IN THE HIGH COURT OF SOUTH AFRICA
WESTRN CAPE DIVISION, CAPE TOWN

Case number: 15275/2015

In the matter between:

HENCETRADE 15 (PTY) LTD Applicant

And

TUDOR HOTEL BRASSERIE & BAR (PTY) LTD Respondent

JUDGMENT delivered on 16 May 2016
(Application for leave to appeal)

BINNS-WARD J:

[1] The respondent in the principal case has applied for leave to appeal to the Supreme Court of Appeal ('SCA') against the whole of the judgment that was delivered in the principal case on 20 April 2016. The application was opposed.

[2] The application is based on two grounds. The first is that inasmuch as this court decided the case applying the approach enunciated in *Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC* [2007] SCA 62, at para 22, there is said to be a reasonable prospect, having regard to certain *obiter dicta* in *Thompson v Scholtz* 1999 (1) SA 232 (SCA) and the judgment of the Transkei full court in *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (Tk), that the SCA 'will reconsider its view' in the *Pilco Investments* matter. The second is that there is a reasonable prospect that another court might find on appeal that the lease was not effectively amended in terms of the agreement described at paragraph 5 of the principal judgment to exclude the area comprised of the third floor of the Huys Heeren XVII building.

[3] I referred in the principal judgment to the doubts expressed in a number of places, including the SCA's judgment in *Thompson v Scholtz* 1999 (1) SA 232 (SCA), about the soundness of the approach adopted in the line of judgments following on *Arnold v Viljoen* 1954 (3) SA 322 (C). Paragraph 22 of the judgment in *Pilco*

Investments does indeed, as submitted by the respondent's attorney, appear to reflect an application of the approach in *Arnold*, notwithstanding a reference therein to the remission of rental principle discussed in *Thompson*. The criticism directed at the line of authority based on *Arnold* certainly makes this an area of the law that would benefit from a clarifying judgment from the SCA if and when the right case presents such an opportunity.

[4] No point would be served, however, by granting leave to appeal if I am not persuaded that there is a reasonable prospect *a different result* would ensue if the SCA were, on appeal, to apply the approach adumbrated in the pertinent *obiter dicta* in the judgment of Nienaber JA in *Thompson*; alternatively, that there is a reasonable prospect that it might uphold the respondent's invocation of the the *exceptio non adimpleti contractus*. I shall consider the prospects in those respects presently. The proper approach, in my view, is to do so mindful that the purpose of litigation is for the court to determine the litigants' dispute. Therefore, if *the result* of the case is unlikely to be affected irrespective of the differing approaches in legal principle that may be adopted, it would not be appropriate to send the matter on appeal merely to settle what would, in effect, be an academic question in the factual context of the matter in hand; cf. e.g. *Grainco (Pty) Ltd v Van der Merwe* [2016] ZASCA 42 (30 March 2016), at para 28-29. To express the position more prosaically, it would be unjust to the applicant in the principal case to grant the respondent leave to appeal and thereby keep the applicant out of it its property pending the determination of the appeal, unless I were persuaded that there was a reasonable prospect that the ejectment order it has obtained against the respondent might be set aside on appeal.

[5] It will be recalled that the respondent sought to rely on the *exceptio non adimpleti contactus* in the principal case. The leading authority on that defence is the judgment in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A). As I shall seek to illustrate, although the respondent's invocation of *exceptio* arguably might find some support in the judgment in *Ntshiqa*, it is wholly irreconcilable with the reasoning applied by Nienaber JA in *Thompson*.

[6] The question in issue in *Thompson* was how the plaintiff's claim for occupational interest should be dealt with in a situation where he had, in breach of the agreement, failed to give occupation of the whole property to the defendant. The defendant had, however, been given the use and enjoyment of the greater part of the

property in question. The setting was described by Nienaber JA as closely analogous to that in which a lessor claims rental under a contract of lease when the lessee has not been given the full use and enjoyment of the let property. The SCA considered the applicability of the *exceptio*, but expressly discounted it. It did so after a close examination of the judgment in *BK Tooling*.

[7] In considering whether the *exceptio* defence was available to the plaintiff's claim for occupational interest, Nienaber JA pointed out (at 240J) that what he termed '*two major premises or propositions*' are '*basic to the judgment*' in *BK Tooling*. He observed (at 241D) that '[i]*mplicit in the first proposition is the notion that a plaintiff is precluded from recovering any remuneration if his performance* [in terms of a snynallagmatic contract] *falls short of perfection, even when the defendant, notwithstanding its shortcomings, accepts and utilises it'.* He continued (at 241E) '[t]*he second proposition in BK Tooling takes account of that eventuality. The second proposition is that the first proposition cannot be applied without qualification; the qualification is that there is a corrective; and the corrective is that where the shortcoming in the plaintiff's performance is capable of being restored (or 'cured') the Court has a discretion, if fairness so dictates, of allowing the plaintiff his contractual remuneration - but minus the cost of restoring his defective work to the required contractual standard.*' The learned judge of appeal went on to explain, for the reasons set out in the judgment (at 243G-244I), that while both propositions are readily applicable in the context of short performance of a contract of *locatio conductio operis*, the second proposition in *BK Tooling* is not practically transposable to a reciprocal contract in which, as in the current matter, there is a situation of continuing breach. He considered the solution in respect of the plaintiff's claim for payment of occupational interest was to apply an approach analogous to that afforded by the remedy of *remissio mercedis* (remission of rental) in the context of lease agreements.

[8] Thus, when questioning the line of authority based on *Arnold*, Nienaber JA did not suggest that the propositions in *BK Tooling* should be applied. On the contrary, the learned judge indicated that it might be preferable to follow the line of authority (see the cases cited at 248A-F) in which the remission of rental principle had been applied. In doing so the leaned judge observed (at 248F-H) that there are material points of distinction between the principles in respect of remission of rental

by a lessee and the two propositions on which the judgment in *BK Tooling* concerning the *exceptio* defence is premised. Nienaber JA noted in this regard (at 248F-H) that '[i]*n approaching remission of rent on the basis of what is fair some common ground can be found with the second proposition in BK Tooling which is also founded on fairness (at 427A). Even so, it would be wrong to equate the two instances or to regard them as anything more than merely analogous. Remission of rental involves an estimation, in the innocent party's hand, of the extent to which the remuneration he owes the guilty party should be reduced in relation to his reduced enjoyment of the latter's performance. As such it may include elements which are peculiar to him. That exercise is primarily subjective. The second proposition in BK Tooling involves a calculation, in the guilty party's hand, of the exact cost of upgrading or perfecting his own defective performance. That exercise is primarily objective*'. (Emphasis supplied.)

[9] J.N Piek and D.G. Klein in their article *'n Huurder se Aanspraak op vermindering van Huurgeld terwyl hy in besit van die Huursaak is*, (1983) 46 THRHR 367 (which is cited with apparent approval in both *Thompson* and *Ntshiqa*), summarise the import of the remission of rental principle in the context of lease agreements as follows (at p. 382): '*Die verhuurder sal in die lig van die vereiste van wederkerige prestasie nie die volle huurgeld kan eis indien hy nie volledig presteer het nie. Waar die verhuurder slegs 'n gedeelte van die ooreengekome genot en gebruik aan die huurder verskaf het, het hy volgens die gemene reg en Suid-Afrikaanse regspraak die reg om 'n pro rata-deel van die huurgeld te ontvang.* ***Die huurder kan nie in so 'n geval met 'n beroep op byvoorbeeld die exceptio non adimpleti contractus weier om 'n pro rata-deel van die huurgeld te betaal nie.*** *Dit spreek vanself dat die huurder wat geen genot en gebruik van die huursaak het nie in die lig van die vereiste van wederkerige prestasie geen huurgeld hoef te betaal nie*'.[1] (Footnotes omitted, and emphasis supplied.) In note 120, the authors state '*Die gemeenregtelike gesag* [D 19 22 25 2; Grotius 3 19 12; Van Leeuwen 4 22 17; Pothier

[1] In the light of the requirement of reciprocity of performance, the lessor is not entitled to claim the full rental if he has not himself performed fully. Where the lessor has provided the lessee with only part of the agreed use and enjoyment, he has, according to the common law and South African jurisprudence, an entitlement to receive a pro rata portion of the rental. **The lessee may not in such a situation refuse payment of a pro rata portion of the rental by invoking, for example, the *exceptio non adimpleti contractus*.** It is axiomatic in the light of principle of reciprocity of performance that a lessee that has had no use and enjoyment whatsoever of the subject matter of the lease is not required to pay any rent. (My translation.)

Contrat de Louage 139-164] *en regspraak* [see especially the judgments cited at note 112, some of which were also cited by Nienaber JA in the passage in *Thompson* at 248A-F referred to in paragraph [8], above] *wat hierbo aangehaal is, maak nie melding van enige sodanige reg* [i.e. to rely on the *exceptio*] *wat die huurder mag hê nie.* ***Daar kan uit die feit dat die verhuurder toegelaat is om 'n pro rata-deel van die huurgeld te eis, afgelei word dat die huurder hom nie in so 'n geval op bv die exceptio non adimpleti contractus kon beroep nie.***'[2] (Emphasis supplied.)

[10] To the extent that the full court of this Division had applied the first proposition in *BK Tooling* in determining the intermediate appeal adversely to the plaintiff in *Thompson* on the basis of the *exceptio* (see *Scholtz v Thompson* 1996 (2) SA 409 (C)), its approach was disapproved by the SCA, which instead applied the equivalent of the remission of rental principle. Hence my observation at the outset of this judgment that the SCA judgment in *Thompson* is, if anything, adverse to the respondent's defence in the current matter.

[11] The judgment in *Thompson* is also, by necessary implication, disapproving of the reasoning (but not necessarily the result) in the judgment in *Ntshiqa*, to the extent that that seems to have been expressed as having been founded on an application of the second proposition in *BK Tooling*. The judgment in *Ntshiqa* referred to both the remission of rental principle and the *exception* and gave no sign of astuteness to the points of distinction between the two concepts highlighted in *Thompson*. It also did not give a clear indication which of them it was applying in determining the question whether the lessor in that case had been entitled to cancel the lease. On analysis it seems to me that the court in *Ntshiqa* actually applied the remission of rental principle.[3]

[12] Counsel for the applicant in the principal case highlighted the effect in passages in *Thompson* to which I have referred and argued that even adopting the most favourable approach to remission of rental conceivable in the respondent's favour – that is recognising, for argument's sake, that the respondent was entitled to a remission of rental calculated on a pro-rated reduction of rental calculated by using

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[2] The common law authority and jurisprudence cited above does not make mention of any such right by the lessee [i.e. to rely on the *exceptio*]. **It may be inferred from the fact that the lessor is permitted to claim a pro-rata portion of the rental that the lessee may not invoke, for example, the *exceptio non adimpleti contractus* in such a situation.** (My translation.)

[3] That is also the sense in which *Ntshiqa* appears to have been construed by Satchwell J in *Mpange and Others v Sithole* 2007 (6) SA 578 (W); see the latter judgment at para 68-70.

the floor area of the entire third floor of the Huys Heeren XVII building as a proportion of the total rented floor space (see in this regard para 14 and 17 of the principal judgment) – the respondent would have been in arrears on the posited reduced rental in the amount of R885 511,88 when the applicant cancelled the lease. Counsel's calculation was made on figures that are not disputed by the respondent.

[13] For these reasons, I am not persuaded that there is a reasonable prospect, even were the SCA to reconsider the approach adopted in *Pilco Investments* and adopt instead the approach preferred in *Thompson*, thereby applying the line of authority in the cases cited at 248A-F of the latter judgment and note 112 of the article by Piek and Klein, that the court would, in consequence, uphold the appeal and set aside the order for the respondent's eviction. I am also of the view, having regard to the rejection by the SCA in *Thompson* of the application of the *exceptio non adimpelti contractus* in the judgment of the full court in *Scholtz* supra, and the content of the common law rehearsed in the passages from Piek and Klein's article discussed earlier, that there is not a realistic prospect that the respondent's invocation of the first proposition in *BK Tooling* might be upheld. On that account too, I am not persuaded that there is a reasonable prospect that the ejectment order would be set aside.

[14] The second ground of appeal that the respondent would seek to advance if leave were granted is directed at obtaining a finding that the third floor of the Huys Heeren XVII building was not excluded from the hired premises with effect from the end of April 2014. The aim is to thereby avoid the effect of this court's finding that on any approach the applicant had not been in breach of the lease by withholding occupation of that area during what was referred to in the principal judgment as the 'second period' of the lease (see para 16-18 of the principal judgment). The respondent would seek on that basis to avoid the effect of this court's finding that on any approach it was not open to it to rely on the first proposition of the *BK Tooling* judgment in respect the non-payment of rental during the second period of the lease. It will be apparent in the context of what I have already said about the unlikelihood of the SCA being persuaded that the respondent could in principle rely on the *exceptio non adimpleti contractus*, rather than being limited, if it wished to retain the lease, to asserting an entitlement to a remission of rental, that the second ground upon which the application for leave to appeal has been brought does not advance the respondent's case.

[15] It is not necessary in the circumstances to go into the question that I raised with counsel during argument (apropos the contention described in paragraph 8 of the principal judgment) concerning the effect of the legal principles governing the allocation and appropriation of the payments that the respondent made in respect of rental during the currency of the lease.

[16] The following order is made:

The application for leave to appeal is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court