**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No A1043/2004

In the matter between:

**REBEL DISCOUNT LIQUOR GROUP (PTY) LTD** Appellant

and

**LA ROCHELLE ERF 615 INVESTMENTS CC** Respondent

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**JUDGMENT: 30 NOVEMBER 2005**

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**VAN ZYL J:**

**INTRODUCTION**

[1] The appellant (defendant in the court *a quo*) is a company which runs liquor stores nationwide. It was sued by the respondent (plaintiff in the court *a quo*) for damages arising from an alleged breach of its lease agreement with the appellant relating to certain shop premises. The case came before Allie J, who found in favour of the respondent and ordered the appellant to pay damages in the amount of R934 061,12, together with interest and costs.

[2] The present appeal, with leave of the court *a quo*, is directed against such order in respect of both merits and *quantum*. More particularly the issue on the merits is whether the appellant committed a breach of contract by repudiating its obligations in terms of the lease agreement, or whether it justifiably cancelled such agreement by virtue of the respondent's breach of its contractual duties. In regard to the *quantum* the issue turns upon whether the respondent suffered the damages claimed.

[3] Mr S F Burger SC, assisted by Mr P B J Farlam, appeared for the appellant, while Mr F J M Bosman appeared for the respondent. The court expresses its appreciation to them for their presentations on behalf of their respective clients.

**BACKGROUND**

[4] On or about 20 March 2001 the parties (to whom I shall refer as in the court *a quo*) entered into a written agreement of lease ("the 2001 lease") in respect of shop premises measuring some 447 square metres and situated in a building erected on erf 615, La Rochelle, Johannesburg ("the premises"). It was a term of the lease that a previous lease agreement between the parties, which had been concluded in May 1994 ("the 1994 lease") and cancelled on 26 May 2000, would be reinstated on the same terms and conditions, subject to certain amendments. The reason for the cancellation of the 1994 lease, which was to have run for nine years and eleven months, was that the defendant's sub-tenant had defaulted on rental payments, which he had been required to make directly to the plaintiff.

[5] The defendant appears to have been in occupation of the premises in terms of the 1994 lease for some five years and eight months (from September 1994 to May 2000). After a five-month intermission it took occupation again, temporarily, for approximately five months (from November 2000 to March 2001), prior to the signing of the 2001 lease. Such temporary occupation was presumably in terms of an oral (or tacit) agreement between the parties on the basis of monthly occupancy. Eventually it took occupation of the premises from 20 March 2001 to 18 August 2001 (five months), when it closed its business prior to cancelling the lease on 26 October 2001, ostensibly as a result of a series of armed robberies and burglaries which, it averred, posed a constant threat to the safety and welfare of its employees.

[6] In the letter of cancellation the attorneys of the defendant stated:

1. We act for the company with whom you concluded an agreement of lease on 17 May 1994 for a period of 9 years and eleven months from the date stipulated in clause 3 of the lease.
2. According to our instructions, our client's ability to enjoy quiet enjoyment of the premises let to it has been rendered impossible owing to a spate of armed robberies and burglaries to which our client and its former sub-tenant have been subjected in the past year and which our client was unable to prevent.
3. Given the deterioration of the area in which the premises are situate, our client reasonably apprehends that were it to occupy the premises and trade therefrom, it would again be subjected to armed robberies and burglaries that it would be unable to prevent, irrespective of the steps taken to guard against same. Our client's employees would therefore be required to work in constant fear for their safety.
4. The above facts also mean that the premises are no longer in a proper condition.
5. We have advised our client that it is entitled, in these circumstances, to cancel

the lease.

6. We have been instructed by our client to advise you, as we hereby do, that our client hereby cancels the lease.

[7] The plaintiff regarded this letter as repudiation by the defendant of its obligations in terms of the lease and gave notice that it accepted such repudiation, thereby cancelling the lease. It thereupon claimed damages in the amount of R15 782,78 in respect of arrear rental and charges up to 31 October 2001, and R1 159 418,40 in respect of loss of rental from 1 November 2001 to September 2004, when the lease was due to expire. During the course of the trial the plaintiff amended its claim by abandoning the claim for arrears and reducing the claim for loss of rental to R934 061,12. This reduction was attributed to the mitigation of its loss by virtue of rental it had received, or was due to receive, from a new tenant from July 2003 to September 2004. It was also affected by a reduction of the monthly loss of rental claimed, namely from R26 461,78 to R25 082,26.

[8] In its plea the defendant rejected the plaintiff's cause of action, averring, in paragraph 6.2.2 of the plea, that it had justifiably cancelled the lease on the grounds that:

6.2.2.1 the Defendant had been deprived of undisturbed use and enjoyment of the premises by a series of burglaries and armed robberies, which it could not reasonably prevent;

6.2.2.2 the continued use of the premises entailed a danger to the lives of the Defendant's employees, which no diligence on their part could remove; and

6.2.2.3 the Plaintiff had failed to maintain the premises in a proper condition, with the result that the premises were no longer fit for the Defendant's use.

[9] The defendant likewise disputed the claim for damages, stating that the plaintiff would not have been entitled, in the normal course of events, to receive rental during the remainder of the lease. In addition it pleaded that the plaintiff had failed to take reasonable steps to mitigate its loss. As a result of the amendment of the plaintiff's claim, however, counsel for the defendant indicated that it would not persist with this line of attack on the *quantum* of the damages.

[10] In its request for further particulars for purposes of trial, the plaintiff sought elucidation as to the alleged burglaries and armed robberies. It also required particularity as to the existence of security measures on the premises and plaintiff's alleged failure to maintain the premises in a proper condition. In reply the defendant averred that the burglaries and armed robberies had taken place during the period December 2000 to October 2001, when the store had been "alarmed and monitored by Chubb Security". During such period the plaintiff had failed to maintain the premises in a proper condition. In this regard the defendant requested the plaintiff to admit a burglary on 21 December 2000, armed robberies on 2 and 5 February, 19 March, 27 and 30 April and 18 June 2001, and burglaries on 2 and 17 August 2001. The plaintiff duly admitted this.

[11] During a pre-trial conference the plaintiff requested the defendant to indicate in what manner it had failed to maintain the premises in a proper condition. The defendant responded that this was a reference to "the absence of proper security being provided by the Plaintiff at the leased premises". This appears to have been ventilated in certain correspondence in which the defendant ostensibly requested the plaintiff to contribute towards the security on the premises, such as the appointment of a permanent security guard and installing a "drop safe". In this regard it was pointed out by counsel for the plaintiff, at the commencement of the trial, that there was no reference to any such obligation resting on the plaintiff in terms of the lease agreement, nor was there any allegation to this effect in the pleadings.

**THE ISSUES**

[12] The central issue arising from the pleadings is whether the defendant, by purporting to cancel the lease, repudiated its obligations in terms thereof, hence justifying the plaintiff's acceptance of such repudiation, cancellation of the lease and institution of an action for damages arising from breach of contract. In determining this issue, the defendant's defence must inevitably be scrutinised and assessed, namely whether the defendant was justified in cancelling the lease by virtue of the plaintiff's breach of its obligation to maintain the leased premises in a proper condition by

failing to provide proper security, and hence failing to ensure the defendant's undisturbed use and enjoyment thereof. A further issue relates to the computation of the *quantum* of the plaintiff's claim and the date from which interest runs.

**THE RELEVANT PROVISIONS OF THE LEASE AGREEMENT**

[13] For present purposes the relevant provisions of the reinstated 1994 lease agreement are those contained in the following clauses:

(2) The leased premises shall be used as a liquor outlet and for no other purpose whatsoever without the prior written consent of the LANDLORD (such consent not to be unreasonably withheld). The TENANT shall have the exclusive right to conduct a liquor outlet on the premises …

14) …

14.3 The TENANT shall not have any claim of any nature against the LANDLORD for any loss, damage or injury which the TENANT may directly or indirectly suffer (even if such loss, damage or injury is caused through the negligence of the LANDLORD or the LANDLORD'S servants or employees) by reason of any latent or patent defects in the leased premises or the building, … or arising out of vis major or casus fortuitus or any other cause either wholly or partly beyond the LANDLORD'S control or arising out of any act or omission by any other TENANT of the building … or arising from any cause whatsoever …

36) The LANDLORD does not warrant and the TENANT acknowledges that no representation has been made that the premises are now or shall at any time be suitable for the use by the TENANT for the conduct of any business, nor that any licence or authority that the TENANT required for his business will be granted or renewed.

[14] These provisions must be read together with clause 4.1 of the 2001 lease:

> This agreement [the 2001 lease], together with the lease agreement [the 1994 lease] contains the entire agreement between the parties as to the subject matter hereof.

**THE EVIDENCE**

[15] The main witness for the plaintiff was Mr W Brouze, the sole member of the plaintiff close corporation, while Mr D B Swersky, the marketing director of the

defendant, was the defendant's main witness. There were three other witnesses on either side, who testified on particular aspects arising from the issues between the parties. Their evidence has been summarised in the judgment of Allie J and it is not necessary to repeat it. Suffice it to say that it dealt, for the most part, with the problems arising from the burglaries and armed robberies, which had caused the plaintiff some damage coupled with frustration and inconvenience.

[16] It appears to have been common cause that there was criminal activity in the area where the premises were situated, as illustrated by the series of six armed robberies and three burglaries committed during the brief eight-month period from 21 December 2000 to 17 August 2001. It was also common cause that there had been criminal activity prior to this period, although perhaps not of the same intensity and frequency.

[17] All the witnesses appear to have been in agreement as to the difficulty, if not virtual impossibility, to curb this criminal activity. The installation of an alarm system had proved to be ineffective and there was serious doubt as to whether the appointment of an armed security guard by day and a security guard equipped with a radio at night would have any deterrent effect. On the contrary, this might cause more problems than solve them. A security guard might in fact become a target for miscreants anxious to acquire his or her firearm or radio. In any event one security guard might not be sufficient to render the premises secure, particularly if confronted by a gang of armed robbers. Similarly the installation of a drop safe might not be the answer. The managerial staff would simply be compelled, under threat of death or grievous bodily harm, to open it. It was a most disconcerting fact that the local police were uncooperative, alternatively under-staffed, and could not be relied on to render speedy, if any, assistance when called upon to do so.

[18] It was not disputed that, as a result of such armed robberies and burglaries, the premises were unsafe and the lives of the defendant's employees and customers were constantly endangered. This gave rise, quite understandably, to a spate of resignations and reluctance on the part of many employees to work on the premises. Those who had no choice but to remain in their employment were severely traumatised by their fear, from day to day, that they might become the victims of

armed robbers the next time around. It was inevitable that the goodwill of the business would be negatively affected.

[19] On numerous occasions the defendant brought this intolerable situation to the attention of the plaintiff, requesting its assistance in resolving or curbing the problems arising from criminal inroads on the premises. It appears from the exchange of communications that the defendant specifically requested the plaintiff to have a drop safe installed and to arrange for a security guard to be appointed in an effort to ameliorate the situation. In this regard Mr Swersky suggested, in a letter to the plaintiff dated 10 September 2001, that the rental of the premises be substantially reduced to make allowance for "substantial security costs". The plaintiff's response, in a letter dated 2 October 2001, was to make a "without prejudice" offer to reduce the rental by R2 000,00 per month, which amount could be used by the defendant for security purposes. The defendant rejected this offer and proceeded to vacate the premises before cancelling the lease on 26 October 2001.

**THE JUDGMENT OF THE TRIAL COURT**

[20] In her judgment, Allie J dealt with the issues raised in the pleadings and the evidence tendered on behalf of the parties before considering the respective submissions made by counsel for the parties. At the outset the learned judge pointed out that the defendant had not pleaded that the plaintiff's duty to deliver and maintain the premises in a proper condition included a duty to provide security. When it requested the plaintiff to provide a security guard and a drop safe, it did not rely on any such duty. Inasmuch as the provision of security was not an element of the "physical condition" of the premises when the defendant took delivery of it, it could not be a requirement for maintaining such premises. A security guard was not "a

fixture" attaching to the property or one of the "physical attributes" thereof.

[21] In any event, Allie J continued, if the defendant had believed that the provision of a security guard was a duty of the plaintiff, it should itself have provided a guard and claimed the cost from the plaintiff. This would have constituted compliance with its duty to mitigate its loss. The facts, however, indicated that this had not been the defendant's belief at the time when it addressed its request to the plaintiff. The request gave rise to negotiations, which did not culminate in an agreement, despite the plaintiff's "without prejudice" offer, on 2 October 2001, to reduce the rental payable by the defendant by R2000,00 per month, with a view to enabling the defendant to use such amount for arranging its own security. When the negotiations broke down, the defendant elected to cancel the lease.
[22] In regard to the duty to provide undisturbed possession, the learned judge held that this duty related only to protection against being disturbed by a third party with a title greater than that of the lessee. It did not extend to protection against robbers and burglars.
[23] Allie J rejected the defendant's further argument that it had been entitled to cancel the lease on the ground that it had become impossible to enjoy beneficial use of the premises. This was not borne out by its attempt to dispose of its liquor licence. In this regard the learned judge opined that the defendant's decision to vacate the premises and cancel the lease was "an economic one" arising from the high cost of providing security, coupled with the high rental, which was apparently not market related.
[24] The learned judge saw this approach as making commercial common sense:
If lessors were duty bound to provide security to premises in the absence of a provision to that effect in the lease, property owners could be compelled to prevent the proliferation of robberies that occur at business premises across the country and tenants would be entitled to abandon leased premises in droves. That could not be conduct sanctioned by the law of commerce and trade.

[25] Another problem facing the defendant arose from clause 36 of the 1994 lease agreement, which expressly excluded the plaintiff's duty to maintain the leased premises in a condition suitable for the purpose for which it was leased, *in casu* a liquor store. This was, Allie J held, in accordance with the ordinary meaning of such clause, despite the defendant's attempt to place a restrictive construction on it.

[26] The learned judge then referred to the definition by J W Wessels, *The Law of Contract in South Africa* (2nd ed by A A Roberts, 1951) vol II par 2659, of *casus fortuitus* as including "robberies and other human acts against which no diligence can provide", provided it is "extraordinary". In the present case the prevalence of crimes directed against business premises was such that the robberies and burglaries experienced by the defendant could not have been regarded as "extraordinary". On the defendant's own evidence the provision of security on the premises would have

deterred criminals from committing such crimes, in which event it could not be said that they were of a kind ”against which no diligence can provide". Criminal conduct of this nature was reasonably foreseeable, the learned judge held, by virtue of the frequency of its occurrence, making it possible for the defendant to have guarded against it by the exercise of ordinary diligence.

[27] For these reasons Allie J came to the conclusion that there was no duty on the plaintiff to provide security on the leased premises. In so far as it had effected certain improvements which might have had the effect of providing additional security for the benefit of a tenant, it had not been obliged to do so. It was for the defendant itself to secure the premises in such a way as to make them suitable for use as a liquor store. There was no basis, the learned judge held, for extending the common law duty of a lessor to deliver and maintain the leased property in a proper condition, to include providing security for the benefit of the lessee.

[28] Accordingly Allie J held that the defendant's cancellation of the lease constituted a repudiation, which the plaintiff duly accepted, hence terminating the lease and entitling it to claim consequential damages and *mora* interest from the defendant. In this regard the learned judge was satisfied that the plaintiff had indeed mitigated its loss by obtaining a new tenant.

[29] As for costs, Allie J ordered the defendant to pay the plaintiff's costs on the attorney and client scale, as provided in the agreement of lease, but ordered the plaintiff to pay the wasted costs occasioned by the postponement of the matter on 21 August 2003. She gave no order as to the costs wasted by the postponement of 24 May 2004.

**MAIN SUBMISSIONS ON BEHALF OF THE APPELLANT (DEFENDANT)**

[30] In line with the issues sketched in par [12] above, Mr Burger referred to authority elucidating the duties of a lessor, firstly, to deliver and maintain the thing let in a proper condition and, secondly, to ensure the lessee's undisturbed use and enjoyment thereof. The first duty could transfer to the lessee only in the case of an express agreement to that effect. The second entailed that the lessor was required not only to maintain the thing in a condition which would enable the lessee to use and enjoy it, but also to ensure that the lessee was not disturbed in his or her use and enjoyment thereof. It was immaterial whether such disturbance was caused by the lessor himself or by third persons or even by the operation of natural forces over

which the parties have no control. Should the lessor be in breach of one or both of these duties, and such breach should amount to defective performance of such a nature that the lessee could not reasonably be expected to be satisfied with it, the lessee would be entitled to cancel the lease. If the lessor should be able to remedy the breach, the lessee should give the lessor adequate notice to do so, failing which cancellation may ensue.

[31] In the present case, Mr Burger argued, the leased premises were plainly unsafe and hence manifestly unfit for the purpose for which they were let, namely for use as a liquor outlet. The plaintiff refused to address the problem and did nothing "to alleviate the safety and security problems", despite persistent requests thereto by the defendant. This, Mr Burger submitted, constituted a breach of the plaintiff's duty to maintain the premises in a proper condition, which duty had at no stage been transferred to the defendant.

[32] Clause 36 of the agreement, Mr Burger submitted, did not assist the plaintiff in that, on a proper interpretation thereof, it did not release it from its common law duty to maintain the premises in a proper condition. It merely stipulated that the plaintiff had given no "warranty of suitability" in the sense of a representation that the necessary licence or authority was available or could easily be acquired for conducting a liquor outlet on the premises. This interpretation, he submitted, accorded with the context in which the clause occurred in the agreement and was in line with the plaintiff's obligations in terms thereof.

[33] Mr Burger criticised the finding of Allie J, that the duty to maintain the property in a proper condition related to its physical attributes, as not according "with public policy, the legal convictions of the community, or the constitutional rights and values (which are required to inform the common law)".

[34] Mr Burger likened the situation caused the defendant by persistent robberies to the deprivation of its use and enjoyment of the premises by Act of God (*vis maior*) or fortuitous events (*casus fortuitus*). He suggested that the armed robberies suffered by the defendant constituted *casus fortuitus* in the sense of "hostile incursions" or "depredations at the hands of robbers". In this regard he sought to distinguish the line of authority which does not permit a lessee to abandon a lease when the disturbance of his possession is caused by a tortious act of a third party. In support of this proposition he referred to a number of authorities to which I shall return later.

[35] Should this court hold against the defendant on the merits, Mr Burger

submitted, it should hold in favour of the defendant that the plaintiff had not proved the damages claimed by it. In this regard it was not clear how the plaintiff had calculated its damages with reference to the terms of the 1994 lease and the allegations appearing in the amended particulars of claim. It had not adduced all the evidence available to it for purposes of enabling the court to determine the *quantum* of damages. More specifically it had not proved when the 1994 lease commenced and on what date each year the rental should escalate. The trial court should hence have ordered absolution from the instance.

[36] Should the defendant also be unsuccessful on the *quantum* leg, Mr Burger submitted, the issue of interest arose. On this score he argued that, inasmuch as the amount of the claim had been amended, interest should run from the date of judgment or, at the earliest, from the date of amendment.

**MAIN SUBMISSIONS ON BEHALF OF THE RESPONDENT (PLAINTIFF)**

[37] On the merits Mr Bosman supported Allie J's finding that the defendant had failed to plead that the plaintiff's duty to deliver and maintain the leased premises included the duty to provide security. In any event it had never been the defendant's case that the plaintiff had failed to deliver the premises in a proper condition, while it did not lead any evidence to support the allegation that the plaintiff had failed to maintain the premises after delivery thereof.

[38] With reference to common law and other authorities, Mr Bosman argued that the lessor's duty to maintain the leased premises could never include the provision of security guards. He supported Allie J's finding that such maintenance was directed at physical aspects of the premises, such as fixtures or fittings that required maintenance, repair or replacement.

[39] Mr Bosman referred also to clause 36 of the 1994 lease, in terms of which the plaintiff was exempted from liability should the leased premises prove unsuitable for the purpose for which they had been let. Upon a proper construction, he argued, this clause related to suitability of the premises and not to their maintenance. In any event, even if the premises were defective and the lessor failed to remedy the defects at the request of the lessee, the latter could have the necessary repairs effected and deduct the cost thereof from the rental payable.

[40] Mr Bosman rejected the defence of deprivation of beneficial occupation by *vis maior* or *casus fortuitus.* The robberies and burglaries could hardly be regarded as "depredations by bands of robbers" or "hostile incursions". In any event they were not only foreseeable, because of the prevalence of crime in the area, but were also controllable by means of effective security measures. They could hence have been

anticipated and avoided by the exercise of reasonable care or caution.

[41] At the time the defendant signed the 2001 lease during March 2001, Mr Bosman submitted, it had been aware of the fact that there had been a burglary and three armed robberies on the premises during the period December 2000 to March 2001. The last armed robbery had in fact taken place only a few days before the conclusion of the lease. The defendant thus clearly accepted the risk of further such inroads from that date on. Yet, except for the installation of a drop safe shortly before it abandoned the premises, the defendant did nothing to secure such premises against subsequent robberies and burglaries. Any danger to the lives of its employees was hence caused by its own inaction.

[42] Mr Bosman submitted further that where, as in the present case, the lessee's beneficial occupation has been disturbed by third parties without title to the property, he does not have a claim against the lessor for cancellation of the lease and damages or remission of rental. He may claim relief only against the wrongdoers themselves. In this regard there was no authority for the argument that a lessee would be entitled to remission of rent should he be deprived of the use and enjoyment of the leased premises by the unlawful act of a third person from whom relief could not be obtained.

[43] In regard to the purported cancellation of the lease by the defendant, Mr Bosman submitted that Allie J had correctly held that the defendant had done so for commercial reasons in that the store was trading at a loss. The plaintiff had hence been justified in regarding the cancellation as an act of repudiation, which it had duly accepted before itself cancelling the lease.

[44] In assessing the damages claimed, Mr Bosman submitted, the plaintiff had to determine the rental owing for the unexpired portion of the lease, subject to any income which might accrue from a re-letting of the premises with a view to mitigating such damages. This did not require precise computation but could in fact be estimated "in a rough and ready way". The amount of rental payable from time to time appeared from the relevant invoices, remittance advices, electronic banking reports and bank statements submitted by a witness for the plaintiff. The same applied to the rental received from the new tenant, which rental was set off against the plaintiff's claim for damages against the defendant. This evidence and documentation, Mr Bosman submitted, was the best evidence available and proved overwhelmingly that the lease commenced on 6 September 1994 and that the rental payable in November 2001, from which date damages were assessed, amounted to R27 841,31.

**THE RELEVANT LEGAL PRINCIPLES**

***The Nature of a Lease Agreement***

[45] The subject matter of a lease agreement is the use and enjoyment of the property leased, as stated by R J Pothier in par 22 of his authoritative *Traité du contrat de louage* (translated by G A Mulligan as *Pothier's Treatise on the Contract of Letting and Hiring*, 1953):

It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract.

This *dictum* was cited with approval by Potgieter JA in *Oatarian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785G-H.

[46] The rental determined in a lease agreement is in fact the consideration (*quid pro quo*) which the lessee agrees to pay the lessor for the use and enjoyment of the leased property. See De Groot *Inleidinge tot de hollandsche rechts-geleerdheid* 3.19.1, Voet *Commentarius ad pandectas* 19.2.7 and Van Leeuwen *Het roomsch-hollandsch recht* 4.21.1. Van der Linden *Koopmans handboek* 1.15.11 defines *huur en verhuuring* thus:
… Men verstaat daar door die handeling, waar bij de één zig verbindt om den ander, geduurende eenen bepaalden tijd, het gebruik van eene zekere zaak te doen hebben, tegen het genot van eenen zekeren huurprijs, dien de ander zig verbindt om hem te betaalen.

See also *Neebe v Registrar of Mining Rights* 1902 TS 65 at 86; *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL 1 at 7; *Genac Properties JHB (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 (1) SA 566 (A) at 576D-F.

***The Lessor's Duty to Deliver and Maintain the Property in a Proper Condition***

[47] The lessor's primary duty is to deliver the leased property in a proper condition, in the sense that it must be placed at the disposal of the lessee for his or her undisturbed use and enjoyment (*commodus usus*), after which it must be maintained in such condition. See the *Digest* (*Digesta*) of Justinian (abbreviated "*D*") 19.2.9 pr;

Van Leeuwen *Censura forensis* 1.4.22.10; Van der Linden *Koopmans handboek* 1.15.12; Pothier *Traité du contrat de louage* par 53. A delightful description of this duty appeared from the pen of Holmes JA in the case of *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 (A) at 748G-749A:

Rain is oft a blessing, but when it leaks through the roof of a shop leased to an antique dealer the result is apt to be bothersome. So the lessee told the owner about it; and the owner told the architect; and the architect told the builder; and the builder told the foreman; and somebody told the sub-contractor; and something was done about it; but still the roof leaked, and still the ceiling ushered down the drops; so the lessee tolled the death-knell of the lease and vacated for ever.
The issue is whether he was entitled to do this.
The answer depends on:

i) Whether the leaking caused a substantial interference with the lessee's *commodus usus*, which I understand to mean the snugness and benefit of his occupation – the *quid pro quo* of his rent. Substantial interference is a matter of duration and degree.
ii) Whether the owner was aware of the leaking roof.
iii) Whether the owner had had a reasonable opportunity to stop the leaking before the lessee vacated. This depends upon the circumstances.

[48] There is hence a continuing duty resting on the lessor to maintain the leased property in a proper condition, in the sense that it will remain reasonably suitable for the purpose for which it was let throughout the currency of the lease. The parties may, of course, agree that this duty will be borne by the lessee. See De Groot *Inleidinge tot de hollandsche rechts-geleerdheid* 3.19.12; Voet *Commentarius ad pandectas* 19.2.14; Van der Linden *Koopmans handboek* 1.15.12; Pothier *Traité du contrat de louage* par 75 and 106. Innes J elucidated this duty in *Poynton v Cran* 1910 AD 205 at 221:

Now, the Roman-Dutch law (differing in this respect from the law of England) imposes upon every lessor the duty of placing and maintaining the leased premises in a condition reasonably fit for the purpose for which they are let … The principle is that the tenant is entitled to the due use of the thing which he has leased, and he cannot enjoy that use unless the property is delivered and maintained in a state of repair which is reasonable under the circumstances.

See also *Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) at 150G-H; *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A) at 931A-D; *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A) at 949F-H and 950G-958E; *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) at 748A-C.

***Disturbance of Commodus Usus: Vis Maior and Casus Fortuitus***

[49] The lessee's *commodus usus* may be disturbed by the lessor, by third persons or even by the operation of natural forces (commonly termed *vis maior*, *vis divina* or "Act of God"), or by fortuitous or accidental circumstances or events (*casus fortuitus*), over which the parties have no control. If the lessor is responsible for the disturbance, he or she will clearly be accountable for it. If a third party with a superior title disturbs the lessee, the lessor will be obliged to protect him or her from eviction or similar legal action. Where the disturbance is attributable to *vis maior* or *casus fortuitus*, or to a third person without a superior title, however, the situation becomes a little more complicated.

[50] In the classic work on South African contract law by the former Chief Justice Sir J W Wessels (see par [26] above), *vis maior* and *casus fortuitus* (which he renders as "inevitable accident") are dealt with as circumstances under which contractual obligations may be discharged by operation of law. More specifically they give rise to "impossibility of performance" in the sense that a party to a contract may be precluded from performing his or her obligations under such contract. In par 2657 the learned author points out that the "Civilians" (the old authorities on Roman and Roman-European law, which includes Roman-Dutch law) placed *vis maior* and *casus fortuitus* "on the same footing as an excuse for the non-performance of a contract".

[51] *Vis maior* usually occurs in the form of uncontrollable natural forces or disasters, such as earthquakes, floods, torrential storms, conflagrations or shipwrecks not caused by any human intervention and "to which human infirmity could offer no resistance" (*cui humana infirmitas resistere non potest*). This definition appears from *D* 44.7.1.4, where the jurist Gaius is said to have included, as examples of *vis maior* (or *maior casus*, as he calls it), incursions by robbers or enemies (*praedonum*

*hostiumve incursu*). See also *D* 13.6.18 pr, *D* 19.2.13.2 and the early case of *Johannesburg Consolidated Investment Co v Mendelssohn & Bruce Limited* 1903 TH 286 at 292-293, where Smith J considered the position of a lessee confronted with *vis maior* in the following terms:

The enjoyment of the property may be lost by *vis maior* affecting the tenant personally, or affecting the property itself. The tenant may himself be deprived of possession by being driven away by the incursion of a hostile army or through a well-grounded fear of a hostile invasion; or the use of the property may be hindered by landslip or flood; or the crops on the ground may be destroyed by a passing army, or by extraordinary heat or blight, or the ravages of birds or locusts … I think that the principle to be gathered from the *Digest* is that there must be some cause acting directly either upon the lessee or upon the property itself, which prevents either totally or to a very great extent the enjoyment which the parties contemplated the lessee should have.

See also *Rubidge v Hadley* (1848) 2 Menzies 174 at 177-178; *Hansen, Schrader & Co v Kopelowitz* 1903 TS 707 at 714-715; *Moosa v Schiele* 1905 TS 616 at 618-619.

[52] *Casus fortuitus*, in turn, relates to fortuitous or accidental circumstances or events, which cannot be foreseen by even the most diligent person. In par 2658 Wessels opines that there is no definition of this concept "which is quite satisfactory". He refers in this regard to Baldus who, in his *Quaestiones* 12.4, defines it as "an accident which cannot, by the diligence of the human mind, be avoided by the person who suffers it" (c*asus fortuitus est accidens quod per diligentiam mentis humanae non potest evitari ab eo qui patitur*). Similarly Vinnius, in his *Quaestiones selectae juris* 2.1 defines it as "every fortuitous event not foreseeable by human understanding or, if foreseeable, cannot be resisted" (*est autem casus fortuitus id omne, quod humano captu praevideri non potest, aut cui praeviso non potest resisti*).

[53] In par 2659 Wessels suggests that *casus fortuitus* "is not confined to the cataclysms of nature, but also includes robberies and other human acts against which no diligence can provide". He finds support for this proposition in Vinnius *Jurisprudentia contracta* 2.66: *His adde damna omnia a privatis illata quae quominus inferrentur nulla cura caveri potest* ("add to this all those injuries, caused by private individuals, of such a nature that no caution can guard against them"). The reference to "cataclysms of nature" is, with respect, inappropriate in that it relates to *vis maior* rather than *casus fortuitus*. The latter would, however, include "robberies and other human acts" which are not foreseeable or, if foreseeable, cannot be avoided or resisted.

[54] Wessels adds a qualification (in par 2659) in that there must be "something extraordinary in the event before it can be regarded as *casus fortuitus*". He refers in this regard to Brunnemann *Commentarius in quinquaginta libros pandectarum* ad *D* 18.1.78.3: *Qui suscipit casum fortuitum tempestatis, non videtur sentire de casu saepius contingente*. In free translation this may be rendered: "A person who undertakes liability for the fortuitous event of a storm is not regarded as consenting to liability for an event which occurs frequently". This leads Wessels to conclude (in par 2660):

By inevitable accident therefore the Civilians mean an occurrence which could not

reasonably have been foreseen (*inopinatus*) and which could not have been guarded against by ordinary diligence.

[55] To understand what Brunneman means in the cited text, one must have regard to the *Digest* text on which he is making comment, namely *D* 18.1.78.3. In that text Labeo gives the example of the sale of a farm on which a corn crop is growing. If the seller undertakes to remain liable for the crop even if it should be destroyed or damaged by the violence of a storm, he will not be liable if the destruction or damage is due to immoderate and unusual snowstorms (*si [nives] immoderatae fuerunt et contra consuetudinem tempestatis*).

[56] This accords with what Vinnius says in his *Quaestiones selectae juris* 2.1 in regard to a contract of lease. After stating that the lessee's obligation to perform is excluded by *casus fortuitus*, if it relates to an unforeseen event (*casus improvisus*), he raises the question whether that would include unusual and rare events (*casus insueti et rari*). He points out that Bartolus, Mantica and Gail distinguish between "usual fortuitous events" and those which are "unusual or occur otherwise than is customary" (*distinguunt illi inter casus fortuitos solitos … et insolitos seu qui praeter consuetudinem eveniunt*). The latter hence relates to "an unexpected fortuitous event which does not usually occur" (*casus fortuitus intelligitur inopinatus, non ex consuetudine eveniens*). It accords with the said passage from Labeo, who restricts liability for *casus fortuitus* to unusual events only. The seller will be liable "only if the storm was unusual and raged in a manner not expected from the weather in that region" (*si modo tempestas insolita fuit, et praeter morem coeli regionis saeviit*). This leads Vinnius to say that *casus fortuitus* relates particularly to the unexpected (*casus fortuitus vel maxime pertineat ad inopinata*), to that which cannot be foreseen (*praevideri non posse*). And that which the parties cannot foresee, they cannot avert (*nam etsi praevideri non possunt, nec averti possunt*). See also Voet *Commentarius ad pandectas* 18.6.2.

[57] When the disturbance of the lessee's *commodus usus* has been caused by the wrongful conduct of a third party or third parties, the lessee will, under normal circumstances, have to look to the third party or parties for relief. His or her claim will usually be based on delict and damages may be claimed with the *actio iniuriarum*. See Pothier *Traité du contrat de louage* par 81 and 287. He adds that, if the lessee has been unable to claim damages from the third party because the wrongdoer is unknown or impecunious, he or she may approach the lessor for a full or partial remission of rental payable. See also *Rex v Stamp* 1878 Kotzé 63 at 64-65; *Baum v Rode* 1905 TS 66 at 68.

[58] Damages arising from theft or burglary are usually attributed to the lessee if he or she was able, by using ordinary care, to prevent it. See *D* 17.2.52.3 and the authorities cited in Wessels par 2661. In par 2667 the learned author points out that the mere fact that the performance has become difficult, burdensome, unreasonable,

inconvenient or costly will not entitle the debtor (in the present instance the lessee) to terminate the agreement. See *D* 45.1.137.4, where Venuleius says that, "generally speaking, the difficulty and inconvenience suffered by the debtor will not serve as an impediment to the creditor" (*generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris pertinet*). See also *Macduff & Co Ltd (in liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 606.
[59] An interesting question arising from this is whether a lessee may be excused from paying rent if he has vacated the leased premises as a result of fear (*timoris causa*). In *D* 19.2.27.1 Alfenus suggests that the lessee may be excused only if there is a just cause (*iusta causa*) for such fear. Voet *Commentarius ad pandectas* 19.2.23 supports this principle on the basis that the lessee who has vacated the premises for just cause need pay rent only for the period that he has been in occupation thereof. An example of such just cause would be a raid by a hostile force or by brigands whom the lessee is unable to resist. See also *D* 19.2.13.7 and *D* 19.2.33-34.

***Quantification of Damages***

[60] In regard to the quantification of damages, Berman J held, in *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA 652 (C) at 655H-J:

Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him with an award of money as a fair approximation of his mathematically unquantifiable loss.

[61] The learned judge found support for this approach in *Hersman v Shapiro & Co* 1926 TPD 367 at 379-380, where Stratford J said:

Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based on it.

See also *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 631E-632A; *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 970E-H.

[62] A court is not required to adopt an arbitrary or conjectural approach in assessing the *quantum* of damages claimed. See *Monument Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118D-E (*per* Rose Innes AJ):

> [I]t is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made.

[63] On the other hand, if precise evidence is not available, a court may, on the evidence before it, assess the damages "in a rough and ready way", provided the lessor has taken reasonable steps to mitigate his or her damages. See *Smith v Weeks* 1922 TPD 235 at 237; *Commercial Careers College (Pvt) Ltd v Forest View (Pvt) Ltd* 1979 (2) SA 402 (RA) at 404A-405G.

***Application of the Law to the Facts***

[64] When these legal principles are applied to the facts and circumstances of the present matter, it is quite clear that the court *a quo* was, with respect, perfectly correct in holding that the defences raised by the defendant do not hold water. Apart from an oblique suggestion in the pre-trial minute (par [11] above), the defendant never pleaded that the plaintiff had a duty to provide security in order to render the premises suitable for use as a liquor outlet. More importantly, no such duty was mentioned anywhere in the agreement between the parties, and it was likewise not mentioned in the letter of cancellation (par [6] above). To allege such a duty would, of course, be in conflict with clause 4.1 of the 2001 lease, which states that the provisions appearing in the 1994 and 2001 leases contain the entire agreement between the parties (par [14] above).

[65] Not only does no such duty appear from the said agreement, but the relevant provisions of the agreement (par [13] above) expressly exclude the plaintiff's liability under the circumstances which prompted the defendant to vacate the leased premises and to cancel such agreement. Clause 14.3 refers specifically to loss, damage or injury

arising from *vis maior, casus fortuitus* or "any other cause either wholly or partly beyond the LANDLORD'S control". Clause 36, again, specifies unequivocally that the landlord does not warrant, and has not represented, that the premises will be suitable for the conduct of any business or that any licence or authority required for the conduct of such business will be granted or renewed. There is no merit in the submission (par [32] above) that clause 36 relates only to the acquisition of a licence or other authority to conduct a business.

[66] Even if the agreement did not contain provisions such as those appearing in clauses 14.3 and 36 thereof, the defendant did not prove that the disturbance of its use and enjoyment of the leased premises by criminal conduct which it could not prevent, should be attributed to the plaintiff's failure to maintain the premises in a proper condition (par [8] above). At no stage during the defendant's occupation of the premises was there any suggestion that it was not suitable for conducting a liquor outlet, being the declared purpose of the lease as provided in clause 2 thereof (par [13] above). The defendant had in fact used the premises for this very purpose from September 1994 to May 2000 (a period of some five years and eight months) and then again from November 2000 to March 2001 (some five months) before taking occupation thereof from March to August 2001 (approximately five months) in terms of the 2001 lease (par [5] above). There is nothing to this effect in the letter of cancellation (par [6] above). It is mentioned for the first time in paragraph 6.2.2.3 of the defendant's plea (par [8] above).

[67] In view of these considerations I respectfully agree with Allie J's finding (in par [20] above) that the duty to deliver and maintain the leased premises in a proper condition relates to its physical condition and attributes, such as the construction of the building and the fixtures or fittings adhering thereto. This is what requires maintenance, repair or replacement, as the case may be. Providing security, in whatever form, cannot be regarded as an element or attribute of such condition, unless it has been specifically agreed to by the parties. On the contrary, it is for the tenant to ensure that its business and employees are protected from criminal acts perpetrated by third parties, be it by physical means, such as the installation of security gates, burglar proofing and the like, or by the use of appropriately qualified security personnel.

[68] In any event it was certainly not the condition of the premises which gave rise to the burglaries and armed robberies, but its situation in an area where crime was rife and the defendant's business was probably regarded as a "soft target". The defendant

was perfectly well aware of this at the time the 2001 lease was concluded on 20 March 2001 since, during the immediately preceding three months, from 21 December 2000 to 19 March 2001, there had been a burglary and three armed robberies on the premises. The last armed robbery had in fact taken place the day before the 2001 lease was concluded (par [10] above). During the next three months there were a further three armed robberies, during April and June 2001, followed by two burglaries during August 2001, as a result of which the defendant vacated the premises. From this it appears that the situation during the defendant's five-month occupation of the premises, when there were three armed robberies and two burglaries, was in fact no worse than it had been in the period directly before such occupation, when there had been three armed robberies and one burglary.

[69] This creates the impression that the defendant had reached the end of its tether when the August 2001 burglaries took place in quick succession, raising fears once again that they would be followed by further burglaries and armed robberies. One can understand the unhappiness and frustration that the defendant's management and employees must have felt. This inevitably translated into fear for their safety, and predictably gave rise to resignations and reluctance to work on the premises. I am respectfully inclined to agree with Allie J (par [23]-[24] above) that the decision to terminate the lease was based on commercial or economic considerations rather than on the defendant's perception of the legal position.

[70] I have some difficulty with Mr Burger's submission (par [34] above) that the armed robberies and burglaries constituted *casus fortuitus* in the form of "hostile incursions" or "depredations at the hands of robbers", which entitled the defendant to resile from the agreement. The authorities on which he relies do not, in my view, support this interpretation inasmuch as they relate, at best for the defendant, to a remission of rent under certain circumstances. On the other hand, even if this submission were correct, it cannot be said, in view of the long history of criminal activities directed at the defendant's business, that such fortuitous events were not foreseeable or, if foreseeable, could not be resisted (see par [52]-[56] above). They occurred with such frequency that they became almost "normal" or "usual". It would, indeed, appear that the defendant had accepted that this was the position and that it was a risk it would have to face and attempt to guard against. If this had not been the case it would not have been prepared to sign the 2001 lease the day after an armed robbery, not to mention the fact that such robbery had, in the period between 21

December 2000 and 5 February 2001, been preceded by a burglary and two other armed robberies (par [10] above).

[71] It is difficult to escape the conclusion that the defendant not only foresaw that the series of criminal activities would continue, but also believed that they could be countered, however difficult it might be. Initially it was hoped that an alarm system, with the necessary police backing, would do the trick. The lack of police cooperation, however, made this system ineffective, causing the defendant to look to other protective devices, such as security guards and the installation of a drop safe (par [17] above). It would appear that, despite reservations as to their efficacy, a drop safe was in fact installed (par [41] above) and the defendant appealed to the plaintiff to appoint a security guard or guards. At no stage was it suggested, however, that it would be impossible to resist the criminal inroads by the exercise of reasonable care. On the defendant's own version the provision of security would have acted as a deterrent to criminals. That being the case, nothing prevented it from appointing a security guard, or multiple guards, to protect its business. I agree with Mr Bosman that the situation in which the defendant found itself, and the fear in which its employees lived, were due to its own inaction.

[72] There is no doubt, as pointed out earlier (par [57] above), that the criminals launching burglaries and armed robberies against the defendant's business were third parties who were acting wrongfully and were hence liable to the defendant in delict. Their conduct might have had the effect of disturbing the defendant's *commodus usus* of the premises but, as far as I can glean from the evidence, it did not give rise to defects which caused any interference, substantial or otherwise, with the defendant's beneficial occupation thereof. It may be accepted, of course, that this kind of criminal

conduct made it burdensome and inconvenient for the defendant to conduct its business. This would not, however, justify the defendant's terminating the agreement (see par [58] above).

[73] The same applies to the scenario where the lessee alleges that the said criminal conduct has given rise to inordinate fear among its employees. As mentioned previously (par [59] above), the authorities on which the defendant has relied in this regard deal with just cause for fear which might entitle the lessee to a remission of rent, and not to any right to cancel or terminate the lease agreement.

[74] It follows that the court *a quo* correctly held that the defence on the merits of the plaintiff's claim could not be upheld and that the purported cancellation of the lease constituted repudiation by the defendant, which repudiation the plaintiff duly accepted. The plaintiff was hence entitled to cancel the agreement and to claim damages from the defendant.

[75] On the issue of damages the defendant's approach was obstructive rather than helpful. Although it questioned the plaintiff's calculation of damages, it did not lead any evidence to counter, or even supplement, that of the plaintiff in regard to the rental payable for the unexpired portion of the lease. It likewise had little or nothing to say about the plaintiff's mitigation of loss by means of a lease agreement with a new tenant, who would make payment of an amount of R140 758,04 up to 15 September 2004, such being the date of which the plaintiff's lease with the defendant would have expired. This income, together with the plaintiff's abandonment of its claim for arrear rental and charges, gave rise to a substantial reduction of the claim, namely from R1 159 418,40 to R934 061,12 (see par [7] above).

[76] Mr Burger's criticism (par [35] above) of the plaintiff's evidence on *quantum*,

as being speculative and partially hearsay, was singularly unpersuasive. His submissions relating to the commencement and expiry dates of the 1994 lease come over as a splitting of hairs which would make no substantial, if any, difference to the plaintiff's claim. The defendant was in as good a position as the plaintiff to present evidence on *quantum* yet chose not to do so. I am quite satisfied that the plaintiff adduced the best evidence available and that it was more than sufficient, even if not mathematically precise, to enable the court below to assess the amount of damages suffered by the plaintiff (see par [60]-[63] above).

[77] The alternative submission, namely that the interest should run from the date of judgment or, at the earliest, from the date of amendment of the amount of the claim (par [36] above) must be rejected out of hand. The amendment was to the obvious benefit of the defendant and there was no justification whatever for any order other than the usual, namely that interest would run at the rate of 15,5% *per annum* from the date of *mora*, being the date on which the summons was served on the defendant.

**CONCLUSION**

[78] It follows that the appeal must be dismissed with costs.

**D H VAN ZYL**

Judge of the High Court

I agree.

**A M MOTALA**

Judge of the High Court

I agree.

**L J BOZALEK**

Judge of the High Court