Common law and statutory rights of residential tenants during the lockdown in South Africa*

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OPSOMMING

Gemeenregtelike en statutêre regte van residensiële huurders gedurende die inperking in Suid-Afrika

Die COVID-19-pandemie het regoor die wêreld ekonomiese verwoesting gesaai. In baie stede staar residensiële huurders, wat hulle werke as gevolg van die ekonomiese slagting verloor het, haweloosheid in die gesig. Sodanige huurders ervaar finansiële nood en 'n gevolglike onvermoë om huur te betaal. Hierdie toedrag van sake het die Suid-Afrikaanse regering genoop om 'n moratorium op uitsettings te plaas deur regulasies ingevolge die Wet op Rampbestuurs 57 van 2002 (die "Grendelstaatregulasies") uit te vaardig. Sodanige regulasies beperk egter vryheid van beweging en maak dit vir sommige residensiële huurders onmoontlik om voordeel uit die okkupasie van huurpersele te trek, aangesien hulle in ander provinsies of selfs oorsee vasgekeer is of was. Die eerste deel van hierdie artikel ondersoek die gemeenregtelike regte van residensiële huurders wat weens die reisbeperkinge wat deur die Grendelstaatregulasies opgelê is, nie die volle genot van gehuurde eiendomme in stede kan (of kon) geniet nie. Dit analiseer die pandemie as 'n skielike, onvoorsiene en onvermydelike natuurlike gebeurtenis wat aan die elemente van die definisie van *vis major* voldoen. Met dié doel voor oë, bespreek hierdie bydrae die reg van residensiële huurders om ingevolge die gemenereg die verweer van *vis major* te gebruik om kwytskelding of vermindering van huur te eis. Die tweede deel van die artikel ondersoek die beskerming van residensiële huurders teen swak behandeling deur verhuurders en teen uitsettings tydens die grendelstaat.

* This article was made possible by the financial generosity of the National Research Foundation (Grant no: 115581). We are grateful to the editors and the anonymous reviewers for their insightful feedback on the draft manuscript. We are also thankful to Professor Anél du Plessis (SARChI CLES), Rosemary Mwanza (University of Eastern Finland), and Chantelle Moyo (North-West University) for their constructive comments. Any faults that remain are ours.

1 INTRODUCTION

The COVID-19 pandemic is wreaking untold suffering upon many people across the world. In South Africa, the lockdown[1] imposed to curb the spread of the coronavirus severely disrupted economic activity, leading to a sharp rise in financially distressed businesses,[2] retrenchments,[3] unemployment, indigence, and poverty.[4] Taking into account that the economy was struggling before the outbreak of the disease, COVID-19 threatens to render South Africa an "economic wasteland".[5] Amidst the health emergency and the ensuing economic havoc, the exponential increase in job losses poses a high risk of homelessness to many people. As an increasing number of people are facing unemployment, especially in urban areas, it is inevitable that many are not able to pay their rent and that, in the absence of a protective legal framework, landlords will evict, or have already evicted, them. Hence, the national executive, acting under lockdown regulations promulgated in terms of the Disaster Management Act,[6] placed a moratorium on evictions during the lockdown.[7] The lockdown regulations had, and continue to have, an impact on the relationship between landlords and residential tenants[8] in at least two ways. In the first instance, it prohibits the eviction of residential tenants. Secondly, it prohibited and could, in the future, again prohibit international travel and restrict interprovincial travel. This entails that residential tenants (except South African citizens) who travelled to other countries before the lockdown were precluded from returning to South Africa for the duration of the prohibitions on international travel.[9] The inability to return to South Africa

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1 The lockdown was imposed after the Declaration of a National State of Disaster, published in GN 313 in *GG* 43096 of 15 March 2020, which followed the classification of COVID-19 as a national disaster by the Head of the National Disaster Management Centre (see GN 312 in *GG* 43096 of 15 March 2020) in terms of s 23 of the Disaster Management Act 57 of 2002 (hereafter "the DMA"). The Minister of Cooperative Governance and Traditional Affairs extended the Declaration of a National State of Disaster several times, starting on 15 July 2020 (GN 646 in *GG* 43408 of 5 June 2020). On 13 July 2020, the Minister extended the declaration to 15 August 2020 (GN 765 in *GG* 43525 of 13 July 2020). At the time of writing, the declaration had been extended to 15 December 2020 (GN 1225 in *GG* 43905 of 14 November 2020).

2 *Mhlonipheni v Mezepoli Melrose Acrh (Pty) Ltd* 2020 JOL 47359 (GJ).

3 *Macsteel Service Centres SA (Pty) Ltd v NUMSA* 2020 JOL 47372 (LC).

4 *Community of Hangberg v City of Cape Town* 2020 ZAWCHC 66 para 6.

5 *Khosa v Minister of Defence* 2020 JOL 47215 (GP) para 34. In this judgment, Fabricius J drew attention to the fact that international rating agencies downgraded South Africa to "junk status", the decline in the value of the Rand, and the decision of the government to approach international markets for funds as some of the manifestations of South Africa's troubled economy before the outbreak of the pandemic.

6 In court judgments, the regulations are referred to as the "lockdown regulations", "COVID-19 regulations" and simply as "the regulations"; see *De Beer v Minister of Cooperative Governance and Traditional Affairs* 2020 JOL 47361 (GP) para 2.

7 The lockdown was implemented under different Alert Levels; see GN 608 in *GG* 43364 of 28 May 2020.

8 In this article, a residential tenant is defined as a lessee who occupies a dwelling that is let by a landlord in terms of the Rental Housing Act 50 of 1999 (hereafter "the Rental Housing Act").

9 S 21(3) of the Constitution of the Republic of South Africa, 1996 guarantees citizens the right to enter South Africa at any time and to reside anywhere. Subject to compliance with health protocols, it does not appear that the pandemic (or other public emergency for that matter) can limit the right of citizens to enter South Africa.

meant, and could (should another international travel ban be imposed) in future mean, that the affected tenants could not have beneficial occupation of the leased premises and were deprived of the full use and enjoyment of the dwellings.

The question arises as to whether residential tenants who travelled to other countries before the lockdown and who could not return to South Africa are obliged to pay rent to South African landlords. This raises the question as to whether the declaration of a National State of Disaster and the ensuing closing of the country's entry points could be classified as *vis major*, which would release residential tenants from their leases. Could residential tenants invoke the COVID-19 pandemic and the lockdown as defences against claims for rent? Is it legally possible for residential tenants to claim remission of rent in such circumstances? These questions could be interpreted as an appreciation of the distinction between the *obligation* to pay rent and the *ability* to pay rent. This does not include the issue of determining whether affected tenants, in such circumstances, would legally be able to cancel their leases. This is important for the delimitation of this work.

In this article, we examine the common-law and statutory rights of residential tenants during the lockdown in South Africa. The common law is one of several components of the hybrid South African legal system.[10] It provides tenants with rights during a public health emergency, such as COVID-19, and operates subject to the Constitution, applicable legislation, and regulations. We first discuss the common law rights of residential tenants who could not, due to international and interprovincial travel restrictions, enjoy full use and enjoyment of leased premises. We submit that the common-law rights stem from *vis major* and include the right to raise *vis major* as a defence against claims for payment of rent. This includes the right to invoke *vis major* as an essential allegation for tenants' claims for the remission of rent. From a statutory perspective, we examine the protection of residential tenants by the lockdown regulations, particularly the right not to be evicted. With regard to the lockdown regulations' protection of residential tenants, we endeavour to analyse how the South African government, using special powers granted by the DMA, protects vulnerable members of society during the health emergency that the COVID-19 pandemic brought about. It is our view that, whereas the COVID-19 pandemic will pass and the lockdown will be lifted entailing that the regulations will be repealed, an academic account of how the government protected vulnerable people during the pandemic is essential, not only to ascertain the strengths and weaknesses of the government's response to the plight of residential tenants, but also to inform future policy. The scientific community has warned of a strong probability that another virus pandemic will ensue before the end of the century.[11] If that happens, lessons from the government's response to COVID-19 will be vital in protecting vulnerable members of society, including residential tenants who could be unable to meet their rental obligations.

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10 Du Bois "Introduction: History, system and sources" in Van der Merwe & Du Plessis (eds) *Introduction to the law of South Africa* (2004) 95–139.

11 See Murdoch "The next once-a-century pandemic is coming sooner than you think — but COVID-19 can help us get ready" http://theconversation.com/the-next-once-a-century-pandemic-is-coming-sooner-than-you-think-but-covid-19-can-help-us-get-ready-139976 (accessed on 10-12-2020); Crow "The next virus pandemic is not far away" https://www.ft.com/content/dc33f21b-740f-4be8-9947-b47439f557d2 (accessed on 10-12-2020).

We limit our contribution to the common-law and statutory rights of residential tenants. We do not examine the generality of constitutional rights affected by the lockdown regulations (such as the right to property). Where applicable, we mention constitutional rights, but only in so far as these relate to the right to access adequate housing, which is the anchor for the protection of residential tenants under the lockdown regulations. In our opinion, the impact of the lockdown regulations on the constitutional right to property is a distinguishable matter, which requires a separate discussion. Also, we do not delve into the general principles of the South African law of contract and its intricacies, such as supervening impossibility, cancellation, and specific performance. We expressly limit our analysis to two aspects: in the first instance, the rights of tenants to raise *vis major* as a defence against claims for payment of rent and as an essential allegation for claims for the remission of rent; and secondly, the efficacy of emergency regulations regarding the protection of residential tenants against eviction during the lockdown. With regard to *vis major*, we confine our discussion to foreign nationals who travelled from South Africa during the lockdown and could not return to resume their tenancy in the country for the duration of the lockdown. Also, the analysis applies to South Africans who travelled to other provinces and who were impacted by initial prohibitions on inter provincial travel. On the protection of residential tenants against eviction, the discussion applies to all affected tenants in South Africa.

2 *VIS MAJOR* AS A DEFENCE

Vis major "… includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against".[12] An event qualifies as *vis major* if it is extraordinary and unforeseen, "which human foresight could not be expected to anticipate".[13] The implication of *vis major* is that it absolves a party from fulfilling the terms of an agreement.[14] Outbreaks of armed hostilities, epidemics, pandemics, and acts of public authorities (such as legislation), which affect the fulfilment of agreements, are examples of *vis major*.[15] Arguably, the COVID-19 pandemic is an act of nature of which the violent and sudden assault on humanity could not have been anticipated. It can, therefore, in certain circumstances, be classified as *vis major*, as we explain in this article.

Parties to a residential lease may include provisions in the rental contract to absolve themselves from fulfilling the contractual duties in the event of sudden, superior, and overwhelming events, which interfere with the fulfilment of the contract.[16] If the lease is unwritten, or where the lease does not contain such provisions, acts of God that arise during the term of the lease are considered *vis major*. When a superior and unforeseen event deprives the residential tenant of

12 *New Heriot Gold Mining Co Ltd v Union Government (Minister of SAR & H)* 1916 AD 415 at 433.

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

14 See *Mhlonipheni* para 36.

15 For a general discussion of legislation as a *vis major*, see *Bayley v Harwood* 1954 3 SA 498 (A). For the proposition that the closing of leased premises under public health legislation to combat a pandemic constitutes *vis major*, see *Stockham & De Jong & Co* (1901) 18 SC 156. For an extensive analysis of war, plague, and the acts of public authorities as some of the examples of *vis major* that could affect leases, see *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707.

16 Smith *Eviction and rental claims: A practical guide* (2020) § 9.6.

the beneficial occupation of the leased premises, the tenant can raise the defence of *vis major* when the landlord claims the payment of rent.[17] It is argued that the COVID-19 pandemic and the lockdown regulations promulgated to curb its spread could be used by a residential tenant to raise the defence of *vis major*.

The context within which tenants could rely on *vis major* is understood as follows: After the declaration of the COVID-19 pandemic as a national disaster on 15 March 2020, the national executive enacted a countrywide lockdown to curb the spread of the coronavirus and sealed the borders.[18] Residential tenants (of foreign origin), who travelled from South Africa before the lockdown, could not return to resume their tenancies until the government lowered the Alert Level to Level 1 (which happened on 18 September 2020). However, tenants could not have reasonably foreseen when the Alert Level was to be lowered. Several points should be noted. In the first instance, the regulations prevented the tenants from returning to South Africa to resume the beneficial occupation of the leased premises. Secondly, the outbreak of the COVID-19 pandemic, the imposition of the lockdown, and the ensuing closing of South Africa's entry points are events beyond the control of the tenants, who could not reasonably have foreseen these circumstances. Therefore, tenants could not have avoided or overcome the situation, which was exceptional and not attributable to them.

Given that it is impossible to know when the pandemic would end and when the government would reopen (or in future again close) the country's entry points, it was neither financially sound nor sustainable for tenants who were outside South Africa to continue paying rent to South African landlords. Landlords' expectations to the contrary would have been unrealistic, if not overly optimistic, because the law of lease rests on the essential element that a lessee must have beneficial occupation or the full use and enjoyment of the leased premises.[19] Where the tenant does not have access to the leased premises, this essential element of a lease is absent. Tenants are not in control of the closing of South African borders and such closing, resulting from the lockdown, came unexpectedly. As a result, it was impossible for some tenants to enter South Africa. The act of government, in the form of the lockdown regulations, which resulted in the closing of borders, together with the pandemic, can be regarded as acts of state whose ramifications equal *vis major*. This proposition is supported by several cases, such as *North Western Hotel v Rolfes, Nebel and Co*,[20] *Morris v Mappin and Webb*,[21] and *Fleming v Johnson and Richardson*.[22] In all of these cases the courts ruled that government interference with a lease (by legislative or executive action) could in certain circumstances constitute *vis major*.

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17 *Ibid.*

18 Reg 21 in GNR 480 in *GG* 43258 of 29 April 2020 (as amended); reg 41 was added by GN 608 of 28 May 2020.

19 *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 3 All SA 128 (SCA) para 8.

20 *North Western Hotel v Rolfes, Nebel & Co* 1902 TS 324 (the Executive Government had imposed martial law, which, among others, necessitated the closure of bars, which had been leased).

21 *Morris v Mappin & Webb* 1903 TS 244 (the tenant had lost beneficial occupations due to the expulsion of the lessees by the Executive Government in the middle of a war).

22 *Fleming v Johnson and Richardson* 1903 TS 319 (commandeering of cattle by the government at a leased farm).

Accepting that the COVID-19 pandemic and the lockdown (or the regulations that accompanied it) were sudden and due to superior forces, which fall under the definition of *vis major*, the question arises as to what residential tenants could do when confronted with legal claims for the payment of rent (instituted by landlords through edictal citation or otherwise). In our view, tenants could raise *vis major* as a defence against such claims. However, tenants would not succeed with the defence of *vis major* by averring that the lockdown rendered it "difficult, expensive or unaffordable"[23] to pay their rent. Rather, tenants have to aver that the closing of the borders made it impossible for them to have full use and enjoyment of the leased premises, thereby depriving them of beneficial occupation of the leased premises and defeating the purposes of the leases.

While residential tenants of foreign citizenship could not resume their tenancies due to the lockdown regulations, which led to the closing of South Africa's entry points, citizens who travelled to their homes in other provinces could also not resume their tenancies due to the initial lockdown regulations, which prohibited interprovincial travel.[24] Students, for example, could return to universities only after procuring travel permits issued by the universities, and only when they formed part of the categories of students identified by the Minister of Higher Education, Science and Innovation.[25] Although the government gave once-off permission to all South Africans to travel under Alert Level 4,[26] the uncertainties surrounding the pandemic led many to choose to endure the lockdown in their homes. This placed tenants in a difficult position with regard to their landlords as to whether they had to continue paying rent; and if so, whether they had to pay the full amounts or discounted amounts.

3 RIGHT TO REMISSION OF RENT

When a tenant is prevented from fully enjoying the use of the leased premises for any period, the tenant is entitled to a remission of rent.[27] A claim for remission of rent depends on establishing the occurrence of *vis major* and could be summarised as follows:

> "A lessee is entitled to remission of rent either wholly or in part where he has been prevented either entirely or to a considerable extent from making use of the property for the purposes for which it was let, by *vis major* or *casus fortuitous*, provided always that the loss of enjoyment of the property is the direct and immediate result of the *vis major* or *casus fortuitous*, and is not merely indirectly or remotely connected therewith."[28]

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23 See *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 4 SA 191 (W) at 198D.

24 The conditions under which persons could move from their residences were stipulated in reg 16 of the consolidated GNR 480 in *GG* 43258 of 29 April 2020, as amended on 12 July 2020.

25 See GN 652 in *GG* 43414 of 8 June 2020. These directions applied retrospectively from 1 June 2020. See also GN 355 in *GG* 43486 of 29 June 2020 (s 8 for Alert Level 4; s 9 for Alert Level 3; s 10 for Alert Level 2; and s 11 for Alert Level 1).

26 See GN 534 in *GG* 43320 of 14 May 2020.

27 *Boyd v Stuttaford & Co* 1910 AD 101 at 117. See also *Zweigenhaft v Rolfes, Nebel & Co* 1903 TH 242 at 246.

28 *Hansen* at 719–720, followed in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Ltd* 1903 TH 286 at 292. See also Mulligan *Letting and hiring: Pothier's treatise on the contract of letting and hiring* (1953) 139.

A tenant who has paid rent in advance and who, during the tenure of the lease, becomes entitled to remission of rent as a consequence of *vis major*, may claim an appropriate amount by means of a *condictio sine causa*.[29] Although the list of circumstances that could lead to a successful claim for remission is wide, it includes *vis major* and good reasons for quitting the leased premises – such as looming war, fear of robbers, or other reasonable causes for alarm.[30]

In *Hansen*, the court considered an appeal on the question of whether deprivation of tenants' full use and enjoyment of leased premises by a proclamation, issued in response to the outbreak of war, was a ground for the remission of rent. The appellants contended that the proclamation issued by the Transvaal government at the outbreak of the Second Anglo-Boer War had mandated the closure of bars and restaurants that the appellants had rented, thus depriving them of the beneficial occupation of the properties. Their tenants, to whom they had sublet the properties with the knowledge and consent of the landlord, had fled when war broke out.[31] In deciding the case, Wessels J alluded to Brunnermann's *Commentaries on the Pandects*, one of the old authorities, which he summarised as having stated the following: "If at the approach of plague the lessee remains, but cannot get any sub-lessees for rooms hired for the purpose of sub-letting, by reasons of the danger caused by plague, then there should be a partial remission of rent."[32]

Although Wessels J found it difficult to judge whether the above authority supposed a plague that broke out in the leased premises or near the rented premises, the COVID-19 pandemic makes things easier for the present discussion. Applied to COVID-19, the argument could be that tenants who were, or continue to be, prevented by the pandemic from deriving beneficial occupation of the leased premises are entitled to remission of rent. The lockdown, which prevented some tenants from travelling to their leased premises and from sub-letting those premises (because there were no tenants to whom to lease the premises due to the lockdown), rendered tenants entitled to remission of rent. Following the analyses in *Rolfes* and *Fleming*, one could argue that it was not only the outbreak of the pandemic that triggered the right of tenants to claim remission of rent, but also the act of government (in imposing the lockdown). Factors that hinder tenants from fully enjoying and using the leased premises entitle them to claim remission of rent.

It appears that only tenants who were deprived of the beneficial use of leased premises by the lockdown regulations, which prevented them from travelling to their leased premises, are entitled to remission of rent. Tenants who, for fear of COVID-19, left their leased premises and travelled elsewhere to be with family or friends just before the lockdown came into effect have no right to claim remission of rent.[33] The reason is simple: tenants who left their leased premises to be with family or friends before the lockdown did not enjoy beneficial occupation of the leased premises due to their fear of the pandemic, and not due to the pandemic or the lockdown itself. It was their fear, not the pandemic or the lockdown regulations, that initially displaced them from their leased premises.

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29 See *Holtshausen v Minnaar* (1905–1910) 10 HCG 50; *Hughes v Levy* 1907 TS 276.

30 *Hansen* at 719.

31 See the summary of facts at 710.

32 *Hansen* at 714.

33 See the analysis at 717.

The authorities are silent on the question whether fear, which comes about because of a plague or imminent act by the government could be classified as *vis major*. Such fear does not satisfy the definitional elements of an Act of God. It remains to be seen whether tenants are entitled to remission of rent where there was an outbreak of COVID-19 cases in a concentrated residence, such as a block of flats, which led tenants to flee the building. Brunnermann seems to suggest that the outbreak of a plague that directly causes lessees to flee, must be distinguished from the outbreak of a plague that indirectly causes the flight of tenants.[34] In the circumstances surrounding the COVID-19 pandemic, where no place can be considered safe from the coronavirus, it is difficult to ascertain whether tenants, who flee a building due to an outbreak of COVID-19, would be entitled to remission of rent.

4 PROTECTION AGAINST EVICTION UNDER ALERT LEVELS 3, 4, AND 5

The prohibition of evictions under the lockdown regulations should be understood in the international context and through the lens of South Africa's housing realities. In April 2020, the Special Rapporteur on the Right to Adequate Housing, Leilani Farha, issued guidelines on evictions during the COVID-19 pandemic, noting that the pandemic and the ensuing lockdowns imposed by states to defeat the pandemic presented several challenges, which placed housing at the frontline of the defence against the coronavirus. The Special Rapporteur noted that, despite the call for people to "stay at home" to slow the spread of the coronavirus, many vulnerable people faced threats of eviction.[35]

The intervention of the Special Rapporteur stemmed from two principal international instruments that protect the right to housing – the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights, to which South Africa is a State Party.[36] The Special Rapporteur noted that forced evictions were not only inconsistent with the call for people to "stay at home" but also violated the right to housing by causing homelessness during a global emergency.[37] Although international law limits certain rights, "the right to adequate housing is not subject to derogation in times of emergency"[38] like the COVID-19 pandemic. Also, the Special Rapporteur noted that an eviction during a pandemic was "a potential death sentence".[39] Since many businesses – including estate agents – closed during the lockdown, people who were seeking alternative homes were likely to struggle to secure accommodation. Hence, the Special Rapporteur implored states to exercise their legislative and other powers to protect vulnerable people against evictions and to take all necessary steps to ensure that no people were extra-judicially evicted during the pandemic.[40]

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34 See the analysis by Solon J at 721.

35 Farha "COVID-19 guidance note: Prohibition of evictions" https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_evictions.pdf (accessed on 23-07-2020).

36 See art 25 of the Universal Declaration of Human Rights 10 December 1948, 217A (III) (1948) and art 11 of the International Covenant on Economic, Social and Cultural Rights 16 December 1966, United Nations, Treaty Series, Vol 993, 3 (1966).

37 Farha.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

The South African government was constitutionally obligated to ensure that public and private actors did not derogate the right to housing during the COVID-19 pandemic and that it fulfilled its obligation by placing a moratorium on evictions. Under Alert Level 4, regulation 19 stipulated that the courts could grant eviction orders but that such orders could not be enforced until the last day of Alert Level 4. However, the regulations afforded the courts discretionary powers to order the execution of evictions under Alert Level 4 when convinced that doing so would be just and equitable.[41] Regulation 36 of the amended regulations contained similar provisions for evictions under Alert Level 3.[42] These regulations were essential to meet South Africa's international obligations to realise the right to adequate housing, to curb the spread of the novel coronavirus by reducing homelessness, and to insulate financially distressed residential tenants from eviction.

During the lockdown, the temporary limitations on the entitlement of landlords to evict non-paying tenants so as to accommodate tenants who were willing and able to pay the rent were important to prevent homelessness. The purpose was objectively important not only for residential tenants but also for the broader society, because it helped to curb the spread of the novel coronavirus. Also, the temporary restrictions worked to realise the duties of private persons and entities in order to further the Bill of Rights, as espoused in section 8(2) of the Constitution.[43] However, it must be noted that tenants who were unable to pay rent during Alert Levels 3 and 4 were not discharged of the obligation to pay such when their circumstances improved. Even if the tenants found other places to stay and relocated, their financial obligations to the former landlords were not extinguished.[44] Also, landlords could offset deposits paid by tenants at the commencement of lease agreements against the rent owed by the tenants.[45]

5 PROTECTION UNDER ALERT LEVEL 2

On 18 August 2020, South Africa moved from Alert Level 3 to Alert Level 2.[46] Accordingly, the Minister promulgated regulations that, among others, regulated evictions.[47] Unlike the previous regulations, the Alert Level 2 regulations were extensive regarding the protection of residential tenants. Regulation 53 prohibited the eviction of persons from places of residence without a competent court order.[48] When suspending or staying an order of eviction (unless when doing so

41 Reg 19 (as amended).

42 Reg 36 was added by GN 608 of 28 May 2020.

43 See *Daniels v Scribante* 2017 8 BCLR 949 (CC) paras 156–162 on the horizontal application of the Bill of Rights. See also *Amod v Multilateral Motor Vehicle Accidents Funda* 1998 4 SA 753 (CC) para 31.

44 See the Rental Housing Act for the regulation of the rights and duties of residential tenants and landlords.

45 See s 5(3)(g) of the Rental Housing Act.

46 See GN 891 in *GG* 43620 of 17 August 2020 (hereafter "the Alert Level 2 Regulations").

47 GN 891 in *GG* 43620 of 17 August 2020.

48 It appears that the spike in unlawful evictions during the pandemic, particularly in the City of Cape Town, prompted the Minister to include this prohibition in the regulations. In four cases, the Western Cape Division of the High Court made findings to the effect that the City of Cape Town had taken the law into its own hands by evicting people without court orders. The cases were *Hangberg Community*; *South African Human Rights Commission v City of Cape Town* 2020 ZAWCHC 84; *Jordan v City of Cape Town* Case No: 5809/2020 (unreported) and *Mtshingana v City of Cape Town* 2020 ZAWCHC 156.

was not just or equitable) until after the end of the national state of disaster, regulation 53(2) required a court to consider the following factors: (a) the public interest to prevent homelessness and to limit movement and gatherings, and the protection of the health of everyone; (b) the regulations that prohibited unnecessary movement; (c) the impact of the pandemic on the parties; (d) the balance of convenience and the need to minimise prejudice; (e) limitations on access to legal services during the disaster; (f) the availability of (immediate) alternative accommodation and basic services to the affected person(s); (g) the availability of adequate measures to protect the public health during any possible relocation arising out of the granting of an eviction order; (h) the conduct of the occupier(s), which could cause harm to others or threaten human life; and (i) whether the party who applied for an eviction order had, in good faith, taken reasonable steps to limit or preclude relocation during the state of disaster.

Undoubtedly, these provisions placed stringent requirements on landlords and other persons who wanted to obtain eviction orders. Furthermore, regulation 53(3) required a court, when determining whether to grant an eviction order, to "… request a report from the responsible member of the executive regarding the availability of any emergency accommodation or quarantine or isolation facilities pursuant these regulations."

This requirement ensured that the courts did not easily grant eviction orders where the affected persons may have been rendered homeless. The prohibitions relating to evictions were augmented by provisions relating to the resolution of rental housing disputes.

The national state of disaster presented, and could in future again present, several challenges for the resolution of rental housing disputes. The challenges included constraints on the movement of persons (to lodge cases at the Rental Housing Tribunals) and limited access to legal services. Regulation 54 of the Alert Level 2 regulations stipulated that for the duration of the disaster, the Rental Housing Tribunals, which are established in terms of the Rental Housing Act, were obliged to consider the circumstances and determine procedures and platforms to hear and decide rental housing disputes.[49] This seems to suggest that the tribunals could have used internet-based platforms and video-conferencing to hear urgent cases.[50] Importantly, the regulations provided that a tribunal could set down a matter for hearing with 24 hours' notice and grant an urgent *ex parte* spoliation order for the restoration of occupation of a dwelling or access to such a dwelling.

Regulation 54(2) of the Alert Level 2 regulations listed conduct that constituted unfair practice during the disaster: (a) the termination of services when (i) the landlord had not given the tenant reasonable notice and the opportunity to make representations before such termination; (ii) the landlord had not reasonably and in good faith reached an agreement with the tenant about alternative rental payments; and (iii) the landlord failed to arrange for the uninterrupted provision of services during the disaster; (b) levying penalties for late payment of rent where such delay was due to interruptions caused by the disaster; (c) conduct that prejudiced the occupation of a residence, the health of the tenant

49 Reg 54(1)(*a*) of the Alert Level 2 regulations.

50 See reg 54(4), which alluded to expeditious hearings and remote hearings to facilitate access to the tribunals.

or the ability of the tenant to adhere to restrictions on movement; and (d) unreasonable and oppressive conduct when considered within the context of the (financial and other) difficulties affecting tenants as a result of the disaster.

5.1 Protection against eviction under Alert Level 1

On 18 September 2020, the Minister of Cooperative Governance and Traditional Affairs withdrew the Alert Level 2 regulations and published the Alert Level 1 regulations.[51] The Alert Level 1 regulations affirm the right to protection against eviction and stipulate that no person may be evicted during the national state of disaster unless the eviction has been granted and authorised by a competent court.[52] The regulations afford the courts the discretion to suspend and stay eviction orders until the end of the national state of disaster except where doing so would not be just and equitable after considering, among others, the following factors: (a) the public interest for all people to have access to residences during the pandemic and to prevent unnecessary movement of persons; (b) the restrictions on the movement of persons in terms of the regulations; (c) the impact of the pandemic on the affected persons; (d) the balance of convenience; (e) the availability of alternative access to accommodation; and (f) adequate measures for the relocation of evicted persons.[53]

Further, the Alert Level 1 regulations stipulate that, in appropriate circumstances, a court hearing an application for the eviction of a person could (in addition to other legal requirements) request the relevant member of the executive to furnish it with a report on whether accommodation, quarantine and isolation premises are available for the persons whose eviction is sought.

As was the case with the Alert Level 2 regulations, the Alert Level 1 regulations stipulate how rental housing disputes must be resolved. Regulation 71 retains the powers of the Rental Housing Tribunals to determine urgent and fair procedures to hear rental housing disputes and to grant spoliation orders *ex parte* on 24 hours' notice.[54] Also, the Alert Level 1 regulations list circumstances under which the Rental Housing Tribunals may presume unfair practices on the part of landlords, such as when the landlords failed to provide reasonable notice and opportunities to residential tenants to make representations; failure to enter into arrangements with tenants about the payment of rent; and, failure to reasonably engage with tenants to make arrangements to factor in the exigencies that the pandemic brought about.[55] Generally, the Alert Level 1 regulations do not derogate much from the Alert Level 2 regulations in so far as the adjudication of rental housing disputes is concerned.

5.2 Possible evictions during the lockdown: *P P S v T L S*

5.2.1 *Setting and legal issues*

Despite the moratorium on the execution of eviction orders against residential tenants, the courts have discretionary powers to order such evictions if doing so

51 Reg 2 in GN 999 in *GG* 43725 of 18 September 2020.

52 Reg 70.

53 *Ibid.*

54 Reg 71(1).

55 For a full list, see reg 71.

will serve the interests of justice and if it is just and equitable to do so.[56] The courts must be hesitant to allow the execution of eviction orders, although there are certain circumstances that require the execution of evictions. In the context of COVID-19, the Special Rapporteur stipulated the exceptions as follows:

> "The only exceptions to this blanket policy should be where someone must be removed from his or her home because he or she is causing harm to others or in situation of a serious threat to the life of residents, e.g. to prevent death provoked by housing collapses or by natural disasters, such as flooding. Any person that is evacuated to prevent harm must be provided with secure and decent alternative housing."[57]

Considering the increase in gender-based violence during the lockdown,[58] it is imperative that the courts ensure that perpetrators of gender-based violence are removed from family environments where they cause harm. This could be construed as one of the reasons why the lockdown regulations provide the courts with discretionary powers to grant or stay evictions. However, it is not clear under what circumstances, and using which criteria, the courts may grant evictions of residential tenants who committed gender-based violence. At the beginning of September 2020, this issue was partly addressed in *P P S v T L S*.[59]

The case emanated from an order of the magistrates' courts, which prohibited the appellant from entering and residing in a house jointly owned by him and his wife, the respondent. The parties were married in community of property. The magistrate purported to evict the appellant from the house in terms of section 7(1)(*c*) of the Domestic Violence Act.[60] This section provides that a court may use a protection order to prohibit a perpetrator of domestic violence from entering a residence that the perpetrator shares with the complainant if granting such an order would be in the best interests of the complainant. In the present case, the magistrate granted the respondent a protection order against abusive behaviour by the appellant. She alleged emotional and verbal abuse, in the form of insults aimed at her by the appellant.[61] The protection order was obtained through an *ex parte* application and was finalised on the day that the court evicted the appellant from the matrimonial home.

On appeal, a full bench of the High Court had to decide whether the eviction order granted by the magistrate was competent in law. The court held that the Prevention of Unlawful Eviction from and Unlawful Occupation of Land Act[62] did not apply to the present case because the appellant and the respondent were co-owners of the house. The court observed that parties who owned a house in terms of the community of property regime enjoyed the right to grant, refuse and

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56 On the authority of the courts to grant just and equitable remedies, see s 172(1)(*b*) of the Constitution.

57 Farha. In *De Beer*, Davis J identified a flood as a disaster that could compel forced removals such as evictions (para 4.14).

58 Africa Check "South African police record 2,300 gender-based violence complaints in first week of lockdown – not 87,000", https://africacheck.org/spot-check/south-african-police-record-2300-gender-based-violence-complaints-in-first-week-of-lockdown-not-87000/ (accessed on 24-07-2020).

59 2020 ZAWCHC 9.

60 116 of 1998 (hereafter "the DVA").

61 See para 6.

62 19 of 1998.

withdraw consent to enter and reside in such a house. Interestingly, the court was unwilling to "express an opinion on the case where the parties are married out of community of property and the land in question belongs solely to one of them".[63]

5.2.2 *Procedural fairness of the eviction*

The full bench examined the procedural fairness of the eviction. The court noted that the record furnished by the magistrate's court was unsatisfactory, leading to the postponement of the hearing on several occasions.[64] The court observed that the magistrate unduly turned a protection order hearing into an eviction hearing without giving the appellant an indication that the court intended to order an eviction. The procedural impropriety led the court *a quo* to omit to inform the appellant that he had the right to seek representation by counsel.[65] Also, the magistrate had not afforded the appellant an opportunity to respond to the allegation of abuse against him. Furthermore, the eviction issue was not properly before the court.[66] Evidently, the conduct of the court *a quo* was procedurally unfair and could best be described as a travesty of justice. This compelled the High Court to cite some of the leading cases on the importance of conducting proceedings in a manner that is procedurally fair.[67] The conduct of the court *a quo* was furthermore procedurally unfair in that the magistrate had considered irrelevant factors and failed to consider important issues. For example, the magistrate told the appellant that he had nothing to lose from the eviction because it was not his house; that he was a co-owner of the house by virtue of the community of property regime; and that he had to find himself an alternative place to reside.[68]

5.2.3 *Infringement of constitutional rights*

The magistrate did not inquire as to whether the appellant had access to alternative accommodation and did not ascertain whether he had the financial means to secure accommodation. Actually, the magistrate was throwing him out on the streets to join the ranks of the homeless.[69] The lockdown regulations stipulate that no person can be evicted without assurance of alternative accommodation – a court of law first has to satisfy itself that the person to be evicted has access to adequate alternative accommodation. This is meant to prevent homelessness, to protect the dignity of the evicted person and to ensure that the right to access adequate housing is upheld at all times.[70] An eviction from one's home is drastic and, if not properly thought through, could infringe on one's rights to property, and to the freedom and security of one's person.[71] Hence, a proper case has to be made to show the urgency of the need to evict a person from his home when he was accused of domestic abuse. In the present case, there was no proper basis for

63 Para 20.

64 Para 2.

65 Paras 25, 28, and 29.

66 Paras 22 and 24.

67 Para 21. The court cited the following cases: *De Beer v North-Central Local Council and South-Central Local Council* 2002 1 SA 429 (CC); *PSH v PH* [2013] ZAECGHC 90 and *Ramadwa v Kokodi* [2018] ZAGPPHC 714.

68 See para 12.

69 Para 29.

70 See the court's observations in para 27.

71 Para 27.

using domestic abuse as a ground for eviction since the parties had been staying together for about seven weeks after the eviction order without any incident.

The High Court further observed that, not only did the magistrate violate the appellant's constitutional rights, but she also infringed the best interests of the child, protected in terms of section 28 of the Constitution, in that the magistrate failed to apply her mind to the implications of the eviction on the children of the appellant and the respondent.[72] The judgment showed that the magistrate was so intent on evicting the appellant from the matrimonial home that she was prepared to ignore the Constitution. Such a decision was not expected from a judicial officer who took an oath to decide cases without fear, favour, or prejudice.[73] In view of the procedural irregularities, the court remitted the matter to the magistrate's court for a decision as to whether to grant an eviction order in terms of section 7(1)(*c*) of the DVA. The court directed the court *a quo* to hear evidence and arguments by both parties and to elicit and consider any relevant information and applicable legal principles.

6 CONCLUSION

At common law, residential tenants who cannot access leased premises due to an Act of God, such as a pandemic like COVID-19, can raise *vis major* as a defence when landlords claim the payment of rent. Also, the common law entitles tenants whose beneficial occupation or full use and enjoyment of leased premises are interfered with by public authorities through legislation (such as an Act of Parliament, disaster regulations or other public health emergency laws promulgated in terms of an Act of Parliament – like the lockdown regulations) to claim remission of rent. Furthermore, the common law provides tenants who have paid a portion of rent in advance with the right to claim remission of such rent on the basis of *vis major*. During the COVID-19 situation in South Africa, it is not only the outbreak of the pandemic that entitles residential tenants to raise the defence of *vis major* and to claim remission of rent, but also the lockdown, which led to the closing of the country's entry points and the prohibitions on inter-provincial travel. Hence, the pandemic, the lockdown, and the regulations, taken together, satisfy the *vis major* definition of a superior, sudden, unforeseen, and unavoidable circumstance that deprives residential tenants of the full use and enjoyment of the leased premises. The regulations prohibit evictions and direct the courts not to order the execution of evictions for failure to pay rent, because that would violate the rights to human dignity and access to adequate housing. It should be noted that the regulations impose a ban on evictions in such a way that there is no need to distinguish between tenants who are able to pay rent and those who are unable to do so.

However, there is no absolute ban on the eviction of residential tenants. The regulations empower the courts not only to stay evictions for the duration of the lockdown, but also to order the execution of such evictions when doing so would be just and equitable. Although no reported case on the eviction of residential tenants during the lockdown could be found at the time of writing, it could be argued that the case of *P P S v T L S*, heard in August 2020 and decided in September 2020 during Alert Level 2, provides some guidance on the

72 Para 30.

73 See s 165(2) of the Constitution.

circumstances and factors that a court will consider before granting an eviction order. In that case, the court held that a court must satisfy itself that there is a compelling reason to order an eviction and that the person to be evicted has access to adequate alternative accommodation so as not to infringe on constitutional rights. The relevant rights include the right to human dignity, freedom and security of the person, property, and access to adequate housing.