IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No: 07/7063

In the matter between:

MPANGE, ZITHULELE

AND 20 OTHERS **Applicants**

And

SITHOLE, MTHOKOZISI **Respondent**

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JUDGEMENT

SATCHWELL J:

INTRODUCTION

1. This judgment arises from issues attendant upon the legal dilemma faced by desperate tenants who find themselves at the mercy of an unscrupulous landlord. The vexed question concerns the remedies available to such tenants who are confronted with two equally unpalatable alternatives: on the one hand, homelessness and on the other hand, residence in an unsafe and inadequate building for which they are paying rental.
2. There are a number of possible remedies available to the court where a slum

landlord has failed to maintain premises in a safe or proper condition. One such remedy is an order for specific performance that the landlord render the building fit for the accommodation purpose for which he has rented it out to a number of tenants. Another remedy is an order that the rentals payable by the tenants to the landlord are reduced proportional to the reduction in use and enjoyment of the accommodation. Earlier decisions of our courts tended towards a refusal to grant such orders.

3. This judgment first considers judicial and academic criticism of these decisions. Thereafter this judgment examines these remedies in the light of the obligation on this court to develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights and the rights to adequate housing, dignity and privacy provided for in the Constitution. It against that background that this judgment determines both the remedies of specific performance and reduction of rental to be permissible in the present case.

4. The applicant tenants were initially unrepresented in these proceedings. The court approached the Johannesburg Bar for assistance and is greatly indebted to Advocates Steven Budlender and Kate Hofmeyr who appeared as *amici* and, in that capacity, prepared comprehensive and thoughtful heads of argument and assisted this court with careful and creative submissions[1].

FACTUAL BACKGROUND

5. It is common cause that, since January 2005, the respondent has been renting out rooms or portions of rooms in a building to at least 113 occupants and their families in Leyland House. These 113 occupants, including the applicants,

1 Michael van Kerckhoven first alerted me to the need to reconsider the remedies available to a tenant where the landlord is in breach of his obligations.

currently pay the sum of R 420 per room per month into a bank account in the respondent's name. Access to the building is controlled by respondent's agents who require applicants and other occupiers to hand over their bank deposit slips. Applicants complain that proof of payment of rental monies is thereby destroyed but the respondent avers that the slips are returned.

6. The building was apparently previously a three story warehouse or factory consisting of open workshops. Applicants aver that they each provided funds ranging from R 450 to R 900 to the respondent for the erection of brick walls so as to create rooms. It is not in dispute that there are only board partitions between rooms.

7. The applicants complain of the conditions of the building and have attached photographs to their pleadings supporting certain of these complaints. The allegations include lack of privacy between rooms, illegal and unsafe electrical connections, insufficient and unhygienic sanitation facilities, accumulation of refuse, broken walls and windows, general decay and disrepair. Many of the problems are occasioned by the unsuitability of the building for its current, ie accommodation, purpose. It is also alleged by the applicants that the some problems are a result of alleged non payment of municipal charges and levies.

8. The respondent contends that the conditions within and without the building are either exaggerated or will be attended to while certain of the problems are caused by or occasioned by the applicants. He also states that the alleged failure to pay municipal charges is not the concern of the applicants.

9. Applicants aver that complaints or requests to the respondent concerning occupation, rental or the building are met with threats by the respondent or his agents who enter the building at night carrying firearms. It is common cause that one such agent is group of men or a business entity known as 'Bad Boys'. It is

claimed that the respondent has also advised the applicants that his position as a High Court advocate will protect him and the 'Bad Boys'. These threats and such behaviour are denied by the respondent.

RELIEF SOUGHT

10. Applicants are all residents in Leyland House. They prepared their own pleadings and represented themselves in this application. The respondent, who is an advocate of the High Court, was legally represented throughout. The application was initially heard on an urgent basis and a number of interim orders were made pending finalization.

11. The applicants placed the ownership of Leyland House and the administration thereof in issue. The applicants complain that the respondent is not the registered owner of this property and that even if he was, he rents out rental accommodation in contravention of certain Statute and regulations both by operating in the absence of required permits and by the appalling conditions to which he subjects the residents of the building. They plead, in some detail, that various of their Constitutional rights have been infringed by the behaviour of the landlord respondent.

12. It was on the this basis that the applicants sought orders that the respondent be prohibited from collecting rentals from them in respect of their occupancy of Leyland House; that the respondent be ordered to refund to the applicants monies unlawfully received by him from the applicants as rentals; that the respondent be prohibited from contacting the applicants or other occupiers of Leyland House or from entering into the property. Their notice of motion contained the catch-all prayer for "further or alternative relief".

13. In the course of argument, counsel for the respondent pointed out that the

applicants had primarily formulated their case on the basis of the alleged non-ownership of the property by the respondent and that the relief sought by them did not amount to a claim for specific performance that the respondent render the building fit for the purpose for which it has been leased . However, this objection was subsequently abandoned.

14. The applicants are quite obviously not persons of education or means. If they were, they would certainly not be living in these appalling conditions. They would not have had to rely on their own ingenuity to prepare this application to court. If they had been able to obtain legal representation the legal issues arising from the facts which they have set out in their papers might have been correctly identified and the relief sought might have been formulated accordingly.

15. It has been long accepted that the court should make allowance for the inexperience of lay litigants who "cannot be cannot be expected to display the same ability of draughtsmanship and precision of language as is expected by a legally trained and experienced pleader " [2] This approach was restated by the Constitutional Court in Xinwa and others v Volkswagen of South Africa (Pty) ltd 2003 (4) SA 390 CC , where was said

> " Pleadings prepared by laypersons must be construed generously and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance." [at paragraph 13][3]

2 Viljoen v Federated Trust Ltd 1971 (1) SA 750 (O) at 757 B-C

3 In Xinwa there is reference to the approach in the United Sates that pleadings prepared by laypersons are held to "less stringent standards than formal pleadings drafted by lawyers" (Haines v Kerner et al 404 US 519 (1971) at 520) and that "where a

16. In the present case, the applicants have set out all relevant facts and the context to those facts. Over the course of four court appearances, the true legal issues and remedies possibly available have been discussed and argued in great detail notwithstanding that they were not all identified by the applicants in their Notice of Motion and supporting affidavits. There has been no prejudice to the respondent. Indeed, respondent's counsel submitted in the Heads of Argument which he prepared that the remedy of specific performance should be ordered and, in argument, presented certain proposals as to how this could be implemented.

OWNERSHIP OF THE PROPERTY

17. The applicants premised their approach to this court and the relief sought on the averment that the respondent is not the registered owner of the premises. The respondent also appeared to perceive the issue of ownership as decisive of the dispute. Both parties are mistaken in their approach. However, the issue of ownership and the non-joinder of the registered owner of the building does have relevance to the ability of this court to implement the remedies available to it and must therefore be canvassed.

Is the respondent the owner ?

18. Applicants allege that the respondent is not the registered owner of the property.[4] The respondent asserts that he is the owner and that he negotiated to purchase Leyland House from Jeppe Industrial Property (Pty) Ltd in March 2004 .

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plaintiff pleads pro se in a suit for the protection of civil rights the court should endeavour to construe the plaintiff's pleading without regard for technicalities".(Picking et al v Pennsylvania R Co et al 151 F 2nd 240 at 244,)

4 Erf 1111 Reg Div IR Tvl.

19. The respondent has gone no further than to aver that he negotiated a purchase of the building and attach a copy of an agreement for the Sale of Land in Instalments dated June 2004 which records agreement between Jep Ind Prop (Pty) Ltd and the respondent to purchase the property for the sum of R350 000. over a period of time [5]. It is apparent from this document that the respondent has taken possession of the property and is, as he claims, the person in control of the property.

20. In response, the applicants conducted a search of the Deeds Registry in Johannesburg and handed into court an extract from the Deeds Registration System dated 22nd March 2007 which records the registered owner of Erf 1111 Jeppestown to be "Jep Ind Prop Pty Ltd" under Title Deed T1071/1952.

21. The respondent has made out no case for ownership of the property Notwithstanding averments in his affidavit, the countervailing evidence is that the respondent is not the owner [6]. It was so conceded in argument by his counsel.

22. It should also be noted that the respondent does not claim that he is acting as agent for the registered owner.[7] There is nothing from the directors of the owner company or the liquidator of the owner company confirming that the respondent is acting on behalf of the company or is their managing agent in

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5 A deposit of R10 000 was to be paid and thereafter monthly installments of R10 000 were to be paid to I B Accounting Services with final date of payment to be 31st March 2005 by which date a guarantee for the balance of the purchase price and interest thereon was to be furnished against registration of transfer into the name of the purchaser. Possession was, subject to fulfillment of all conditions, to pass to the purchaser on 1st April 2004. Transfer of the property was to be effected by a named conveyancer by no later than thirty days from 30th April 2005.

6 See Port Nolloth Municipality v Xhalisa & others 1991 (3) SA 98 C

7 Anyway, the fact of agency is not established by the declaration of the agent. see Rosebank Television & Appliances Coy Pty Ltd v Orbit Sales Corp 1969 (1) 300 W at 303E

respect of the property.

Lessor needs no title

23. The relief sought by the applicants is premised upon a finding that the respondent is neither the registered owner of the premises nor the agent of the registered owner and accordingly is not lawfully entitled to extract rentals from the applicants and other occupants. In the course of a number of hearings, it has been carefully explained to the applicants who attended at court that their landlord is not required in law to be the owner of the property.

24. That a lessor is not the owner of the thing let does not affect the validity of the lease agreement entered into between the lessor and a lessee. In principle, a lease may be valid even though the lessor is not the owner of the property let and has no right to let it [8]. All that the law requires is that the landlord gives vacant possession to those to whom he rents [9]. The respondent, as lessor, is required to do no more than warrant that no person with a superior right will disturb the applicant lessees' use and enjoyment of the property let, namely Leyland House,[10] with the result that the applicants may not dispute the respondent's title to the property.[11]

25. There is a further challenge by the applicants that the respondent is not entitled to lease these premises to them in absence of permits issued in accordance with regulations promulgated in terms of the National Building Regulations Act. This argument does not assist the applicants. Not only does it not lie in the mouth

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8 See Hillcock & another v Hilsage Investments (Pty) Ltd 1975 (1) SA 508 (A) at 516D-F

9 See Cooper W E 'Landlord and Tenant' 2nd ed 1994 Juta; Lawsa Vol 14 paragraph 155

10 See Kleynhans Bros v Wesssels' Trustee 1927 AD 271;

11 See Boompret Investments v Paardekraal Concession 1990 (1) SA 347 A 351 H; Hillock v Hilsage Investments 1975 (1) SA 508 (A) 516E;

of the tenant to challenge the title of the landlord [12] but the applicants decline any opportunity to complain to the municipal authorities because such an approach would, no doubt, result in a closure of the building and their eviction therefrom. A further complaint that the respondent does not run an 'accommodation establishment' as defined in the Public Health By-laws of the City of Johannesburg Metropolitan Municipality renders such standards inapplicable to the premises leased out by the respondent.

26. The result is that the respondent is not the registered owner of the building leased and occupied by the applicants. This does not unseat him as landlord. Nor does it disentitle him from concluding leases with the applicants or others and claiming agreed rentals from them.

BREACH OF LEASE BY THE RESPONDENT

27. The respondent has not only claimed to be the owner of the property. He is the acknowledged lessor. On his own papers, is "the person in charge of the building". He claims that he instructed an architect to draw up structural plans which were submitted to the municipality for approval. He asserts that he employs a number of persons, including cleaners and a caretaker, to care for the building. He avers that he has employed the services of a plumber to quote for repairs in respect of certain of the complaints. Indeed, in his papers the respondent asks for the court to allow him time to repair both the lavatories and electrical wiring.

28. It is trite that a lessee is entitled to full use and enjoyment of the property during the full term of the lease. The respondent is therefore under a duty to deliver and maintain the property in a condition reasonably fit for the purpose for which it

12 ibid

has been let.[13] The duty includes the obligation that lessees shall not be exposed to any unnecessary risk to life or property [14] and that lessees shall occupy the premises with safety [15] [16]

29. The applicants allege the following defects in the premises:
    a. there are only 2 unisex toilets in the premises, which are used by the occupants of 113 rooms. The toilets do not have fixed doors which results in a total lack of privacy for the occupants as they make use of the toilet facilities;
    b. the refuse from the building is not collected and as a result accumulates in the building.
    c. the premises are very badly lit in the day and have little or no lighting at night;
    d. illegal electrical connections from the street light outside the building result in exposed electrical cabling in the building;
    e. there is an illegal water connection which provides a single water tap from which all occupants of the premises must obtain their water for drinking, eating, washing and bathing;
    f. the floors are covered in urine;
    g. the rooms are partitioned with hardboards despite the respondent's undertaking to partition the rooms with bricks; and
    h. there are broken windows on two floors of the premises.

30. In some cases the respondent denies the existence of the disrepair, such as the

13 Poynton v Cran 1910 AD 205 at 214; Hunter v Cumnor Investments 1952 (1) SA 735 (C) at 740A; Harlin Properties (Pty) Ltd & another v Los Angeles Hotel (Pty) Ltd 1962 (3) SA 143 (A) at 150 H ; Cape Town Municipality v Paine 1923 AD 207 at 218

14 See Amin v Ebrahim 1926 NPD 1 at 7

15 See Tee v McIlwraith 1905 (19) ECD 282 at 286

16 These leases between the applicants and the respondent are not determined by written agreement . It has not been suggested that the oral agreements exclude these responsibilities and obligations on the part of the lessor respondent whose pleadings, in any event, confirm that he is so obligated.

electrical wiring, but then indicates he wishes to be given time to place it in good order. In other cases, he admits the disrepair and gives some indication of an effort to remedy it, such as the employment of cleaners. In other cases, such as broken windows, the respondent denies responsibility for the disrepair.

31. It is common cause that the property has been let by the respondent for the specific purpose of providing residential accommodation for the applicants and other lessees. On the undisputed allegations and the photographs, I have no doubt that these premises are completely unfitted as housing for men, women or children. This is an old warehouse which has been turned into a warren of boarded up rooms. The respondent makes no claim to have procured an electrical supply for lighting, heating or cooking to each of these rooms. This explains the loose wires trailing from the pavement into the rooms. The warehouse provided no more than two lavatories for all employees. The respondent makes no claim to have taken any steps to install lavatories and sanitation facilities to meet the needs of the approximately 500 persons who now live in the building which he rents out to them. There is one tap to provide cooking, cleaning and personal washing water for all these people. The respondent does not dispute that the water and electrical connections have been illegally made but simply denies that he played any part therein. If the respondent is providing residential accommodation to human beings then he must at the very least ensure that municipal connections are available to those who will pay for water and electricity and that the municipality will provide same. Daily living results in the production of garbage and it is the responsibility of the landlord to ensure that sufficient garbage bins are available and that municipal collections take place.

32. I have no doubt but that this landlord has failed to hand over dwelling premises in a proper and habitable condition and that he has failed to maintain these premises in a proper condition of repair while so occupied.

33. The applicants' entry into and continuing occupation of these premises has not been relied upon by the respondent to suggest that the applicants have waived their rights to safe and suitable habitation.[17] In any event, waiver would require knowledge of the rights so waived. There is no indication that there was either such knowledge or such waiver. These applicants have called upon the respondent to remedy the many defects in these premises. He avers that he has taken or is taking steps to procure such remedy and, in his papers, has asked for a grace period of some 90 days within which to effect certain repairs. The arrangement that brick walls were intended to create individual rooms has not been disputed. It was therefore clearly intended to improve the intended accommodation and render the building fit for human habitation. The respondent avers that he has engaged an architect to draw up plans for this building which , he claims, have been submitted to the municipal authorities for approval. The respondent avers that he employs caretakers and cleaners. He has engaged the services of a security company and a plumber to quote for repairs. The respondent appears to view occupation of these premises in their current condition as a temporary situation pending his improvement of the building.

34. Further, absent other options, such waiver, if given, would not have been voluntarily and freely given. [18] The only other option available to these applicants would appear to be homelessness living in the bush, on a pavement or some construction in a squatter camp – now euphemistically known as 'an informal settlement'.

REMEDIES

35. Where the lessor fails to deliver or maintain the property in a condition fit for the

17 See Collen v Rietfontein Engineering Works 1948 (1) SA 413 A; Road Accident Fund v Mothupi [2000] 3 All SA 181
18 See Amin supra

purpose for which it is let there are a number of remedies available to the lessee. These include cancellation of the contract or a claim for specific performance from the lessor. Damages may be claimed in addition or in the alternative[19]. A reduction in rental is also permissible.

SPECIFIC PERFORMANCE BY THE LANDLORD - THE GENERAL RULE

The general rule

36. A contracting party is, in principle, entitled to enforce specific performance of his or her contract. However, the granting of an order for specific performance is in the discretion of the court. In the context of lease agreements where the lessor has failed to deliver or maintain the thing let in a proper condition, the courts have tended to refuse to order the lessor to effect the necessary repairs.[20]

37. It has generally been accepted that a lessee who is unable to persuade a court to make an order requiring the lessor to effect the necessary repairs will be able to achieve the same result by effecting the repairs him- or herself and then recovering the costs thereof from the lessor. This may take the form of either a set-off against rental paid or a claim against the lessor for the amount of the repairs.[21] Such an option is apparently not easily available or at all to the applicants in the present case. They are without the finances and perhaps the skills themselves to effect the renovations needed to render the premises habitable. There are many occupants who are lessees and each would have different personal and financial circumstances as well as different needs and priorities for safe habitation. There are presumably a multiplicity of

19 Woods v Walters 1921 AD 303.

20 Marais v Cloete 1945 EDL. 238 at 243; Barker v Beckett & Co Ltd 1911 TPD 151 at 164 ;Hunter v Cumnor Investments 1952 (1) SA 735 (C) at 740D

21 Poynton v Cran 1910 AD 205 at 227; Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C) at 468C ;Harlin Properties (Pty) Ltd & another v Los Angeles Hotel (Pty) Ltd 1962 (3) SA 143 (A) at 150H-151H

relationships between the tenants in the building and nothing to suggest that they have anything in common other than such residence or share either the desire or ability to work together on a project to renovate this building.

38. In general courts have tended to exercise their discretion against awarding specific performance where damages would provide adequate compensation to a tenant, where it would be difficult for the court to enforce it's decree, where it would operate "unreasonably hardly" against the landlord, where the lease agreement is unreasonable, such an order would produce injustice or would be inequitable under all the circumstances (see Haynes v Kingwilliamstown Municipality 1951 (2) SA 371 (A) at 378H)

39. The basis for the courts' reluctance to grant specific performance where a lessor has failed to maintain the property let in a proper condition was described by de Villiers J in the case of Nissenbaum and Nissenbaum v Express Buildings 1953 (1) SA 246 (W) as follows:

> "as a general rule in disputes between landlord and tenant as to repair of buildings, or neglect to repair or failure to carry out some structural alterations, the Court will not order specific performance because it is a difficult matter for the Court to supervise and see that its order is carried out, and as the question whether there has been specific performance of the Court's order was difficult to determine, it would be difficult to enforce it." (At 249G-H)

The general rule is not inviolate

40. As noted in Nissenbaum supra , specific performance is a discretionary remedy. It would follow that, although the cases may establish a general tendency on the part of the courts not to order specific performance in the context of a lessor's failure to maintain the property let, such tendency ought not to be elevated to an absolute rule.

> "these two cases, however do not show that that general rule is an absolute rule and that there cannot be exceptions, and it seems to me that where a landlord acts in a high-handed manner, … the Court might very well, in a case which savours much more of spoliation than the present one, actually order the landlord to restore the buildings, and the Court would put a very high standard on such performances as a mark of disapproval of the high-handed action of the landlord" (per De Villiers J in Nisssenbaum supra at 249H – 250A)[22]

41. The Appellate Division has criticized the courts' general reluctance to order specific performance in such cases. In ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd 1981 (4) SA 1 (A), Jansen JA commented that our courts had been "somewhat reluctant " to order specific performance "where it would be difficult for the Court to enforce it's decree" but went on to describe this as a "limitation developed from the English practice and not consonant with out law" (at 5G).

42. Jansen JA went on to point out that "even in England this limitation appears to have fallen in disfavour" (5C) [23]. In Tito v Waddell (No 2) 1977 Ch 306 Lord Megarry commented

> "The real question is whether there is a sufficient definition of what has to be done in order to comply with the order of the Court. That definition may be provided by the contract itself, or it may be supplied by the terms of the order, in which case there is the further question whether the Court considers that the terms of the contract sufficiently support, by implication or otherwise, the terms of the proposed order." (at 322B)

43. This reluctance to order specific performance to compel a recalcitrant lessor to

22 In this case de Villiers J ordered the lessor to reinstate the water supply.

23 In the case of Shiloh Spinners Ltd v Harding 1973 AC 691 at 724, Lord Wilberforce held that it was time to move away from certain nineteenth century authorities which posited as the basis for not granting orders of specific performance, 'the impossibility for the courts to supervise the doing of the work'. According to Megarry VC, in the case of Tito v Waddell (No 2) 1977 Ch 306 , it was at one time said that an order for the specific performance of the contract would not be made if there would be difficulty in the court supervising its execution. The Vice Chancellor expressed himself " unable to see the force of this objection" and commented that, after it had been discussed and questioned in C H Giles & Co Ltd v Morris [1972] 1 W.L.R. 307, 308 the House of Lords "disposed of it" in Shiloh Spinners *supra.*

effect the necessary repairs to the property let has also attracted academic criticism See Kerr A J Principles of the Law of Sale and Lease (1998) 56; Cooper, The South African Law of Landlord and Tenant (1973) 81

44. It would seem that South African and English courts as well as academic writers have provided well founded criticism of the justification for refusing to grant an order of specific performance against a lessor to effect repairs so as to maintain the premises in a condition reasonably fit for the purpose for which they were let. The notion that such an order would be difficult to enforce would arise only when the person in whose favour it was granted alleges that the defendant has failed to comply therewith. Any factual disputes as to the question of compliance can be dealt with, at such a stage, by invoking the usual principles applicable to factual disputes.[24] As Lord Megarry succinctly put it "The real question is whether there is a sufficient definition of what has to be done in order to comply with the order of the Court."

45. After all, it is not unknown in the South African experience for our courts to craft supervision of orders and enforcement to be implemented pursuant to default.[25]

46. On the facts of the present case, it is unlikely that the applicants have the means to effect the necessary repairs to the premises themselves. Without such an option available to them, and in the absence of an order for specific performance, the applicants will continue to occupy premises that present a danger to their health and safety, limit their privacy and impair their dignity. Continued occupation of the premises under such conditions therefore implicates the applicants' rights under sections 10, 14 and 26(1) of the Constitution.

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24 See Cooper, The South African Law of Landlord and Tenant (1973) 81

25 See Pretoria City Council v Walker 1998(2) SA 363 CC; Dawood v Minister of Home Affairs 2000(3) SA 935 CC; August v Electoral Commission 1999(3) SA 1 CC; Willy Aaron Sibiya v Director of Public Prosecutions, Johannesburg (3) CCT 45/04 ; Minister of Health v TAC 2002(5) SA 721 CC

47. To suggest that the applicants could decline to rent these premises and seek accommodation elsewhere ignores the realities of the shortage of accommodation for poor people in Gauteng and the plight of inner city residents at the mercy of slum landlords. The applicants could report the respondent to the municipal authorities and have the building declared a health hazard and unfit for human habitation. This approach also ignores the desperation of the homeless and the plight of the applicants who do not wish to become homeless.

THE LANDLORD AND THE CONSTITUTIION

48. I would therefore conclude that the authorities should not necessarily preclude the court from granting the remedy of specific performance in this particular case. The approach of the courts from which the above rule emanates has been subjected to criticism by the Appellate Division/Supreme Court of Appeal (albeit in *obiter dicta*) and by academic commentators. The English law upon which these judgments relied have now repudiated this rule. There appears to be no decision binding on this court which precludes it from granting the remedy of specific performance since all the relevant decisions are merely of persuasive value. In light of the rights to dignity, privacy and access to adequate housing set out in the Constitution, I believe that this court is obliged by section 39 (2) of the Constitution to develop the common law in a manner that permits it to grant this remedy in a situation such as that of the present case.

Development of the Common Law

49. Section 39(2) of the Constitution [26] has been interpreted by the Constitutional Court to place an obligation on courts to develop the common law in the light of the values underlying the Constitution. (see Carmichele v Minister of Safety and

26 "When interpreting any legislation and when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights"

Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) at para 39)[27]. The Constitutional Court has repeatedly stressed that the obligation contained in section 39(2) should always be borne in mind by the High Courts and the Supreme Court of Appeal [28]. Where a court's exercise of discretion implicates constitutional rights, it must be interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of Rights [29] and with due consideration given to international law.[30]

Section 26(1): access to adequate housing

50. The Constitutional Court has held that section 26 of the Constitution imposes both negative and positive duties. Subsection (1) imposes, at the very least,

> "a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing." (Government of the RSA v Grootboom 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 34.)

51. In fleshing out the nature of the duties imposed by section 26(1) of the Constitution, it is valuable to consider the comments of the United Nations

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27 "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."

28 Phumelela Gaming and Leisure Ltd v Grundlingh and Others 2006 (8) BCLR 883 (CC) at para 26; K v Minister of Safety and Security 2005 (6) SA 419 (CC) at para 17; S v Thebus and Another 2003 (6) SA 505 (CC) at paras 25-7

29 Giddey NO v JC Barnard and Partners 2007 (2) BCLR 125 (CC) at paras 16, 18 and 30

30 Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at para 23

Committee on Economic, Social and Cultural Rights (the Committee) on the right to adequate housing. See Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at para 23 The Committee has dealt with the meaning of 'adequate housing' in General Comment 4. There, the Committee has emphasized the integral link between the right to adequate housing and other fundamental human rights, including human dignity. In relation to habitability, the Committee has noted:

> "Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well." (The Right to Adequate Housing (Art 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at para 8)

52. Further, the Committee has stressed the need for effective domestic legal remedies to deal with many of the component elements to the right to adequate housing. Such remedies include mechanisms to deal with: "(c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination and (e) complaints against landlords concerning unhealthy or inadequate housing conditions."[31]

Section 10: dignity

53. Human dignity is the central value of the objective normative value system established by the Constitution .[32] As the former Chief Justice has written:

> "As an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the

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31 (The Right to Adequate Housing (Art 11(1)) UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at para 17)

32 Carmichele supra at para 56

> application of the social and economic rights entrenched in the Constitution."(Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196.)

54. The Constitutional Court has repeatedly emphasized the link between the socio-economic rights in the Constitution and the right to dignity.[33] Limited access to electrical, water and toilet facilities, the absence of regular refuse removal and broken windows creates squalid conditions which affect applicants' dignity. In addition , society as a whole is demeaned if the state, through its judicial arm, cannot come to their assistance. [34]

55. A general rule of the common law which regards orders of specific performance as inappropriate in the context of a lessor's failure properly to maintain the premises let, presupposes a class of lessees who have the means, themselves, to effect the necessary repairs. Where the class of lessees does not have the means to cover the costs of such repair themselves, the failure of the courts to exercise their discretion in favour of an award of specific performance will entail that such lessees are required to remain in occupation of premises that severely compromise their dignity.

Section 14: privacy

56. Furthermore, in two key respects, the disrepair of the premises in this case implicates the applicants' right to privacy. The Constitutional Court has held that 'the scope of a person's privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured'. A legitimate expectation of privacy comprises a subjective expectation of privacy

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33 See Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 83; Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC) at para 40; Jaftha v Schoeman and Others; van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC) at paras 21 and 24.

34 See Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para 18

that society has recognised as objectively reasonable. See Bernstein v Bester NO 1996 (2) SA 751 (CC) at para 75

57. According to the Constitutional Court, privacy is acknowledged in the truly personal realm, but as a person moves in communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly. However, the most intimate core of an individual's privacy interests consists in the "inner sanctum of a person, such as his or her family life, sexual preference and home environment". See Bernstein *supra* at para 67 . The Court has also stressed the link between privacy and dignity:

> Privacy is a right which becomes more intense the closer one moves to the intimate personal sphere of the life of human beings and less intense as it moves away from that core. This understanding of the right flows, as was said in *Bernstein*, from the value placed on human dignity in the Constitution. (Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC) at para 18.)

58. In the present case, I am satisfied that the failure on the part of the respondent to effect brick partitions to separate the rooms in the premises prevents the applicants from living in a 'zone of personal intimacy and family security'. (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at para 17). Furthermore, the absence of any doors on the toilet facilities provided in the premises subjects the applicants to an acute invasion of the most intimate core of their privacy interests and impairs their dignity.

NON JOINDER OF THE REGISTERED OWNER

59. However, a finding that the respondent is not the registered owner impacts significantly on the possibility of utilizing specific performance by the

respondent as an appropriate remedy in this dispute.

60. The registered owner, Jeppe Industrial Properties (Pty) Ltd, has not been joined in this matter. Any order made by this court which impacts on the status or condition of this building affects the interests of the registered owner. The owner, whether the company itself or the liquidator thereof, is entitled to be joined by reason of it's interest in the building and the land upon which it stands[35].

61. It would appear that the owner of Leyland House has simply abandoned this property. There are a multiplicity of possible reasons why the property was never transferred into the name of the respondent. He may not have performed his obligations under the agreement of sale and failed to pay all instalments of the purchase price. The owner may be unable to afford to procure registration of transfer into the name of the purchaser since it may not have paid all land rates and taxes, service charges and electricity imposts in respect of the building to the relevant local authority and is therefore unable to obtain the clearance certificate required for transfer to take place. It may be that the outstanding municipal charges far exceed the purchase price agreed with the respondent and there is therefore no incentive for the transfer of ownership to be finalized. This is all speculation.

62. Notwithstanding the owner's non-involvement in the running of this building and it's apparent relinquishment thereof to the respondent, including the benefit of all collected rentals, the owner still has an interest in the building. Such interest extends not only to the shareholders in the owner company but also the Liquidator on behalf of the creditors of the company. Even if the major creditor was the local authority to whom the aforesaid charges were owed, there is an interest in the property and it's fate through the continuing registered ownership

35 Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 A

in the name of Jeppe Industrial Properties (Pty) Ltd. At the very least, that interest must be recognized by joinder of the owner.

63. Any order must be crafted to recognize that the owner has not presently been joined in this application. Either this court must avoid granting any remedy which would affect the owner's interests. Alternatively the court must postpone the making of such an order until such time as the owner has had the opportunity to indicate it's wishes in regard to this application.

REDUCTION OF RENTAL

64. There is another remedy available in this case which is sensitive to the effect which the respondent's failure to effect the necessary repairs to the premises has on the applicants' rights of access to adequate housing, dignity and privacy.

The approach when the lessee remains in occupation.

65. A lease is a contract of reciprocal obligations. It ought to follow from the reciprocity of the duties between lessor and lessee that where a lessee abides by a lease despite a defect in the thing let, he or she should be entitled to a reduction of the rent proportional to the diminished use and enjoyment of the thing.

66. However, in a line of cases which began with the decision of Arnold v Viljoen 1954 (3) SA 322 (C) various provincial divisions of the High Courts have held that where the lessee remains in occupation of the thing let, he or she remains liable for the full rental even though he or she would not have had full use and enjoyment of the thing let. On this line of thought, the test for a lessee's liability for rental is whether he or she was in occupation of the leased premises and not whether such occupation was beneficial or not.[36]

36 Tooth and Another v Maingard and Mayer (Pty) Ltd 1960 (3) SA (N) ;Marcuse v Cash Wholesalers (Pty) Ltd 1962 (1) SA 705 (FC) ;Bourbon-Leftly v Turner 1963 (2) SA 104 (C) ;Appliance Hire (Natal)

Criticism of the 'continuing occupation' approach

67. This approach has attrcted criticism from academic and judicial quarters. See Cooper, Landlord and Tenant 2nd ed at 102-7 and 164; De Wet and Van Wyk, Die Suid-Afrikaanse Kontraktereg en Handelsreg , 5th ed, 359, 366 ; Joubert (ed) The Law of South Africa vol 14 at para 146; Piek and Klein "n Huurder se Aanspraak op Vermindering van Huurgeld terwyl hy in Besit van die Huursaak is' (1983) 46 THRHR 367 ;Steynberg v Kruger 1981 (3) SA 473 (O)

68. In Ntshiqa v Andreas Supermarket (Pty) Ltd 1997 (3) SA 60 (Tk) , the full bench pointed out that the line of cases beginning with Arnold v Viljoen were purportedly based on the Appellate Division authority in the case of Sapro v Schlinkman 1948 (2) SA 637 (A). However, as Miller J highlighted in Ntshiqa, the *ratio decidendi* of Sapro's case was that a lessee who enjoys the full use and enjoyment of the premises must pay the full rent even though the lessor defaults in complying with a non-essential term of the contract. It did not, therefore, cover cases where the lessee had not enjoyed the full use and enjoyment of the premises. On this ground, the full bench of the Transkei Supreme Court refused to follow the line of authority established in Arnold supra.

69. In the case of Thompson v Scholtz 1999 (1) SA 232 (SCA), Nienaber JA referred to this criticism and, in an obiter remark, indicated his agreement therewith:

> "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." (At 246G-H)

(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) ;Greenberg v Meds Veterinary Laboratories (Pty) Ltd 1977 (2) SA 277 (T)

70. There are at present, therefore, two provincial division decisions which regard a reduction of rental as a competent remedy in cases in which a lessee has remained in occupation of premises despite defects therein, as well as an obiter remark by Nienaber JA in the Supreme Court of Appeal endorsing the appropriateness of such a remedy.

Appropriateness of a Reduction in Rental

71. In the present instance the applicants have certainly not had the benefit of full use and enjoyment of adequate housing at Leyland House. The diminution of their occupation has already been spelt out - lack of privacy, absence of sufficient lavatories, one water tap for all residents, illegal and dangerous provision of electricity and so on.

72. If the equities weigh against an order for specific performance by reason only of the non-joinder of the owner of the premises, an order for the reduction of rental for the period until the respondent effects the necessary repairs will, in my view, be an appropriate response to the implications for the applicants' rights under sections 10, 14 and 26(1) of the Constitution which continued occupation of such premises presents.

73. Comments earlier in this judgment concerning the impact for the applicants' Constitutional rights of access to adequate housing, dignity and privacy apply with equal force to compel the provision of a reduction of rental remedy.

74. Although such an order does not, itself, purport to cure the disrepair of the premises which implicates the applicants' rights, it nevertheless provides an incentive to the respondent to effect such repairs in order to regain the full amount of the rental. In addition to this, it may provide the applicants with the means, in the form of saved rental monies, to somewhat alleviate their current living

conditions. The significant advantage of this remedy, as opposed to the remedy of specific performance, consists in the fact that it speaks only to the relationship between the respondent and the applicants. In other words, it is contained within the confines of their relationship. Unlike the order of specific performance, a reduction in rental does not necessarily impact on the rights and interests of a party not before this court – either the registered owner, the Liquidator or the creditors.

CONCLUSION

Specific Performance

75. I have no doubt that the facts of this case should persuade this court to exercise it's discretion in favour of an order for specific performance against the respondent that he, as landlord, do those things specified by the court to render the accommodation at Leyland House fit for the purpose for which it has been leased.

76. At common law, the courts have already acknowledged a need for flexibility in this area. Moreover, the constitutional injunction to consider the applicants' rights of access to adequate housing, dignity and privacy in the exercise of a court's discretion to grant an order of specific performance points towards the appropriateness of such a remedy in a case such as this.

77. However, details as to the priorities for renovation and repair, expertise with regard to such endeavours, the costs thereof, the time periods involved, the disruption to current inhabitants in their occupation whilst such renovations endure, possible alternative accommodation for the duration of such renovation and numerous other issues have not been canvassed by any of the parties to this litigation. For appropriate design and successful implementation of such a

structural interdict a specific plan of action to render Leyland House fit for human habitation would have to be carefully prepared and presented. Notwithstanding that the respondent has already indicated in his papers that he has such a plan in mind and that architectural plans have already been submitted to the municipal authorities, he has given no details thereof. Absent details of renovation and regeneration of the building it is not possible to grant either an order for specific performance or a declarator that there will be a reduction of rental until necessary and specified repairs are effected to the building.[37]

78. In addition I am mindful that the the respondent is not the owner of the building and that the registered owner has neither been joined in nor notified of these proceedings. This failure does implicate the appropriate remedy in this case.

79. Any order requiring a non-owner lessor to effect repairs to the property will necessarily impact on the owner's rights in respect of the property. In addition to this, it is unclear what recourse the owner may have against a lessor who effects repairs with which the owner is dissatisfied. Of particular significance in this regard is the fact that an owner who is dissatisfied with the repairs done to the property pursuant to a court order is unlikely to have a claim for damages against the lessor given that the requirement of unlawfulness for such a claim to succeed will not be satisfied. Since the repairs would have been carried out pursuant to court order, they would not have been unlawfully effected.

80. The direct and substantial interest of the registered owner in any order of specific performance granted by this Court, suggests that it's non-joinder or non-notification in this case must militate against the appropriateness of a specific performance remedy.

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37 See Willy Aaron Sibiya v Director of Public Prosecutions, Johannesburg (3) CCT 45/04 where Yacoob J cautioned that successful supervsion requires, inter alia, that detailed information be placed at the disposal of a court and a careful analysis and evaluation of such details

81. I have considered a variety of possible orders involving a postponement of the application or an interim order for reduction of rental pending service on or joinder of the registered owner. The purpose thereof would be to allow to the registered owner the opportunity to engage with this dispute and express views as to any order for specific performance in regard to the owner's building. Again, the stumbling block remains the absence of particularity as to such specific performance.

82. I have concluded that it is inappropriate for this court to be overly interventionist and creative in resolution of this dispute. In due course, the applicants may themselves seek the relief of specific performance having joined the registered owner (or Liquidator) in such an application. It may also be open to the respondent to approach this court for variation of the order for reduction in rental on presentation of a plan or scheme to render Leyland House safe for human habitation, with due regard to the interests of the registered owner.

Calculation of the reduction in rental

83. In Thompson supra Nienaber JA carefully examined the approach which a court should take to calculating a reduction in rental. The guidelines developed in that judgment may usefully be implemented in the present case.

84. The general principle remains that "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" (247A). The relief granted would be an abatement of "the rental due by him *pro rata* to his own reduced enjoyment of the merx." (247B) and where the lessee were deprived or did not receive any usage whatsoever then he or she would "be entirely absolved from the obligation to pay rental" (247C).

85. The measure against which this proportionate abatement is to be calculated is the " tenants reduced enjoyment or utilization of the leased property." The test is therefore a subjective one and "subjective factors which are peculiar to the tenant and which have no pertinence to the cost of repair must ineviatably be incorporated into the equation."(247 F). The amount of remission is to be calculated without reference to any claim for damages but by reference to what is fair in all the circumstances.

86. In the present case I have already determined this court should, in fairness, come to the assistance of the applicants. I am satisfied that there is sufficient information before me on which I can determine a reduction in the occupational rental. I accept that it is a "near impossibility" (Thompson at page 249D) to make an assessment with any degree of accuracy but this should not be a deterrence. There is, after all, no "self-evident method or formula" in terms whereof one can calculate the reduction in rental. (248)

87. The circumstances relevant to the respondent's letting of this building and the applicant's hiring of these premises have already been set out in some detail. The extent to which these premises are currently unsuited for accommodation purposes is self-evident. Taking all relevant factors into consideration, I believe that it would be fair to the applicants (who are prepared to live in less than acceptable housing out of desperation) and to the respondent (who does not own the building and has expended nothing or little thereon) if the rentals currently paid by each lessee (ie the occupants per each unit), including the applicants, were to be reduced to monthly rental of R 170 (one hundred and seventy rand) per lessee or housing unit.

88. Should the respondent take steps to renovate and repair the building and render it fit for human habitation he is not precluded from approaching this court for a

variation in this order or a substantive order with regard to appropriate rentals.

ORDER

89. It is ordered as follows:

1. The Respondent and/or his agents are interdicted from demanding or soliciting or receiving from any tenant or occupant or family group in and of the building known as Leyland House situate at 15 Jannie Street, Jeppestown, Johannesburg (Erf 1111 Registration Division IR Tvl) a rental for occupation of a unit or room in such building in excess of R 170 per unit or room (one hundred and seventy rand) per month.
2. The Respondent shall continue to provide such services, such as caretaking and cleaning, as were provided by him at date of launching of this application.
3. There is no order as to costs.

Dates of hearing:- 11 March, 9 April, 15 May 2007
Date of Judgment- 22 June 2007
For Applicants: In Person
For Respondent: Adv Motwane
Attorneys for respondent; Attorneys of record withdrew; subsequent attorneys unknown
Amici : Adv S Budlender and Adv K Hofmeyr