89/98

REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 167/96

In the matter between:

WILLIAM ROLAND THOMPSON Appellant

and

JOHANNES NICOLAAS SCHOLTZ Respondent

CORAM : Van Heerden, DCJ, Smalberger, Nienaber, Zulman, JJA, Melunsky, AJA

HEARD : 21 August 1998

DELIVERED : 28 September 1998

JUDGMENT

NIENABER JA

NIENABER JA:

The appellant, plaintiff in the court below, sold what was essentially a stock farm in the Beaufort West area together with certain livestock to the respondent, defendant in the court below, for R1,1m. I shall refer to the parties as the plaintiff and the defendant respectively. The farm, Springfontein, 8 500 hectares in extent, was sold to the defendant as a going concern. On it there is a farmhouse. In terms of the written agreement of sale the plaintiff was obliged to give the defendant occupation ("besit") of the entire farm on 1 May 1992. On that date he had vacated the farm but not the farmhouse. The defendant nevertheless took over the stock and all the farming operations for his own account. Because the plaintiff continued to occupy the farmhouse the defendant was compelled to reside on another farm, Inverurie, some 12 kilometres distant, where he also farmed. The plaintiff only vacated Springfontein on 10 October 1992. By that time registration of transfer of the property into the defendant's name had already been effected

against payment of the purchase price. This occurred on 18 September 1992. By 10 October 1992 the purchaser had accordingly received both transfer and full occupation and the seller had received the full purchase price.

But there was a problem. It related to the payment of occupational interest. Clause 3 of the deed of sale provided as follows:

> "3. (a) Besit van die eiendom sal aan die Koper gegee word op 1 Mei 1992, vanaf welke datum die risiko verbonde aan die eiendom op die Koper sal oorgaan;
>
> (b) die Koper sal op versoek van die Verkoper se prokureurs 'n pro rata gedeelte van die belastings en diensgelde betaalbaar ten opsigte van die eiendom, gereken vanaf die datum van besit, betaal;
>
> (c) die Koper sal ook besitrente gereken teen 12,5% (twaalf komma vyf persent) per jaar vanaf die datum van besit tot die datum wat die volle koopprys betaal word, betaal, maandeliks agteruit betaalbaar op die koopprys, vanaf 1 Mei 1992 tot datum van betaling van die koopprys."

The defendant refused to pay occupational interest in terms of clause 3(c). On 9 September 1992, while the plaintiff was still residing at Springfontein and before

transfer had been registered, the plaintiff caused action to be instituted against the defendant for payment of occupational interest calculated at the rate of 12,5% per annum on the full purchase price. (There was some dispute initially about the date from which and the date to which the calculation of the occupational interest should refer but these may now be taken to be 1 May 1992 and 18 September 1992 respectively. This amount, calculated by the trial court and not challenged on appeal, is R52 325.) The defendant filed his plea on 23 March 1993, that is, after the plaintiff had finally vacated the farmhouse and after the defendant and his family had moved from Inverurie to Springfontein.

The defendant's defence was the so-called *exceptio non adimpleti contractus* ("the *exceptio*"). It is a defence entitling a party from whom performance is demanded to withhold it until the party demanding performance has rendered or tendered his own performance; it arises where performance and counter-performance are contractually dovetailed and the party demanding performance

is to render his own performance either in advance of or in conjunction with performance from the other side. (Cf *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) ("*BK Tooling*"); *Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd* 1979 (2) SA 56 (A); *Motor Racing Enterprises (Pty) Ltd (in liquidation) v N P S (Electronics) Ltd* 1996 (4) SA 950 (A).) As such it is a stalemate defence to a claim *ex contractu* and not a remedy for breach of contract; indeed, it will frequently be available to a contracting party where no breach of contract has been committed by his opposite number, for instance, where a contract of sale is silent as to the date for payment and delivery, no *interpellatio* has been given by either side, and the seller claims payment from the purchaser (or *vice versa*) without delivery (or payment) having been tendered.

Occupational interest is the return which the seller of immovable property earns by permitting his purchaser, pending payment, to occupy the property sold (cf *Sidali v Mpolongwana* 1990 (4) SA 212 (C) 216E; *Dawnford Investments CC*

and Another v Schuurman 1994 (2) SA 412 (N) 418F-G). Clearly there is, in such a case, reciprocity between the seller's obligation to give occupation and the purchaser's obligation to pay occupational interest. If the plaintiff had retained occupation of the entire farm the defendant would accordingly have been entitled, for as long as he did so, to refuse to pay any occupational interest. But of course, the plaintiff did not withhold occupation of the whole farm; he gave the defendant occupation but it was incomplete or partial occupation. In *BK Tooling* this court held that a defendant, faced with a claim *ex contractu,* is entitled to invoke the *exceptio* even against a plaintiff whose performance, if not exact, was nonetheless substantial - although, in an appropriate case and subject to appropriate proof, an adjustment in the contract price might in the exercise of its discretion have to be made by the court to avoid injustice where a defendant, who had neither rejected the defective performance nor cancelled the contract, had taken advantage of a plaintiff's partially defective or incomplete performance (at 414B-C; 427A; 434A-

D; 434H - 435A). The decision is discussed in greater detail later in this judgment.

It was on that very basis (that the defendant was entitled to raise the *exceptio* to the plaintiff's claim for occupational interest and that the plaintiff was at best entitled to only a portion of his claim) that the matter was approached in both courts below and in this court.

Before the trial court (Burger AJ sitting in the Cape Provincial Division) both parties achieved some success. Four of the defendant's six counterclaims succeeded. It is not for present purposes necessary to dwell on them. In addition the trial court held, with reference to *BK Tooling* and in favour of the defendant, that the *exceptio* was available to him as a substantive defence to the plaintiff's claim for occupational interest; at the same time the court also held, this time in favour of the plaintiff, that he was nonetheless entitled to some occupational interest. The court reduced the amount which it calculated to be due to the

plaintiff as occupational interest in terms of the contract by deducting the additional travelling expenses which the defendant had incurred during the period he was prevented from occupying the farmhouse at Springfontein and was obliged to reside some 12 kilometres away at Inverurie. The additional travelling expenses, so it was held, was the only pecuniary loss the defendant suffered as a result of not having the use of the farmhouse at Springfontein. That was calculated to be R1 866 - 81 days at 24 kilometres per day at 96c per kilometre. Taking that figure into account the trial court awarded the plaintiff R50 459 by way of occupational interest. The trial court thus deducted from the sum which would have been due to the plaintiff had he performed in full, the sum it considered due to the defendant because he had not performed in full.

The defendant thereupon appealed to the full court of the Cape Provincial Division. The appeal succeeded. The judgment is reported: *Scholtz v Thompson* 1996 (2) SA 409 (C). The court (per Brand, J) held, again with reference to *BK*

Tooling, and like the trial court had, that the *exceptio* was a good defence to the plaintiff's claim for occupational interest; but, unlike the trial court, it denied the plaintiff reduced occupational interest because, so it was held, the plaintiff had failed to discharge the *onus* of proving what it would have cost to remedy the shortfall in his own performance (i.e. his failure to vacate the farmhouse). Proof by the defendant of the expenses he incurred in travelling to and from Springfontein differed so fundamentally from proof of the amount required to bring the defective performance into order that it could not be commandeered by the plaintiff, so the court *a quo* determined (at 416F-417G), to plug a perceived gap in his own case.

The trial court had found:

> "... there is no doubt that defendant, although deprived of the use of the house, made full use of the farm and, as I have indicated before, that is quite overwhelmingly the most important aspect. It is far more important to farm on the farm than to occupy the farmhouse."

This finding was not challenged before the court *a quo* (or, for that matter, in this court). Even so the court *a quo* found that on a literal application of the *BK Tooling* formula (of which more later) it was unable to grant the plaintiff any relief. The appeal was accordingly upheld with costs and the trial court's award of R50 459 was altered to one of absolution from the instance. In addition the court *a quo* restored the defendant's first counterclaim for consequential damages for additional travelling expenses which, before the trial court, was in effect subsumed into the reduced award of occupational interest made to the plaintiff. The amount granted on appeal was R1 129, calculated on the basis of 49 additional return trips from Inverurie to Springfontein at 24 kilometres per return trip at 96c per kilometre. There is no appeal against this finding.

Three reasons were initially advanced on behalf of the plaintiff in support of his appeal in this court: 1) Given that the benefits accruing to the defendant in terms of the contract (the commercial exploitation of the farm) so comprehensively

outweighed the shortcomings in the plaintiff's performance (the failure to vacate the farmhouse), the maxim *de minimis non curat lex* applied and the *exceptio* accordingly did not (*BK Tooling* 420A, 432G; *Motor Racing Enterprises (Pty) Ltd (in liquidation) v NPS (Electronics) Ltd, supra,* 964G-H). 2) Alternatively, and given that the defendant utilised the plaintiff's incomplete performance to the full and conducted farming operations on the plaintiff's farm for his own account during the entire period while the farmhouse was withheld from him, this is *par excellence* the sort of case where the court ought to exercise its discretion in favour of the plaintiff by relaxing the strict requirements of the *exceptio.* 3) Sufficient material had moreover been placed before the trial court to enable it to quantify the cost of remedying the shortfall in the plaintiff's performance. To these three grounds the plaintiff added a fourth, based on the decision in *Arnold v Viljoen* 1954 (3) SA 322 (C), which was advanced late in the argument and which will be discussed later in this judgment.

Contrary to the plaintiff's first submission the *de minimis* principle cannot save or assist him. It pertains to the breach or to its consequences. The trial court referred to the plaintiff's failure to give the defendant possession of the house at Springfontein as " ... the only real or substantial impediment to the defendant's possession ... of the farm Springfontein after 1 May 1992"; an impediment which is described as "real or substantial" cannot be dismissed as being "trifling" (cf *Hitchins v Breslin* 1913 TPD 677, 683). Both courts below awarded the defendant consequential damages for the plaintiff's breach in failing to vacate the house on the farm; a breach for which damages in excess of R1 000 are awarded can likewise not be termed trivial.

Both courts below appeared to proceed on the supposition that everything said in *BK Tooling* was directly and precisely applicable to the facts of this case. The defendant in *BK Tooling* instructed the plaintiff to do certain work in accordance with certain specifications; part of the plaintiff's work did not comply

with the specifications; the defendant nevertheless accepted and utilised the work so done but when sued for the remuneration refused to pay for it. This court decided that the defendant was liable for the contract price minus the cost of remedying the defective work.

Basic to the judgment are two major premises or propositions. I shall henceforth refer to them throughout as the first and the second proposition in *BK Tooling* respectively.

The first is that the *exceptio* is available as a defence to a party ("the defendant") from whom performance is demanded by the other contracting party ("the plaintiff") whose own reciprocal performance has not been rendered precisely or in full; the *exceptio* accordingly applies even if the defect in the plaintiff's performance (short of being *de minimis*) is not so serious as to justify its rejection or the cancellation of the contract by the defendant.

This conclusion constitutes (at 436G-437H) a deliberate rejection of the

approach advocated by De Wet & Van Wyk (*Die Suid-Afrikaanse Kontraktereg & Handelsreg*, now in its 5th ed., vol. 1, 200-201; and cf Van der Merwe, et al, *Contract, General Principles* 283) that when the plaintiff has performed *substantially* the *exceptio* will not be open to the defendant, who must then content himself with a claim for damages for the shortfall in the plaintiff's performance.

Implicit in the first proposition is the notion that a plaintiff is precluded from recovering any remuneration if his performance falls short of perfection, even when the defendant, notwithstanding its shortcomings, accepts and utilises it. The second proposition in *BK Tooling* takes account of that eventuality. The second proposition is that the first proposition cannot be applied without qualification; the qualification is that there is a corrective; and the corrective is that where the shortcoming in the plaintiff's performance is capable of being restored (or "cured") the court has a discretion, if fairness so dictates, of allowing the plaintiff his contractual remuneration - but minus the cost of restoring his

defective work to the required contractual standard. The plaintiff's claim, so it is postulated, is one *ex contractu* for the contract price less the cost of the cure and not one based on enrichment. By contrast to the approach based on substantial performance the defendant is not required to formulate a claim for damages. The ball, so to speak, is in the plaintiff's court. It is for the plaintiff, when suing for payment, to show firstly, that the circumstances of the case justify a departure from the first proposition and secondly, to prove the costs of the cure. This approach has profound and obvious implications in respect of the pleadings, the *onus* and the evidence which is to be produced in legal proceedings.

It is fundamental to the second proposition that the shortfall in the plaintiff's performance firstly, must be capable of being fully restored to contractual standard and secondly, that the cost of doing so must be capable of being quantified.

Restoration can take place either by way of substituted performance or by

way of a monetary award for the cost thereof. It is for the plaintiff to calculate and prove the cost of restoring the defective work. At the end of the exercise, once the plaintiff has remedied the defective performance either by substitution or by an adjustment to the "contract price", the position is viewed as if the plaintiff had performed in full. The aggrieved party in effect would have received his full contractual due, partly in *specie*, partly in money, and consequently becomes liable in return to perform his side of the bargain.

The contract with which *BK Tooling* was concerned was one of *locatio conductio operis* (a product of work against payment) where the locator's performance was defective. The present case is different. The obligation of the seller to allow the purchaser to occupy the property pending payment *pari passu* with registration of transfer was a continuing one. Its breach, committed when the plaintiff did not vacate the farmhouse, was likewise a continuing one. It endured for as long as occupancy of the farmhouse was withheld from the defendant. That

being so the breach in this instance, unlike the breach in *BK Tooling*, could not be retroactively restored or "cured". A monetary payment could function as compensation for the defendant's consequential loss but *ex confesso* it could never serve as a substitute for the loss of occupation suffered by the defendant during the period he was deprived of the occupation of the farmhouse. On a literal application of the second proposition in *BK Tooling* the plaintiff could therefore never reach the juncture where, by means of substituted performance or a supplementary payment, he could claim the agreed counter-performance, i.e. occupational interest minus an amount computed to complement the defect in his performance. I return to the point later in this judgment.

Before the hearing of the appeal counsel for both parties were invited to address this court on whether the *exceptio* remained available to the defendant after the plaintiff had given him full possession of the farm on 10 October 1992. This was before the defendant filed his plea in which the *exceptio* was first raised.

The question posed was whether the breach was no longer one of defective performance but had become one of mere late performance; and if so, whether such breach, the defendant having accepted the late performance, was not in any event fully accommodated in the defendant's first counterclaim for consequential damages (cf *Dominion Earthworks (Pty) Ltd v M J Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A)).

Both counsel thereupon filed additional heads of argument and both appeared to be in agreement that the point raised might have been good if the contract had been one of *locatio conductio operis*; but because it involved a continuing obligation the *exceptio* in principle remained available to the defendant. The *exceptio* in the case of *locatio conductio operis* is a means of resisting what is in essence a premature demand for counter-performance by a party who is himself in arrears with his own reciprocal performance. As soon as he performs the defendant's "weerhoudingsreg" (*BK Tooling*, 415H; 418F; 419A-

D; 420F) falls away. But here, as counsel for the defendant rightly pointed out, the defendant's duty to pay occupational interest was not hinged simply on the plaintiff's duty to give occupation of the farm; it was hinged on the plaintiff's duty to allow the defendant to remain in occupation of the entire farm during the entire period concerned. By vacating the farmhouse in October 1992 the plaintiff had not expunged his breach which had commenced in May. During that entire period the defendant was deprived of full occupation and since occupational interest is payable for occupation the belated evacuation of the house could not, in line with the first proposition in *BK Tooling*, frustrate the defendant's reliance on the *exceptio*. The giving of complete occupation on 10 October 1992 did not and could not cure the incomplete occupation during the earlier period. But of course that does not meet the real point in the case. This was not, after all, a case where no occupation was given for only part of a stipulated period; this was a case where only part of the occupation was given for the entire stipulated period. The

real point is whether the plaintiff was entitled in those circumstances to claim a reduced remuneration in line with the second proposition in *BK Tooling*.

Counsel for the defendant submitted that it was not open to the plaintiff to rely on the second proposition in *BK Tooling* since the matter was neither pleaded as such nor canvassed in evidence. It is true that the plaintiff in his amended particulars of claim, while admitting that he only vacated the farmhouse in October 1992, nonetheless insisted on payment of occupational interest in full. He relied on an oral agreement entitling him to remain in occupation of the farmhouse until the end of 1992. That being so he did not in the alternative ask for a reduction in the occupational interest *à la BK Tooling*. What he did ask for in the alternative was for an award based on unjust enrichment because "... Defendant had the beneficial use and occupation of the said property, while Plaintiff was during that period, deprived of such use and occupation". The plaintiff's evidence in support of the alleged oral agreement was not accepted by the trial court and his claim

based on enrichment was not seriously pursued. Nevertheless the pleadings did serve to alert the defendant to the crux of the case namely, whether the plaintiff was entitled to any occupational interest in the light of his admission that he only vacated the farmhouse after 18 September 1992. Much of the evidence was directed at the circumstances surrounding that issue. The defendant's defence to that claim consisted of a denial of the alleged oral agreement and a consequent reliance on the first proposition in *BK Tooling*. The reliance on that proposition in *BK Tooling* necessarily portended a reliance on the second proposition thereof. The defendant could not have been taken by surprise that the plaintiff resorted to it once his evidence of an oral agreement was rejected. In my view and contrary to the submission of the defendant, the plaintiff is accordingly not precluded from doing so on appeal.

There are two main reasons why the second proposition in *BK Tooling* (designed to cater for defective performance in a *locatio conductio operis* situation

and presupposing a breach that can be fully restored) may operate less than satisfactorily when it is sought to apply it strictly to defective performance of an obligation of a continuing nature. The one reason has been referred to above. It is that the breach, being likewise of a continuing nature, cannot be "cured" after the event, either in kind or in money. The other reason, a related one, is that it will often be impossible to assess the cost of restoring or "curing" the defect in the plaintiff's continuing malperformance. Take as an example this analogous case. The plaintiff's obligation is to give the defendant the use of his (the plaintiff's) house, containing two bathrooms, for a certain period at a certain remuneration. At the agreed date of delivery one of the bathrooms, used as a storeroom by the plaintiff, remains locked. It remains so locked either for the entire period or for a part thereof. The defendant, although registering his complaint, chooses not to cancel the agreement. Is the plaintiff entitled to claim the agreed sum? On the strength of the first proposition in *BK Tooling* clearly not. But how, on the

strength of the second proposition in *BK Tooling*, is the amount of remuneration to be reduced? There simply is no measure by means of which the "cost of the cure" can be assessed. Very much the same position, I believe, applies in the case under consideration. What the plaintiff had to provide was the farm. That included the farmhouse. That performance, as a matter of interpretation of the contract of sale, was obviously indivisible. The use of the farmhouse cannot be severed from the use of the farm as a whole in order to accord it a separate commercial value. It cannot be separately valued because it is not a separate entity. Nor can its value be determined by valuing the farm as a whole (including the farmhouse) and comparing it to the value of the farm without a similar farmhouse. The value of the farmhouse as a fraction of the value of the farm is in truth irrelevant because what is to be determined, for the purpose of the exercise, is not the value of the farmhouse but the value of its use, expressed as a fraction of the agreed occupational interest (which incidentally included R100 000 for the

movables) and by which the occupational interest is then supposed to be reduced. The occupational interest in turn is related not to the use of the property sold but to the purchase price, which is again related to the value of the property and not to its temporary use. The court *a quo* said this (at 417H-I of the reported judgment):

> "Since respondent admittedly produced no evidence whatsoever to establish the objective value of his defective performance, I find the question as to what evidence would suffice to be somewhat academic. Presumably he could, as suggested by Mr *Rogers*, produce evidence to establish the fair and reasonable value of the occupation of a farmhouse such as the one in question, which could then be deducted from the agreed occupational interest for the farm as a whole, ie including the farmhouse."

That, with respect, begs the question. A realistic standard of comparison for the use of a farmhouse on an extensive farm in the middle of the Karoo on a short term basis simply does not exist. The defendant's own witness, Van der Merwe, an experienced local attorney, said as much. However, I do agree with the court *a*

quo (at 417A-H) that the value of the use of the farmhouse is not represented by the consequential loss suffered by the defendant, which is the subject matter of his first counterclaim. In short, absent a scale of comparison, the second proposition in *BK Tooling* on the facts of this case is incapable of application. Unless a solution can be found elsewhere any attempt to apply it would of necessity mean that anyone situated as was the plaintiff in this case would be left without a remedy. I believe there is a solution. It must be sought in the analogous case of remission of rent in a lease of land. Lease of land is analogous to the facts of this case because in both instances an agreed remuneration is payable by the one party for the temporary use of another's property.

Before turning to remission of rent it is necessary to refer to a series of cases commencing with *Arnold v Viljoen* 1954 (3) SA 322 (C) which also deal with leases of land. These cases, cited below, were garnered by counsel for the plaintiff in support of a contention that the defendant in the present case is in the same

position as was the tenant in each of those cases. The cases suggested that the tenant was liable to pay the full rental when the *merx* was defective but he remained in occupation and that such tenant then had to be satisfied with a counterclaim for damages.

These cases all deal with defects in the quality of the *merx* and not, as in the present case, with incomplete performance subsequently completed.

The facts in *Arnold v Viljoen, supra*, greatly simplified, were that premises were leased to a tenant to be used by him as a residential hotel or boarding-house. The lease was for five years, commencing on 1 November 1952. The rental was payable monthly in advance. The tenant, having taken occupation in November 1952, failed to pay the rental for January and February 1954. On 22 February 1954 he vacated the property on the ground (accepted for the purpose of the case to be correct) that it was not in a tenantable condition at the commencement of the lease. His stance was that he was not liable for the rental for January and February

1954 because he enjoyed no beneficial occupation of the leased premises. The court held against him. Dealing with the landlord's contention that the lessee remained liable, subject to a counterclaim for damages, for the payment of the full rental for January and a proportionate share thereof for February, the court at 329H-330C said the following:

> "For the latter proposition he depended on the case of *Sapro v. Schlinkman,* 1948 (2) S.A. 637 (A.D.), where the Court, after a full consideration of the authorities, held that even where the lessor had committed a breach of the contract of lease going to the root thereof the lessee was bound to pay the rent for the period during which he remained in undisturbed possession of the leased premises. The obligation was to pay rent as such and not to make a payment on the basis of a *quantum meruit.*
>
> On the basis of this authority, respondent is clearly liable for the rent for January and a proportionate share thereof for February, saving always his claim for whatever damages he may prove to have suffered by reason of any breach of contract. Mr. *Charles* sought to distinguish *Sapro's* case on the ground that in that case the tenant had had undisturbed possession of the leased premises in respect to the period for which he was being sued for rent, whereas here, since the premises were not fit for the conduct of a boarding house therein, he had no beneficial occupation. I think the test for

the tenant's liability for rent is whether he was in occupation or in possession of the leased premises and not whether such occupation or possession was beneficial or not."

And at 331G-332B it was stated:

"I come now to deal with the applicability to this case of the principle enunciated in *Hauman v. Nortje,* 1914 A.D. 293, viz. that as a general principle a party cannot call upon the other party to perform his contract without himself having performed or being ready to perform his part of the contract. That this principle is applicable to agreements where a plaintiff's right to performance is conditional on re-performance by him of a reciprocal obligation is not in dispute. But on the other hand this principle does not apply to all agreements in which each party undertakes obligations towards the other ... Now on the present contract respondent, who had possession of the leased premises, the furniture and the goodwill since the inception of the contract until its cancellation on the 22nd February, cannot claim that despite this he is not obliged to pay his rent because applicant has failed to fulfil his part of the contract by not handing over the premises in a tenantable state of repair. He is obliged to pay the rent but can in turn claim damages. I do not consider that respondent has any greater right to refuse to fulfil his obligation to pay an instalment of the purchase price which became due and payable before he rescinded, simply because the premises were not in a tenantable state of repair."

The *ratio* appears to be this: although the premises were untenantable the lessee did not cancel the lease; accordingly he had occupation (i.e. possession) of the premises during January 1954 and until he vacated them on 22 February 1954; until he quit the premises the tenant was not entitled to either withhold payment of the rental or claim a reduction thereof; his remedy was to counterclaim for damages or to rely, where appropriate, on set-off; because he quit the premises on 22 February 1954 he was liable for only a proportional part of the rental for that month.

Arnold's case was followed in a number of others, most notably, *Marcuse v Cash Wholesalers (Pvt) Ltd* 1962 (1) SA 705 (FC); *Bourbon-Leftley v Turner* 1963 (2) SA 104 (C); *Appliance Hire (Natal)(Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 (2) SA 287 (D); *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W) 121F; *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T), and *Parekh v Shah Jehan Cinemas*

(Pty) Ltd and Others 1980 (1) SA 301 (D) 310G-H.

This line of cases has attracted criticism, both judicial and academic. (Cf *Steynberg v Kruger* 1981 (3) SA 473 (O); *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (TK SC); Cooper, *Landlord and Tenant,* 2nd edition 102-107 and 164; De Wet & Van Wyk, *supra* 359, 366; 14 LAWSA para 146; Piek & Klein, 1983 (46) *THRHR* 367.)

The thrust of the criticism is that the court erred in holding that the tenant, despite not having received beneficial occupation, first had to quit before he was entitled to refuse to pay rental or, by implication, to claim a remission thereof; and that the authority relied on (*Sapro v Schlinkman*, 1948 (2) SA 637 (A)) does not, upon proper analysis, support the principle laid down.

I am inclined to agree. To award the landlord the full rental when he failed to give his tenant full occupation is to offend against the first proposition in *BK Tooling;* and to deny the tenant a reduction of rental *pro rata* to his diminished

enjoyment of the *merx* is to offend against all authority sanctioning a *remissio mercedis* when the landlord is in breach of the lease. All the same I find it unnecessary to express a conclusive view on the controversy since it arises only obliquely in this case. The contract under discussion is not, after all, a contract of lease proper and, despite its obvious similarities to lease, is not on all fours with it. To the extent that the plaintiff seeks to rely on *Arnold v Viljoen, supra,* as categorical authority for a contention that the plaintiff in this case is entitled to occupational interest in full and that the defendant is confined to a counterclaim for damages, the contention cannot be sustained.

Remissio mercedis is a remedy of some antiquity. (Cf Grotius 3.19.12; Pothier, *Letting and Hiring,* par 139-140; 150; and the authorities collected in Bodenstein, *Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch-Hollandsch Recht*, 45-49 and Piek & Klein, *supra*, 376-379.) Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he

is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract e.g. because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial. (See the cases cited by Piek & Klein, *supra*, 380 footnote 112.) The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the *exceptio*, more particularly of the first proposition in *BK Tooling* (cf *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A)).

The second proposition in *BK Tooling* does not fit so readily into the

scheme of things where the interference with the tenant's use of the leased property is only partial or temporary. And the reason for that, as stated earlier, is twofold. The first reason is that the obligation and hence its breach is a continuing one: the aggrieved tenant can be paid out for the losses he may have suffered or the duration of lease may perhaps be extended to compensate for time lost in the past, but the use and enjoyment he lost during the period when his occupation was impaired or disturbed simply cannot be restored or reinstated by a supplementary payment. The second reason is the near impossibility of a mathematical calculation of the "cost of restoration". The cost of repair, being an objective standard, is in any event inapposite. What is to be measured in order to scale down the rental is the tenant's reduced enjoyment or utilisation of the leased property. Subjective factors which are peculiar to the tenant and which have no pertinence to the cost of repair must inevitably be incorporated into the equation. Yet a rigid application of the second proposition in *BK Tooling* requires that an exercise be done to

calculate the cost of repair to be deducted and if it should prove not to be possible to do so, it would follow that the second proposition in *BK Tooling* cannot be applied. It was for precisely that reason that the court *a quo* was driven to the conclusion that the plaintiff in this case did not prove a contractual claim even though the defendant enjoyed the use of the farm for four and a half months. (For a similar line of reasoning, compare *Ntshiqa v Andreas Supermarket (Pty) Ltd, supra,* at 68A-E).

In the case of a lease proper the matter is never approached along the lines of the second proposition in *BK Tooling*. Where the interference with the lessee's enjoyment was only partial or temporary it is not the law that the landlord is enjoined to prove the cost to correct or supplement any defects or deficiencies in the *merx,* which is then deducted from the agreed rental. One approach, if *Arnold v Viljoen*, *supra,* is to be followed, is to confine the tenant to a counterclaim for damage when the *merx* is defective. The other, perhaps better approach, with its

own support in the authorities, is to reduce the rental in such a case in proportion to the lessee's diminished enjoyment of the leased property.

A case in point is *Shapiro v Yutar* 1930 CPD 92. The leased premises were used as a private hotel. The roof leaked and while repairs were being effected by the landlord parts of the building were flooded and the defendant quit the premises. The court held that he was not entitled to do so. What he was entitled to do was to claim damages and in addition a remission of the rental. This is what the court (per Gardiner, JP) at 98 said on this point:

> "Now here the tenant was deprived of the use of, at any rate, a considerable portion of the house for about half a month. The dining room, lounge and corridors downstairs were unfit for use, access to the kitchen was difficult. Moreover, on the evidence of Dr. Wood, I think that defendant was justified in not taking up his abode on the upper floor. It must also be borne in mind that this building was a private hotel, and although the defendant had at the time only one boarder, there was always the possibility that someone else might wish to hire a room there. I do not think that the deprivation was, in *Pothier's* words *peu considerable*, nor was it a deprivation arising out of the effecting of ordinary repairs, to which the defendant must be

> taken to have agreed to submit. Half a month's rent would be £25, but it must be remembered that the defendant was not totally deprived of the use of the house. Apparently he had the use of the upstairs rooms for storing the furniture which belonged there. I think a fair amount to allow him for remission of rent would be £20."

The amount of remission is thus calculated without reference to any claim for damages but with reference to what is fair in all the circumstances. (The right of a tenant to execute necessary repairs after notice to his landlord and to charge the cost against the rent (cf *Bensley v Clear* 1878 Buch 89, 90-1; *Marais v Cloete* 1945 EDL 238, 244; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 740A-D) appears to be a special remedy akin to but not identical with a claim for damages for breach of contract (cf *Poynton v Cran* 1910 AD 205, 217-218, 225-227; *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C) 468C-H).

In approaching remission of rent on the basis of what is fair some common ground can be found with the second proposition in *BK Tooling* which is also founded on fairness (at 427A). Even so, it would be wrong to equate the two

instances or to regard them as anything more than merely analogous. Remission of rental involves an estimation, in the innocent party's hand, of the extent to which the remuneration he owes the guilty party should be reduced in relation to his reduced enjoyment of the latter's performance. As such it may include elements which are peculiar to him. That exercise is primarily subjective. The second proposition in *BK Tooling* involves a calculation, in the guilty party's hand, of the exact cost of upgrading or perfecting his own defective performance. That exercise is primarily objective.

The analogy of remission of rent is nevertheless close enough to the facts of the current case (periodic payment by the one party for the temporary use of another's property) to justify its adoption as a means of achieving an equitable result where the second proposition in *BK Tooling* is manifestly inappropriate.

In the *BK Tooling* type of situation precise evidence is required to make a precise correction in order to neutralise the shortfall in the guilty party's

performance. In the case of an obligation of a continuing nature it will frequently not be possible to do so. There may of course be circumstances where a proration can be made with reasonable accuracy: for instance where a lessor had given his lessee possession only on day 10 of a 30 day lease period (cf *Seligson v Ally* 1928 TPD 259, 263) or where he withheld 1 000 hectares of a 3 000 hectare field which was leased. But failing such an obvious standard of comparison the *pro rata* reduction of rental must of necessity imply a fairly robust approach, comparable to the case where an aggrieved party with a claim for damages experiences difficulties in computing the exact extent of his loss (cf *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) 573G-J; *Sarembock v Medical Leasing Services (Pty) Ltd and Another* 1991 (1) SA 344 (A) 352B-E). The same approach, I believe, should be adopted in this instance.

Two questions then arise. The first is whether the court should in fairness come to the plaintiff's assistance. The second is whether the plaintiff has placed

before the trial court sufficient material on which it can in fairness determine a reduction in the occupational interest, even in the broadest of terms. If so, it is for the court to make that assessment and the near impossibility of doing so with any degree of accuracy should not deter it from granting the plaintiff relief.

Should the court come to the plaintiff's assistance? I shall assume, in favour of the defendant, that the discretion referred to in the second proposition in *BK Tooling* (at 426B-H, 435A-B) is applicable even if I have deviated radically from the formula contained therein.

It was argued on behalf of the defendant that the discretion should have been exercised against the plaintiff because of his lack of *bona fides*. I do not agree. The plaintiff's case from the outset was that the parties had informally agreed that he could remain in occupation of the house. The trial court found that there was indeed some loose talk to that effect which, however, was never consummated in an agreement. That being so one cannot conclude, as was

contended, that the plaintiff displayed a contemptuous attitude towards the performance of the contract or that he deliberately set out to frustrate the defendant's expectation of making alterations to the house and of occupying it with his family. The defendant was undoubtedly inconvenienced but that inconvenience is disproportionate to the considerable benefits the defendant derived firstly, in farming Springfontein during the period in question and secondly, in retaining the capital earmarked for payment of the occupational interest; while the plaintiff was by the same token deprived both of the property and of any income he could have gathered from it and from any payments of occupational interest the defendant would otherwise have made but did not.

Fairness to both parties accordingly does not preclude an award of diminished occupational interest.

The second question posed is whether an assessment can be made on the information available of the extent to which the occupational interest should be

diminished.

For the reasons stated earlier it is simply not possible to calculate a reduction of the occupational interest in accordance with any self-evident method or formula. Of necessity one must take a broad view of the matter. The circumstances which would be relevant to a consideration of that question have all been discussed, in one context or another, in the course of this rather protracted judgment. I do not propose to tabulate and evaluate them separately and afresh. Taking all the relevant factors into consideration I believe that it would be fair to the plaintiff and certainly not unfair to the defendant if the occupational interest due to the plaintiff in terms of the contract is reduced by 25%. If one errs by doing so it is an error in favour of the defendant who is, after all, the innocent party.

Finally there is the question of costs.

Inasmuch as the finding of absolution is to be altered to one awarding the plaintiff 75% of his occupational interest the appeal as such must obviously

succeed. The costs of appeal in this court must follow that result.

If the court *a quo* had arrived at the conclusions reached by this court and if the order of this court were to be transposed to the full court with retrospective effect, the defendant would have been substantially successful in his appeal to the full court. The trial court had in effect awarded the plaintiff 100% of his occupational interest (from which it deducted the defendant's first counterclaim, as calculated by it). If this court's order is now projected onto the full court it would have reduced the occupational interest from 100% to 75%. It would furthermore have restored the defendant's first counterclaim although the period in respect of which the counterclaim was calculated was marginally reduced. All in all this result would have represented substantial success for the defendant before the full court entitling him, in my view, to the costs of appeal before it.

The trial court ordered the defendant to pay 75% of the plaintiff's costs. It stated:

"On balance, plaintiff was undoubtedly the more successful party if one looks at the amounts but, again, defendant has achieved some successes as well ... Having given the matter careful consideration, I consider that in all the circumstances a fair costs order would be that the defendant should pay 75% of the plaintiff's costs."

If this court's order on the main claim is substituted for that of the trial court, the trial court's reasoning would still be applicable. The trial court having exercised a discretion on the grounds mentioned, there are in my view insufficient grounds for deviating from its order as to costs.

The following orders are accordingly made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The orders of the court *a quo* are altered as follows:

"1. The appeal is upheld with costs;

2. The orders of the trial court are set aside and the following orders are substituted for them:

'It is ordered that:

a) plaintiff is granted judgment on his main claim in the amount of R39 243,75 (being 75% of the occupational interest of R52 325, calculated at 12,5% p.a. on R1,1m from 1 May 1992 to 17 September 1992);

b) defendant is granted judgment on his first claim in reconvention in the amount of R1 129;

c) plaintiff is granted judgment on defendant's second and third claims in reconvention;

d) defendant is granted judgment on his fourth claim in reconvention in the amount of R1 500;

e) defendant is granted judgment on his fifth claim in reconvention in the amount of R350;

f) defendant is granted judgment on his sixth claim in reconvention in the amount of R2 720;

g) interest is to be paid on the amounts mentioned in a), b), d), e) and f) above at the legally prescribed rate from the date of judgment to date of payment;

h) the defendant shall pay 75% of the plaintiff's costs'."

P M NIENABER
JUDGE OF APPEAL

Concur:

Van Heerden DCJ
Smalberger JA
Zulman JA
Melunsky AJA