

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

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| (1) | REPORTABLE: NO/YES                     |
| (2) | OF INTEREST TO OTHER JUDGES:<br>NO/YES |
| (3) | REVISED                                |

DATE

SIGNATURE

**APPEAL CASE NO. A91/2023****COURT A QUO CASE NO. 22068/2020**

In the matter between:

**REITZ 21 CC****APPELLANT**

and

**ANDRIES QUINTUS SIEBRITS****1<sup>ST</sup> RESPONDENT****BRONWYN DEAN SIEBRITS****2<sup>ND</sup> RESPONDENT****ETHAN QUINTUS SIEBRITS****3<sup>RD</sup> RESPONDENT****This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal**

**representatives by e mail. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of the judgment is deemed to be**

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## **JUDGMENT**

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L I VORSTER, AJ:

1. This is an appeal against the judgment and order made by the Court *a quo*. The Magistrate presiding in the Court *a quo* dismissed the claim of the plaintiff (appellant) with costs on an attorney and client basis and upheld the counterclaim of the defendant (respondents) with costs on an attorney and client scale basis. The facts in the dispute between the parties were uncomplicated and can conveniently be summarized as set down below:

1.1. The first and second respondents are the parents of the third respondent. The third respondent was a student of North West University. They were interested in finding accommodation for the third respondent in Potchefstroom to enable the third respondent to attend classes at the university and to obviate the necessity to commute between Pretoria which is the home and residence of the first and second respondents.

1.2. The appellant is a close corporation and the owner of a premises in Potchefstroom which is developed into a

residence with rooms suitable for accommodation for students. The respondents decided to take up the accommodation provided by the appellant for use by the third respondent to obviate the necessity to commute on a daily basis between Potchefstroom and Pretoria during the course of his studies.

- 1.3. Consequently a written lease agreement was concluded between the appellant as lessor and the respondents as lessee. The intention was that the third respondent would occupy the leased premises as residence to enable him to attend classes at the North West University.
2. The lease was concluded during October 2019 and the lease period was from 1<sup>st</sup> of January 2020 to 15 December 2020.
3. On the 15<sup>th</sup> of March 2020 the Covid-19 pandemic was declared a National Disaster in terms of Section 23(1)(b) of the Disaster Management Act, No 57 of 2002. That led to regulations published in terms of that Act which restricted movement of persons across boundaries. As time progressed there were various levels of restriction of movement of persons. The various stages of limitation of movement is not strictly relevant in this dispute. The fact is that on the 20<sup>th</sup> of June 2020 the leased premises was vacated by the lessees and the keys of the premises as well as the remote control which was used by the lessees were handed back to the lessors.

That led to the summons being issued by the appellant and the respondents defending that action and instituting a counterclaim. The attitude of the respondents was that the imposition of the regulations restricting movement of persons across boundaries rendered the occupation of the leased premises by the third respondent impossible and that consequently they resiled from the agreement and manifested that intention by delivering the keys and the remote control on the leased premises.

4. The appellant consequently issued summons against the respondents. The amount claimed is R8 355,00 which is the amount consisting of several amounts payable in terms of the agreement in the case of the premature cancellation of the agreement by the respondents. An alternative claim was also submitted which is premised on the allegation that the respondents repudiated the agreement between the parties and the amounts consisting of alleged damages is then claimed in the alternative. The amount so claimed is R16 500,00.
5. The respondents defended the action and counterclaimed for the remission of rental paid in terms of the contract in April, May and June 2020 as well as the repayment of the rental deposit it paid and a remote control deposit. The claim in reconvention is premised on the common law doctrine of supervening impossibility (*vis major*). The respondents' counterclaim is based on the impossibility created

by the movement restrictions imposed by the regulations. The case for the respondents was that those movement restrictions rendered it impossible for the third respondent to occupy the leased premises for purposes of attending classes at the NWU University. The defence was that the purpose of the lease agreement was to enable the third respondent to occupy the leased premises and attend classes at the University.

6. It is clear from what is set out above that the correct interpretation of the lease agreement between the parties lies at the heart of the resolution of the disputes between the parties. The plaintiff (appellant) claim is for an agreed amount payable by the respondents in terms of the contract in the event of the respondents effecting a premature cancellation of the contract. That of necessity relates to the repudiation of the contract by the respondents which took place as an unlawful attempt to cancel the contract. The question is therefore whether the premature handing of the keys and remote control back to the lessor amounted to a repudiation of the contract or not. The same question arises in relation to the interpretation of the question whether on a proper construction of the contract the appellant had a duty to ensure that the third respondent remain able to occupy the leased premises to attend classes at the University. In such interpretation of the agreement the appellant as lessor would be practically in the position of an insurer of the third respondent liable for damages in the event of

the third respondent being precluded by circumstances beyond the control of the parties to occupy the leased premises for purposes of attending the NWU University.

7. As is clear from what is said above, the correct interpretation of the lease agreement between the parties lies at the heart of the decision of the case between the parties in the Magistrate's Court. The Court *a quo* had the following to say:

*"17. Context is everything. Therefore it is not necessary to go deeply with the principles applicable to the interpretation of contract. Once a contract has been repudiated the aggrieved party may choose to keep the contract in place and enforce specific performance or accept the repudiation and proceed to cancel the contract and claim damages."*

8. In paragraph 27 of the judgment the Court said the following:

*"27. For the reasons above I find that the defendants have on a balance of probabilities discharged the onus that the unforeseeable supervening circumstances outside the Parties' control or desire prevented them from honouring the lease agreement."*

9. She then dismissed the claim of the appellant and upheld the counterclaim of the respondents for remission of rental and the deposits paid in terms of the contract. She also ordered attorney and client costs on the basis that it was a novel case and therefore attorney and client costs were justified.
10. The lease agreement between the parties is a written agreement which provides for accommodation being made available by the appellants to the third respondent for accommodation purposes in order to enable him to attend classes at the NWU University. It is settled law that the words of a written agreement is the starting point in the interpretation process of what exactly the contract means. An apt summary of the principles relating to interpretation of written contracts is to be found in **Capitec Bank Holdings Ltd & another v Coral Lagoon Investments 194 (Pty) Ltd & others 2022(1) SA 100 (SCA) at paragraph 25:**

*“25. An analysis must commence with the provisions of the subscription agreement that have relevance to deciding whether Capitec Holdings consent was indeed required. The much cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality offer guidance as to how to approach the interpretation of words used in a document. It is the language used, understood in the context in which it is used, and having regard to the*

*purpose of the provision that constitutes the unitary exercise of interpretation. I would add that the triad of text, context and purpose should not be used in a mechanical fashion. It is a relationship between the words used, the concept expressed by those words and the place of the contested provisions in the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.”*

11. In paragraph 26 that judgment the following warning is said:

*“Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from advantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meaning into a contract so as to make it a better contract or one that is ethically preferable.”*

12. In the instant case the lease agreement is an uncomplicated document which provides for the lease of a room in a building on a property in Potchefstroom to the lessee, the term of a lease to be approximately one year and a clause protecting the lessor in the case of a premature cancellation of the lease by the lessee, in which case a certain amount is payable by the lessee to the



lessor. However, it is clear that the lessor protected itself against eventualities which could affect the right and duties of the parties. Clause 6 of the agreement reads as follows:

*“6. Indien die huidige Huurder nie die huurperseel op verstryking van sy huurdatum ontruim nie, of indien die Verhuurder om watter rede ookal nie by magte is om aan die Huurder okkupasie te gee nie, sal die Huurder nogtans okkupasie, sodra dit beskikbaar is op ‘n later datum, aanvaar en die Huurder sal dan geen eis of regte tot enige skadevergoeding as gevolg van sodanige vertraging teen die Verhuurder hê nie.”*

The absence of any provision in the contract or indication that a claim by the lessee as a result of inability of the lessee to exercise his rights of occupation of the leased premises could lawfully be made in such circumstances is a clear indication that such eventuality was not dealt with by the parties as part of the lease agreement and probably it was deliberately omitted. There is no other inference possible due to the fact that the rights of the lessor was protected in clause 6 of the agreement quoted above, whereas no similar provision existed in favour of the lessee in the case of his inability to exercise his rights in terms of the contract. At the time of the formation of the contract, neither of the parties foresaw the

possibility that the Covid-19 epidemic would be declared a disaster and regulations promulgated to restrict the movement of people to places as in fact happened. If that possibility had been foreseen by the parties, I have no doubt that the contract would have dealt with such possibility.

13. The Magistrate found that, as a result of the limitations imposed by the regulations formulated under the Disaster Management Act, the lessee could not exercise his rights in terms of the agreement as lessee, and that therefore the contract became impossible of performance resulting in the cancellation thereof and the entitlement of the lessee to a remission of rent. In my view that finding is completely incorrect. In the first instance it is clear from the evidence that the regulations did not prohibit the lessee to occupy the leased premises. What it did was to restrict the possibility to commute between Pretoria and Potchefstroom. That does not mean that execution of the contract by both the lessor and the lessee became impossible. The obligation of the lessor is to provide vacant possession to the lessee of the leased apartment against payment of the agreed rental. That remained possible. The decision of the lessee not to commute to Potchefstroom whereas he could have taken occupation of the leased premises does not amount to impossibility of execution of the contract. Consequently, the finding of the Magistrate that the contract became impossible of

execution is clearly incorrect. It follows that the counterclaim based on impossibility of the performance of the contract could not succeed.

14. As far as a claim of the plaintiff (appellant) is concerned, it is clear that that claim should succeed. The amount claimed by the appellant is an amount which is provided for in the contract to be payable by the defendants in the event of the defendants prematurely cancel the agreement. The action by the third defendant to hand back the keys and the remote control is clearly an act of repudiation of the agreement. The acceptance thereof by the appellant is equal to acceptance of the repudiation which inevitably leads to cancellation of the agreement. Consequently, I am of the view that the claim of the appellant as pleaded should succeed. As far as costs is concerned, in the debate during the hearing of this matter it was correctly conceded that a cost order on the basis of attorney and clients costs was not warranted. I agree. In my view the following order should be made:

- 1. The appeal is upheld with costs.*
- 2. The order of the Court a quo is set aside and replaced with the following orders:*

- 2.1. *Judgment is granted in favour of the plaintiff against the first, second and third defendants, jointly and severally, for the payment of the amount of R8 335,00;*
- 2.2. *Interest is payable on the aforesaid amount at the applicable mora interest rate from 3<sup>rd</sup> of July 2020, being the tempore morae, until date of payment;*
- 2.3. *First, second and third defendants are ordered to pay the costs of suit of the plaintiff;*
- 2.4. *The counterclaim of the first and second defendants is dismissed with costs.*

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**L.I. VORSTER**  
**ACTING JUDGE OF THE HIGH COURT**

I agree, it is so ordered

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**C.J. VAN DER WESTHUIZEN**  
**JUDGE OF THE HIGH COURT**

Counsel for Appellant:

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Instructed By:

Riekert Terblanche Attorneys

Counsel for the Respondents:

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Instructed By:

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Date of Hearing: 25 January 2024  
Judgment delivered on: 31 January 2024