regulations applicable during the period 26 March 2020 to September 2020 constituted a supervening impossibility of performance that discharged the respondent from the liability to pay the full amount of rental. At best for the respondent, Hansen may mean that the period during which the Covid-19 regulations prohibited or restricted trade (i.e. 26 March 2020 to 20 September 2020) is a direct and immediate cause of the inability to perform, thus comparable to the situation described as 'the first case in Hansen, where the subletting of the property was unattainable as a direct result of the war…"*

[33] All of the above happens in the circumstances where the respondent's defence was recorded by the Court to be "the Covid-19 Regulations impaired its ability to fully trade and exploit the commercial potential of the premises and thus constituted *vis major*, thereby discharging it from the liability to pay rent during alert levels 4 and 5"[22]. Regrettably, the SCA did not make a definitive finding as to whether the impairment of an ability to fully trade and exploit the commercial potential of the premises constituted *vis major* that will discharge liability to pay

[20] At paragraph 25.
[21] (772/2021) [2022] ZASCA 152 (04 November 2022).
[22] Paragraph 21 of the judgment.

rent during hard lockdown. In our view, this is a critical question that profoundly arises in this matter.

[34] Sadly, what appears, in our respectful view, to be an ambivalent answer, supposedly to be found in the first case of *Hansen,* remains unhelpful. In our unguided but considered view, in the first instance the ability to trade fully and exploit the commercial potential has nothing to do with the terms of a lease agreement. Parties do not conclude lease agreements with a sole purpose to trade or exploit the commercial potential. Such purpose only serves the interest of the lessee and not that of a lessor. Like in the *Hutton* case, a failure to achieve such a purpose does not give rise to the principle developed in *Taylor*.

[35] With considerable regret, in our considered view an answer may not even lay in the first case of *Hansen.* As we understand the case of *Hansen, Schrader & Co v Kopelowitz (Hansen)*[23], the full Court concluded that loss of beneficial occupation (essential requirement of a lease agreement) must be the direct result of the *vis major* not merely indirectly or remotely connected therewith. In *Hansen*, the defendant sought remission of rent because the country in which the leased property is situated was at war. Aptly, the full Court also concluded that the fact that a great number of people have left the country, so as to reduce the field from which the lessee draws his custom, is no ground for remission of rent because the *vis major* must be the direct and immediate cause of the lessee being deprived of the use of the property let. We understand this to mean that there must be a connection between the restrictions – ceasing of operations – and the deprived use of the property let. This calls for the application of the causation test, it seems to us. As we know it, the causation test is predicated on two legs; viz; factual and legal causation. The exercise involves the search of the proximate cause. The difficulty in this instance, in our view, is that there was no evidence of loss of enjoyment and or use of the property. On the contrary, during the lockdown, Luhan remained in undisturbed possession and occupation of the premises. As an indication that Luhan and Hennops were more concerned with the thing to be leased (premises), in clause 5 of the agreement, they agreed that if the leased

[23] 1903 TS 707.

premises are destroyed or damaged in any way whatsoever to such an extent that the premises becomes unfit for beneficial occupation, termination may occur, remission of rental for deprivation of beneficial occupation of the leased premises may also occur. The parties further agreed that a dispute as to whether beneficial occupation has been lost shall be resolved by an independently practising architect mutually appointed. Most importantly, Luhan agreed that it shall have no claim against Hennops for any loss of beneficial occupation unless caused by wilful, grossly negligent act or omission of Hennops or its agents or employees. This clause is a perspicuous testimony that at the time of contracting it was not within the contemplation of the parties that loss of sales and or restrictions on sales of motor vehicles may lead to termination and or remission of rental. Situations such as loss of sales or customers was considered and rightfully rejected as the basis for termination and remission in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited (JCI)*[24]. This Court disagrees with a submission by Mr Britz that the *JCI* is distinguishable. What was said in *JCI* rings true to this day with regard to COVID-19 restrictions.

[36] That which was said[25] by the learned Gilbert AJ in *Freestone Property Investment (Pty) Ltd v Rernake Consultants CC and another (Freestone)*[26] is consistent with what was said in JCI. What matters is the performance of the obligations from either side. In deciding the matter, the learned Gilbert AJ departed from an assumption that the hard lockdown incapacitated both parties from performing their respective obligations. Prior thereto he accepted correctly so that our law is settled that a *vis major* that makes it uneconomical or no longer commercially attractive for a party to carry out its payment obligations cannot constitute a basis to be excused from performance[27]. Further, he correctly concluded that the declaration of the state of disaster and the continued effect of the COVID-19 pandemic may have

[24] 1903 TH 286.
[25] The learned Acting Justice said: [12] A consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster should be approached from the perspective of its effect on the performance by the plaintiff of its obligations as lessor and on the performance by the first defendant's obligations as lessee, rather than approached solely from the perspective of whether the first defendant was able to perform its side of the bargain, particularly to pay rental.
[26] 2021 (6) SA 470 (GJ)
[27] Para 24 *Freestone*.

resulted in a dramatic decline of custom through the shopping centre in which the leased premises were situated, does not afford a defence to the lessee.[28]

[37] As bound, we agree with the principle established in *Transnet t/a National Ports Authority v Owner of mv Snow Crystal*[29] when the Court said:

> "…*As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case it is necessary to "look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstance of the case to be applied…" [Own emphasis].*

[38] In *casu*, the nature of the contract is that of a lease of an immovable property. The impossibility invoked by Luhan is that of cessation of operations by the regulations. We have already found that there is a disconnection between the cessation of the operations and the enjoyment of the use of the property. In our view, even if the cessation of the operations constituted a *vis major*, it was incumbent on Luhan to establish a causal link between the cessation of operation within the context of the Regulations and the failure on its part to perform the rental obligations. There was no such evidence presented to establish such a connection. In *Hansen*, the Court accepted that no doubt the war –*vis major*, was the indirect cause of the dearth in tenants, and a heavy and continued fall in the market may also produce an exodus of people, and lessees of rooms may find themselves, without sub-tenants, but the fall of stock will not be the direct, immediate, and necessary cause of particular bedrooms not being let. It was accepted by the SCA that reduction of rental may also arise in any instances where a lessee did not receive the usage of the property outside the *vis major* situation. This becomes so on application of the *exceptio non adempleti contractus*[30]. In *casu*, the exception does not arise.

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[28] Para 29 *Freestone*. See also *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and another and related matters* [2020] 3 All SA 499 (GJ).
[29] [2008] 3 All SA 255 (SCA) at para 28.
[30] See *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 247A-D.

[39] In *casu*, it is not the case of Luhan that due to the Regulations, it was unable to fit stock in the rented space and be able to make sufficient profit to perform its obligations. Its defence lies far and between what may be termed the general effect of the restrictions that may have been felt by many who are similarly placed. The general effect of the restrictions was acknowledged by the SCA.[31] As indicated earlier, on-line or virtual trading would have been a possible method to sell vehicles even in the absence of physical movement of people. Nevertheless, this Court is not satisfied that commercial viability equates loss of enjoyment of the property leased.

[40] Accordingly, the conclusion this Court reaches is that the Regulations do not equate supervening impossibility. The situation that obtained in this matter was not unique to South Africa. It happened world-wide. The concept of supervening impossibility is a universal one. As pointed out earlier in other jurisdictions the doctrine is referred to as a doctrine of frustration. In a very recent Canadian case decided by the Superior Court of Justice Ontario per the learned Mew J in *Braebury Development Corporation v Gap (Canada) Inc (Gap)*[32]*,* dealt with almost similar facts.

[41] Briefly, the facts in *Gap* were as follows. For many years, Gap (Canada) Inc operated a retail store from leased premises at 230-234 Princess Street in downtown Kingston. The renewed lease agreement was to end in December 2020. On 17 March 2020, in response to the COVID-19 pandemic, the Government of Ontario declared a provincial state of emergency. On 24 March 2020, the government ordered all non-essential businesses to close to limit the spread of COVID-19. As a result, Gap was required to shut down its store located at the leased premises and was unable to open until the shutdown restrictions were lifted on 19 May 2020. Gap failed to pay rental for April or May 2020. It made partial payment from June to September 2020. Ultimately, it closed shop and moved out. The plaintiff sued for arrear rental. As a defence, Gap stated that it was relieved of the obligation to pay the arrears of rent because the purpose of the lease was frustrated by COVID-19 pandemic, which resulted in restrictions, which significantly

[31] See *Santam Limited v Ma-Afrika Hotels (Pty) Ltd and Another,* [2021] ZASCA 141 at para 10.
[32] 2021 ONSC 6210 (CV-20-322 Kingston).

impeded its ability to operate its business to the point where it was no longer reasonable, practical, or commercially viable for it to do so.

[42] Mew J in deciding the case, was heavily influenced by the Supreme Court case of *Naylor Group Inc v Ellis-Don Construction Ltd (Naylor)*[33], where the following was said:

> "*Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes a thing radically different from that which was undertaken by the contract." [Own emphasis].*

[43] In reaching his conclusions, Mew J stated the following:

> *"However, taking the approach articulated in Naylor, the question is whether the COVID-19 restrictions radically altered the terms of the lease. While this event did prohibit Gap from operating its retail stores temporarily between March 2020 and May 2020, and then at a reduced capacity until September 2020, it is not clear that this would be sufficient to engage the doctrine of frustration.*
> *Furthermore, to radically alter the terms of the lease, the supervening event must not merely increase the burden of satisfying the contractual obligations, but must "affect the nature, meaning, purpose, effect and consequences of the contract so far as it concerns either or both parties." …*
> *Given that Gap was not required to operate its retail store under the lease, its inability to do so cannot be said to have radically altered the lease's terms, turning it into something completely different than what was intended by the parties entering the lease. By contrast, if Gap had been required under the lease to operate the premises as a retail store, its inability to do so by a supervening event may have risen to the level of radical change required to engage the doctrine of frustration."*[34] *[Own emphasis]*

[33] [2001] 2 S.C.R. 943.
[34] Paras 40-43 of the judgment.

[44] This Court plentifully agree with the sentiments expressed[35] by Mew J. Appositely, similar sentiments are expressed *mutatis mutandis* in *casu.* In this matter, it is not the terms of the lease agreement that the defendant was only allowed to conduct a specific operation. In *Quebec Civil Code in Hengyun International Investments Commerce Inc*[36], the Court held that the Landlord was unable to provide peaceful enjoyment of the leased premises while the tenant was unable to operate a gym due to the COVID-19 restrictions because the lease specified the premises was to be operated "solely as a gym". Inasmuch as the lease agreement mentioned that the premises will be used to conduct a sale of motor vehicles, such does not imply that the sale became impossible the same way as a gym.

[45] In the circumstances, it must follow that the learned magistrate erred when she concluded that there was supervening impossibility that entitled Luhan to be discharged from its contractual obligations. Since, it was common cause that Luhan owed rental, Hennops was entitled to a finding ordering Luhan to pay the arrear rental and penalties attached to the late payment.

Was the contract amended or not?

[46] Luhan alleged that the rental clause of the agreement was amended. In terms of clause 8 of the lease agreement, no amendment shall have any legal effect unless reduced to writing and signed by both parties. There is no addendum signed by the parties reflecting the rental reduction. On that simple basis a conclusion that the lease agreement was amended was made in error. The learned magistrate erred in that regard. The letters used to support the alleged amendment, do not support a conclusion that the term was amended instead it demonstrates that Luhan successfully negotiated a temporary reprieve, which was acceded to for a specified period. That is nothing but a compromise. A compromise is an agreement or settlement of a dispute that is reached by each side making concessions. In *casu*,

[35] Similar sentiments were expressed by the Queen's Bench in *Bank of New York Mellon (International) Ltd v Cine-UK* [2021] EWHC 1013 (QB).
[36] 2020 QCCS 2251.

the parties have agreed on a non-variation clause and such agreement must be honoured.[37]

[47] There is no evidence to suggest that the non-variation clause violated public policy.[38] Should a party seek to rely on constitutional violation, such a party must allege and prove the violation of the constitutional principle. In *casu*, there was no such allegation or proof of violation of a constitutional principle. Accordingly, the learned magistrate erred in making any reference to constitutional principles. Such reference was baseless and made in vacuum. The Constitutional Court in *Carmichele v Minister of Safety and Security and Another (Carmichele)*[39]*,* held that there are two stages that cannot be hermitically separated, when considering development of the common law, and those are; (a) to consider whether the existing common law, having regard the section 39 (2) objectives, requires development; and (b) how such development is to take place in order to meet the section 39 (2) objectives.

[48] The majority judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[40] penned by Moseneke DCJ had the following to say with regard to constitutional challenges:

> "*It is so that the test on proper pleading in Prince related to a challenge to the constitutional validity of a provision in a statute. That test however is of equal force where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change an existing precedent or a rule of the common law…in order to promote the spirit, purport and objects of the Bill of Rights. Litigants who seek to invoke provisions of section 39 (2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and relief sought against it…"*

[49] In *casu*, Luhan did not plead that the non-variation clause is contrary to section 39 (2) of Constitution of the Republic of South Africa. Accordingly, the learned magistrate was not empowered to consider any constitutional invalidity. In any

[37] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).
[38] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[39] 2001 (4) SA 938 (CC).
[40] 2012 (3) BCLR 219 (CC) at para 52.

event, the learned magistrate did not consider the stages mentioned in *Carmichele*.

Was there a novation?

[50] The learned magistrate seems to have conflated novation with an amendment. In law a novation is the substitution of a new contract in the place of an old one. Whereas an amendment is an alteration of the terms of the same old contract. Novation is a matter of intention and *consensus*[41]. When the parties novate, they intend to replace a valid contract by another valid contract[42]. On the facts of this case, there was no *consensus* shown that the parties intended to replace the lease agreement with another lease agreement. The only manner in which a contract term may be changed is by an amendment in terms of the agreed terms on amendment. Novation is not the route to follow.

[51] In the circumstances, the learned magistrate erred when she held that a novation contract was proven to exist.

Was a rectification relief proven?

[52] Strangely, the learned magistrate granted a remedy of rectification. Rectification is a remedy available to insert as it were the common intention of the parties. The parties to the contract must have committed a common mistake at the time of reducing the agreed terms into writing. There can be no common mistake in instances where, as it is the case herein, another party seeks to obtain an amendment of a term or novate the old contract. On the contrary, there is no evidence to justify any rectification relief. In *Jointwo Holdings (Pty) Ltd v Old Mutual Life Assurance Co*[43], the Court held that:

[41] See *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A).
[42] *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD)
[43] [2007] SCA 5.

"*For rectification [of a contract] to be granted, it must be established that the written instrument did not correctly reflect what the parties had intended to set out therein." [Own emphasis].*

[53] In *Propfocus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd*[44], it was held that in order to succeed in a claim for rectification, the party seeking rectification had to prove; (a) that an agreement had been concluded between the parties and reduced to writing; (b) that the written agreement does not reflect the true intention of the parties, and that this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing be established; (c) an intention by both parties to reduce the agreement to writing; (d) a mistake in drafting the document, which could have been the result of an intentional act of the other party or a *bona fide* common error; and (e) the actual wording of the true agreement.

[54] The requirements outlined above have not been proven by Luhan. Therefore, rectification as a remedy was not available. In granting a rectification remedy, the learned magistrate erred.

The issue of penalties

[55] Clause 19 of the lease agreement, under general conditions make provision for what should happen in the event of late payment of monthly rental. It provides thus:

"*Should the monthly rental, for whatever reason, be paid after due date of that particular month, the parties hereby specifically agree that the LESSEE shall pay a penalty amount of 10% of the Gross Monthly rental in addition to the said monthly rental, to the LESSOR. [Own emphasis]*

[56] It became common cause that Luhan failed to pay rental on the due date and in respect of June and July, Luhan did not pay the full amount. Based on that fact, as

[44] [2007] SCA 15.

specifically agreed and on application of *pacta sunt servanda* principle, Luhan must pay a penalty of 10%.

[57] Luhan did not seek an amendment nor novation of this clause. On application of the *pacta sunt servanda* principle, the clause ought to have been given effect. Nowhere in the pleadings did Luhan allege that the penalty of 10% is unreasonable and ought not to be enforced by the Court. Luhan only pleaded that the penalty is out of proportion to the prejudice suffered by the appellant within the contemplation of the Penalties Act. Regard being had to the judgment of the Court a *quo*; it seems that Luhan argued that the amount of penalties is disproportionate because of COVID-19. In giving audience to that argument, the learned magistrate invoked the provisions of section 3 of the Conventional Penalties Act (Penalties Act)[45] and took a view that 10% would be harsh. Ultimately, the Court a *quo* reduced the penalty to 5% instead.

[58] Section 3 of the Penalties Act, contains a *proviso* upon which a Court may exercise its discretionary powers to reduce the penalty. At first blush, it may be argued that a Court has untrammelled powers to reduce the penalty. This is because the opening part of the section provides that "*if it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated*". If the section is read up to there, then a Court would have a *laissez faire* to reduce the penalty. The phrase 'provided that' when used in a statute it simply means a condition is introduced.[46]

[59] It ought to be borne in mind that what the Court will be doing is to find proportionality between the prejudice suffered by the creditor by reason of failure to pay rent on time, in this regard and the penalty imposed by the stipulation. The condition introduced by the section for the exercise of the discretionary power, is to weigh as it were the creditor's proprietary interest against any other rightful interest that may be affected. In our view, the primary interest is the proprietary interests of the creditor (Hennops) but it can be outweighed by the rightful interests, which may be affected by the non-payment of rental. This implies that those rightful interests

[45] Act 15 of 1962 as amended.
[46] See *Jacobsen v Katzer* (Fed. Cir., Aug. 13, 2008)

must be pleaded and proven[47]. Luhan failed to prove the disproportion between the penalty and the prejudice suffered by Hennops. In argument Luhan contended that they were excused from paying rental as a result of COVID-19, therefore, the penalties regarding the months of lockdown should be rejected. Based on this, the Court a *quo* took a view that it shall not be in the interest of justice to impose penalty where there was dire financial strain.

[60] What is required is not the taking into account of the interest of justice but to find lack of proportionality between the penalty and the prejudice suffered as a result of non-payment of rent in time. The phrase '*out of proportion'* means lacking the correct or appropriate relationship with the size, shape, or position of the same thing. In other words, what ought to be weighed is the prejudice suffered by Hennops as a result of late payment[48] and the penalty imposed. It is apparent that the learned magistrate rejected evidence demonstrating prejudice not that it was controverted but on the basis that it was not supported by proof of the incidental costs. In our view, this cannot be a basis to reject the testimony that late payment has with it incidental costs. Nonetheless, the exercise is to compare, as it were the prejudice and the penalty. Unless, there is evidence from Luhan that what it agreed to, specifically, is out of proportion with the late payment prejudice, this Court fails to see how a balancing exercise may be arrived at fairly. This legislation was passed before the adoption of the Constitution. As required, every legislation ought to be interpreted within the prism of the Bill of Rights and by taking into account, holistically so, the text, context and purpose of the legislation. Regard being had to the long title of this legislation, its purpose is to monitor enforceability of contracts. As it was held in respect of restraint of trade clauses, the general rule with regard to them is that they are generally enforceable unless they are unreasonable or unlawful and against public policy[49]. With regard to enforceability as monitored by

[47] In *Smit v Bester* 1977 (4) SA 937 (A), the Court held that where section 3 of the Penalties Act is applicable, the *onus* is on the debtor to show prejudice which the creditor suffered and accordingly that it should be reduced and to what extent. Further, the Court held that when the debtor *prima facie* proves that the penalty should be reduced then there is an onus to rebut on the creditor to refute the *prima facie* case of the debtor, if it is possible for him to do so. See also *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) as well as *Steinburg v Lazant* 2006 (5) SA 52 (SCA).

[48] See *Western Credit bank v Kajee* 1967 (4) SA 396 (N) where the Court held that the words out of proportion does not postulates that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene.

[49] See *Magna alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

the Penalties Act, the same principle of unreasonableness, unlawfulness; and *contra bonis mores*, ought to apply, particularly where the common law principle of *pacta sunt servanda* is developed within the requirements of section 39 (2) of the Constitution.

[61] Accordingly, the conclusion to reach is that there was no basis in law to reduce the penalty[50]. There is no evidence to support any disproportionality between the prejudice suffered and the late payment of rental. To the extent that the learned magistrate invoked the section 3 of the Penalties Act discretionary powers, the learned magistrate erred. Therefore, the reduction of 5% cannot be upheld by this Court.

Concluding remarks

[62] As demonstrated above, amendment; novation; and rectification are reliefs that cannot be ordered simultaneously. In fact, where a party seeks to novate a term in a contract there is an amendment and not novation. Novation replaces the old with the new. Rectification remedy cannot be used in order to enforce an amendment sought by one party. A clear principle is that rectification shall happen when there is a common mistake. On any interpretation, it cannot be said that when the parties agreed on a rental of R77 000.00, they committed a mistake common to each other. On 1 March 2020, what happened was a compromise and not a common mistake with regard to the rental amount clause. So this Court expects care to be exercised by judicial officers when making Court orders.

Order

[63] For all the above reasons, the order set out above is made:

1.1 The appeal is upheld;

[50] See *Digital Direct CC v Le Roux* (87605/14) dated 27 July 2020.

1.2 The judgment and order of the Court *a quo* baring the costs order is set aside;

1.3 It is replaced with the following:

1.3.1 The respondent is ordered to pay to the appellant:

1.3.1.1 An amount of R292 437.23 in respect of the arrear rental and penalties payable in terms of the lease agreement;

1.3.1.2 The interest on the amount with effect from 10 July 2020 to date of payment;

1.3.1.3 The costs of the appeal, on a scale of attorney and client in accordance with the provisions of the lease agreement.

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MOSHOANA J

I concur

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CAJEE AJ

APPEARANCES:

Counsel for the Appellant	: Adv. N.G. Louw
Instructed by	: Manley Inc
Counsel for the Respondent	: Adv. R.A. Britz
Instructed by	: NJVR Attorneys
Date of the hearing	: 17 November 2022
Date of judgment	: 02 December 2022