



## REMISSION OF RENT: A Summary of The Recent SCA Decision in *The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust* (038/2022) [2023] ZASCA 57

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### 1 Introduction

- 1.1 The case of *The Butcher Shop and Grill CC* (“**Butcher Shop**”) v *The Trustees for the time being of the Bymyam Trust* (“**the Trust**”) was first heard in Western Cape High Court. The Butcher Shop was unsuccessful and therefore, appealed to the Supreme Court of Appeal (“**SCA**”). The SCA handed down judgment in the appeal on 21 April 2023.
- 1.2 This case raised the question of a lessee’s entitlement to claim remission of rent payable to a lessor in circumstances where *vis major* has interfered with the beneficial use and enjoyment of leased property by a sub-lease.

### 2 Background: Western Cape High Court Decision

- 2.1 The Bymyam Trust owns a property known as the Amalfi building in Mouille Point, Cape Town. In 2014 the Trust concluded a lease agreement in respect of the property with the Butcher Shop.
- 2.2 During 2019 the Trust and the Butcher Shop concluded a tripartite agreement in terms of which Apoldo Trading (Pty) Ltd (“**Apoldo**”) sub-leased the property for purposes of conducting the business of the restaurant. Apoldo is related to the Butcher Shop in that both entities have the same sole shareholder.
- 2.3 Due to the onset of the Covid-19 Pandemic and the national lockdown which enforced severe trading restrictions on restaurants, the Butcher Shop suffered a significant loss of turnover and withheld rent due to the Trust. The Butcher Shop contended for a remission of rent on the basis that it had suffered a significant loss of turnover and that since it was denied beneficial use of the premises because of the lockdown restrictions, it was not obliged to make full payment of the rental.

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- 2.4 The Trust launched proceedings out of the Western Cape High Court claiming arrear rental. The Butcher shop opposed the application and filed a counter application seeking that the main application be stayed, a declaration that it is entitled to remission of the base rental payable and that the main application be dismissed.
- 2.5 The High Court dismissed the counter application and granted an order in the main application requiring the Butcher Shop to pay an amount of R2 703 191,17 together with interest and costs on attorney and client scale.

### **3 SCA Decision**

- 3.1 The appeal raised four issues:
- 3.1.1 Firstly, whether the lease agreement excludes the claim for remission of rent raised by the Butcher Shop;
- 3.1.2 Secondly, whether the Butcher Shop, a tenant, may claim remission of rental in circumstances where the loss of the use and enjoyment of the property is suffered by its sub-tenant;
- 3.1.3 Thirdly, the concept of reverse piercing of the corporate veil was considered and whether on the facts of this case the Court should disregard the separate legal personality of Apoldo, to allow the Butcher Shop to raise as a defence to the Trust's claim for payment of rent, a defence that Apoldo would be entitled to raise against it; and
- 3.1.4 Lastly, if the above is negative, does the Butcher Shop contend that the common law ought to be developed to permit this Court to disregard the corporate personality of Apoldo in the present circumstances.

#### **3.2 Remission of Rent**

- 3.2.1 The SCA stated that in terms of the common law, a tenant is entitled to claim remission of rent when they have been prevented, either entirely or to a considerable extent, from making use of the property for which it was leased, due to some unforeseen event such as *vis major* or *casus fortuitus*. However, this right only applies if the loss of enjoyment of the property is the direct and immediate result of the unforeseen event and is not merely indirectly or remotely connected to it.
- 3.2.2 The SCA further stated that parties to a lease agreement may limit or exclude the right to claim remission of rent in circumstances of *vis major*. When interpreting a lease agreement, it is assumed that the parties intend that the common law shall apply unless they plainly and unambiguously indicate the contrary. The burden is on the party seeking to exclude or limit the right to claim remission of rent to ensure that the extent to which they wish to be absolved from their obligations is plainly spelt out in the lease agreement.

3.2.3 The Trust argued that the lease agreement did not envisage a claim for remission of rent because the lease restricted beneficial occupation to physical occupation and control, further the obligation to pay the base rent was not reciprocal, and that the tenant had assumed the risk of *vis major* events.

3.2.4 The SCA rejected this argument stating that the definition of "beneficial occupation" did not define the use and enjoyment that was conferred by the lease agreement. The SCA found that the lease agreement did contemplate a common law-based claim for remission of rent and that the burden was on the Trust to exclude or limit this right in the lease agreement.

### 3.3 Piercing the corporate veil and Development of the Common Law

3.3.1 The SCA found that section 20(9) of the 2008 Companies Act did not replace the common law on the possible piercing of the corporate veil but supplemented the common law. In the current matter the court found that the corporate should not be pierced or lifted, as argued by the Butcher Shop.

3.3.2 The SCA addressed the argument that the common law should be developed to apply the remedy of piercing the corporate veil in such circumstances. The SCA noted that no proper case was made out to allow for the Court to engage in the development of the law in a constitutional context.

3.3.3 The SCA stated that the duty to develop the common law is only when it is in the interests of justice, in conformity with the Constitution, and in a manner that promotes the spirit, purport, and objects of the Bill of Rights. Courts will exercise their inherent discretion to develop the common law sparingly and will approach the task mindful of the fact that the major engine for law reform should be the legislature and not the judiciary.

## 4 Conclusion

4.1 The SCA found that the appeal was primarily focused on issues raised in the counter application by the Butcher Shop in the court a quo. The SCA acknowledged that the lease agreement prevented the withholding of base rental payments however, the SCA upheld the High Court ruling.

4.2 As a result, it was confirmed that a lessee's right to remission of rent in terms of the common law can be limited or excluded by the terms of the lease agreement between the parties.

4.3 The appeal was dismissed with costs.