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NEL v. CLOETE.

(APPELLATE DIVISION.)

1971. *September* 13; *December* 9. WESSELS, J.A., POTGIETER, J.A., JANSEN, J.A., TROLLIP, J.A. and MULLER, J.A.

Sale.—Of a house.—Claim for cancellation, return of the deposit and damages.—Deed of transfer lost.—Purchaser demanding transfer within two months.—Period reasonable in the circumstances.

Where a creditor envisages possible cancellation as a result of *mora*, he can, in the notice placing the debtor *in mora*, also state that, on failure to perform within the period fixed, he reserves the right to withdraw from the contract. The question on whom the *onus* rests to prove that the period fixed was reasonable or unreasonable, discussed.

The appellant had, in terms of a written agreement which had been concluded on 3rd October, 1968, purchased a house from the respondent and paid an amount of R1 750 as a deposit. The balance of the purchase price was to be paid by means of a building society bond. Transfer dragged on because the title deeds could not be found. The respondent's attorney had eventually decided to apply for a copy. Before this application was ready, i.e. on 13th June, 1969, the appellant's attorney sent a letter of demand to the respondent demanding that transfer should be effected within two months, i.e. on 12th August, 1969, otherwise the appellant would resile from the contract and demand repayment of the deposit and damages. The respondent replied that the title deeds had not yet been found. On 12th August transfer had not yet been effected. When the appellant learnt on 22nd August that the building society had decided to withdraw the loan because of the delay, he wrote to the respondent on 26th August that the sale must be regarded as cancelled. An action for repayment of the deposit, damages, etc., was dismissed by a Provincial Division on the ground that the period of two months was unreasonable. In an appeal,

Held, that the period of two months allowed in the demand for performance was reasonable, if delay due to the fact that respondent's deed of transfer could not be found was not taken into account—the more so if the con-

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siderable period which elapsed before the date of demand was also taken into account.

Held, further, that the alleged impossibility of complying within the reasonable time fixed by the demand was due to respondent's own fault.

Held, therefore, that respondent had been *in mora* on the termination of the period of two months, and was still *in mora* when appellant exercised his right to withdraw on 26th August, 1969.

The decision in the Transvaal Provincial Division in *Nel* v. *Cloete*, 1971 (2) S.A. 460, reversed.

Appeal from a decision in the Transvaal Provincial Division (HIEMSTRA, J.). The facts appear from the judgment of WESSELS, J.A.

G. A. Coetzee, Q.C. (with him *S.A. Cilliers*), for the appellant: The contract of sale makes no provision for a date of transfer; transfer must therefore be effected within a reasonable time. *Cilliers* v. *Papenfus and Rooth*, 1904 T.S. at p. 79. Where no date of performance has been fixed and where time is not of the essence of the contract, the one party must place the other *in mora* before performance may be claimed.

See *Breytenbach* v. *Van Wyk*, 1923 A.D. at p. 549. The notice fixing a date of performance may be coupled with a notice of rescission creating a right to cancel the contract should there be a failure to comply with the contractual duties within the period stated in the notice. See De Wet and Yeats, *Kontraktereg en Handelsreg*, 3rd ed., pp. 114, 115; *Britz* v. *du Preez*, 1950 (2) S.A. at p. 761; *Microutsicos* v. *Swart*, 1949 (3) S.A. at p. 720. The notice of rescission must allow a reasonable time for performance prior to the date on which the contract may be cancelled. See *Breytenbach* v. *Van Wyk, supra* at p. 549. The issue to be decided is: what circumstances are to be taken into consideration in determining what a reasonable time is? Are the circumstances which have been foreseen by the parties to the contract or which are reasonably deemed to have been foreseen by them, at the time the contract was entered into, conclusive or are the circumstances which have been foreseen or which are reasonably deemed to have been foreseen by them at the time of the notice of rescission conclusive? The basis of the doctrine that a right to cancel may flow from a notice of rescission has been suggested to be a tacit *ex commissoria* without a day for performance having been determined. See van Zijl Steyn, *Mora Debitoris*, pp. 106-107; *Lewis* v. *Malkin*, 1926 T.P.D. at p. 669. If this is the correct basis for the right to cancel, then it follows that the circumstances which should be looked at in determining whether such a right may be exercised, are the circumstances prevailing at the time the contract was concluded. See *Adler* v. *de Waal*, 8 N.L.R. at p. 87; *Young* v. *Land Values Ltd.*, 1924 W.L.D. p. 224; *St. Martin's Trust* v. *Willowdene Landowners Limited*, 1970 (3) S.A. at pp. 135-136; *Willowdene Landowners Limited* v. *St. Martin's Trust*, 1971 (1) S.A.

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at pp. 305, 307. The learned Judge *a quo* failed to apply this principle, but judged the position on the basis that performance had to be reasonably possible at the time of the notice of rescission. To apply the suggested principle would be in accordance with trite principles concerning the calculation of damage flowing from a breach of contract; there is no reason in principle why placing a party to a contract *in mora* and acquiring a right to cancel should be judged with reference to the circumstances prevailing at the time of the notice of *mora* and rescission. The amount of damages (also where the contract is thus cancelled) should be determined with reference to the circumstances prevailing at the time the contract was entered into. Cf. *Lavery & Co. Ltd.* v. *Jungheinrich*, 1931 A.D. 156. The fact that the deed of transfer was lost, was unknown to the parties at the time of the conclusion of the contract. There is no suggestion in the evidence, that the appellant was aware of this fact; respondent was under the impression that the deed of transfer was in the hands of the mortgagee. At the time of the conclusion of the contract the respondent was also aware of the fact that a building society would not for an indefinite period keep an ap-

proved loan open, especially not at that time when it was very difficult to obtain a loan. These are also facts which could reasonably be deemed to have been foreseen by appellant at the time of the conclusion of the contract. It is contended that at the time of the conclusion of the contract: (i) the parties did not foresee that the deed was lost; (ii) it cannot reasonably be deemed that the parties had foreseen that the deed was lost; (iii) it must only reasonably be deemed to have been foreseen that a delay of approximately one month could occur due to the rejection of the deed of transfer; (iv) it was in fact foreseen or should reasonably be deemed to have been foreseen that the building society which was to grant a loan to the appellant, would cancel the loan should transfer and registration not be effected with reasonable speed and efficiency. Even on the basis adopted by the learned Judge *a quo,* the cancellation was justified. To expect the appellant nevertheless to keep to his contractual duties after his building society loan had been withdrawn on 22nd August, 1969, and despite the fact that he could not perform, would be unfair to the appellant. In any case, at the time of the notice of rescission, appellant's attorney was only aware of the fact that the deed of transfer was lost, but he had no reason to know that at that stage nothing had been done to obtain a copy. Even on the alternative basis that the reasonableness of the period stipulated in the notice of rescission had to be determined as at the date of the notice of rescission, the time allowed prior to cancellation was in fact reasonable. It is further contended that even if the reasonableness of the period is to be determined as at the time of the notice of rescission, the time which had already elapsed, should be taken into consideration. See *St. Martin's Trust* v. *Willowdene Landowners Ltd., supra* at p. 136C-F; *Pretorius* v. *Greyling,* 1947 (1) S.A. at pp. 174-175.

T. T. Spoelstra, for the respondent: In South African law *mora* or delay is a culpable (or, as it is sometimes called, wrongful) delay in

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performance. *Adler* v. *De Waal* (1887) 8 N.L.R. at pp. 89 and 90; *Victoria Falls and Transvaal Power Co. Ltd.* v. *Consolidated Langlaagte Mines Ltd.,* 1915 A.D. at p. 31; *Legogote Development Co. (Pty.) Ltd.* v. *Delta Trust and Finance Co.,* 1970 (1) S.A. at pp. 587-588; *Van Zijl Steyn,* pp. 4, 9, 10, 13 and 28 (Roman law), 43-51; *De Wet and Yeats,* pp. 111-12; *Wessels,* paras. 2857, 2862; *De Vos,* 1970 *S.A.L.J.,* pp. 307-8; *T.H.R.-H.R.,* 1968, pp. 113, 117. The word "delay" should be interpreted restrictively. The mere fact that performance has not been completed does not necessarily amount to a "delay" in this context. The concept rather denotes total inactivity or acts so defective that they cannot be viewed as the execution of a duty. Where the party therefore takes reasonable steps to perform, there can be no question of *delay* on his part. *Wessels,* paras. 2881, 2889. A party wishing to serve a demand on the other party or to place the latter *in mora* can legally only do so if certain prerequisites

are present. One of those prerequisites is that the claim must be enforceable. A claim is not enforceable if a debtor can validly except thereto. *Breytenbach* v. *Van Wyk,* 1923 A.D. at pp. 547, 548; *Middleton* v. *Goble,* 1970 (1) S.A. 56; *Van Zijl Steyn,* pp. 13, 41-42; *De Wet and Yeats,* p. 111; *Wessels,* paras. 2858-9. Merely to notify the other party that the guarantee or money is available, does not amount to the execution of a duty. *Breytenbach* v. *Van Wijk, supra* at p. 547; *van der Merwe* v. *Meyer,* 1971 (3) S.A. 22. Moreover, the letter from Snijman & Smullen, dated 11th February, 1966, did not amount to an act done by appellant or on his behalf. It also does not contain an offer to furnish the guarantees requested. Therefore the so-called demand does not in law amount to a demand. *Van Zijl Steyn,* p. 63; *Federal Tobacco Works* v. *Barron & Co.,* 1964 T.S. at pp. 483, 485. A reasonable time should elapse before a demand is made. H. R. Hahlo and Elisson (*sic*) Kahn, *The Union of S.A. The Development of its Laws and Constitution,* p. 493; *Britz* v. *du Preez,* 1950 (2) S.A. at p. 361; *Louw* v. *Trust Administrateurs Bpk,* 1971 (1) S.A. at p. 902; *Strachan & Co. Ltd.* v. *Natal Milling Co.,* 1936 N.P.D. at p. 335; *Van Zijl Steyn,* p. 63. *Sed contra*: *De Wet and Yeats,* p. 109; *De Vos,* 1970 *S.A.L.J.,* p. 311. Several cases deal with the question whether a reasonable time has elapsed since the conclusion of the contract. This is answered with reference to the facts and circumstances known to the parties at the time of the conclusion of the contract. This is more relevant to the question whether a party has by his conduct repudiated the contract as in *Federal Tobacco Works* v. *Barron & Co., supra.* It is wrong to apply the said test in determining the time required where a demand is made. The factual circumstances could have altered so materially that the above-mentioned test could lead to an unreasonably long or unreasonably short period. The test is whether a reasonable time for performance has been allowed in the circumstances of this specific case. *Microutsicos and Another* v. *Swart,* 1949 (3) S.A.

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at p. 730; *Hammer* v. *Klein and Another,* 1951 (2) S.A. at p. 106C-F. Where one party allows a period within which the other is to perform and the former is aware of the fact that all the acts which the other probably will have to do, cannot possibly be done within that period, then the period allowed is obviously unreasonable.

Coetzee, Q.C., in reply.

Cur. adv. vult.

Postea (December 9th).

WESSELS, J.A.: Appellant appeals to this Court from a judgment of HIEMSTRA, J., in the Transvaal Provincial Division which dismissed with costs his claim, *inter alia,* for the return of a deposit in the amount

of R1 750 paid by him to respondent in terms of a contract of sale. From now on I shall refer to appellant as plaintiff and to respondent as defendant.

The factual background of the dispute between the parties may, in so far as it is common cause, briefly be set out chronologically in the following way. In terms of a written contract, entered into on 3rd October, 1968, plaintiff purchased Stand 19, Edward Street, Vereeniging (on which a dwelling house had been erected) from the defendant for R7 000. The contract provides as follows, viz.:

"(1) The purchase price is the amount of R7 000 (seven thousand rand) and is payable as follows:

(*a*) a deposit of R1 750 (one thousand seven hundred and fifty rand) payable as soon as I am notified of the owner's acceptance of this offer, to Schoeman and Van Aarde Vereeniging (Pty.) Ltd. This deposit shall be kept in trust pending registration of the property in my name. Should I fail to effect the necessary payments or to comply with any terms of my offer, I shall forfeit the deposit in favour of the owner who shall retain same as pre-estimated damages.

(*b*) The balance of R5 250 shall be pabable in cash against registration of transfer in my name. An approved bank or other guarantee for this amount in favour of the seller shall be furnished by me within 120 days from the date of acceptance of this offer.

(2) Possession of the property shall be given to me on the date of registration, from which date I shall be entitled to the rent and/or other benefits flowing from the property and liable for all rates and taxes.

(3) Occupation of the property shall be given to me on 1st February, 1969, from which date I shall pay R50 rent per month until the date of registration.

(4) Transfer shall be effected by P. C. Langenhoven and I shall pay all transfer costs, transfer dues and other costs.

(5) I may not withdraw this offer and it is irrevocable until 8th October, 1968.

(6) I have purchased the property after conducting a thorough inspection thereof and I further state that I take it as it stands and the sale is therefore to be regarded as 'voetstoots'.

(7) Should the owner accept this offer, this document shall be construed as a binding contract of sale.

(8) I authorise and request Schoeman and Van Aarde (Pty.) Ltd., to negotiate the necessary bonds for me.

(9) The offer is further subject to the following condition: that the purchaser obtains a 75 per cent loan from a building society."

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Notwithstanding the provisions of clause 3 of the contract plaintiff was already given occupation of the property on 3rd December, 1968. The deposit of R1 750 was paid to the estate agents in terms of the provisions of clause 1 (*a*) of the contract.

On 31st January, 1969, plaintiff was notified by the S.A. Permanent Building Society that his application for a loan in the amount of R5 250 had been approved, subject to certain conditions enumerated in the letter, one reading as follows:

"The directors further reserve the right to cancel the loan, for any reason whatsoever, prior to registration of the bond."

On 5th February, 1969, the estate agents mailed the said contract of sale to Langenhoven, an attorney, requesting him to take the necessary steps for registration of transfer. Mr. Langenhoven practised in Vereeniging and is the person referred to in clause 4 of the contract of sale.

There was apparently an existing bond over the property registered in favour of the Grahamstown Building Society and Mr. Langenhoven

made enquiries on 7th February, 1969, at the local agents of the Building Society in Vereeniging concerning the amount secured by the bond and also requested that the deed of transfer in question be furnished to him "as soon as possible".

On 11th February, 1969, the attorneys of the S.A. Permanent Building Society addressed the following letter to Mr. Langenhoven, viz.,

"We have been instructed by the S.A. Permanent Building Society to see to the registration of a bond by Mr. Nel over the security of the above-mentioned property, and understand that you will deal with the simultaneous transfer.

Please let us have a description of the property in order to enable us to prepare the bond documents, as well as particulars of any guarantees which you may require."

Mr. Langenhoven replied to the above-mentioned letter on 13th February, 1969, as follows:

"I . . . must advise that I requested the deed of transfer of the Grahamstown Building Society and as soon as I have the necessary information at my disposal I shall furnish it to you."

On the 20th February, 1969, the Grahamstown attorneys of the Grahamstown Building Society wrote to Mr. Langenhoven informing him that the deed of transfer had been posted to a firm of attorneys in Pretoria on 17th October, 1962. As a result of this communication Mr. Langenhoven phoned the latter firm requesting them to try and find the deed of transfer. It is unnecessary at present to refer to the various further enquiries by Mr. Langenhoven in an attempt to find the deed of transfer.

As from the third week of February, 1969, plaintiff paid several visits to Mr. Langenhoven's office, but did not succeed in seeing him. (Mr. Langenhoven, it transpired, was absent for two weeks during March, on compulsory military service). At the beginning of April, 1969, plaintiff succeeded in finding Mr. Langenhoven at his office and was informed by him that a search was being conducted for the deed of transfer in question. At the end of April, 1969, Mr. Langenhoven informed the plaintiff that the missing deed of transfer had not yet been found.

Concerning the missing deed of transfer, it appears that Mr. Langenhoven finally decided on or about 10th June, 1969, that further attempts

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to find the deed of transfer would be fruitless and then deemed it advisable to apply for a copy thereof. The evidence refers in detail to the various steps taken by him since then concerning the application to the deeds registries office in Pretoria. The application was submitted at the beginning of September, 1969, but was rejected by the Registrar of Deeds, apparently due to a defective affidavit. After a statement by the defendant, sworn to on 2nd October, 1969, had been handed in at the deeds registries office, a copy of the deed of transfer in question was eventually furnished "late in October".

It further appears that plaintiff decided on or about the 13th June, 1969, to demand transfer, and in accordance with his instructions his attorney wrote a letter to defendant on that day, the relevant parts of which read as follows:

"In terms of the contract of sale client had to pay a deposit of R1 750 and the balance had to be guaranteed within 120 days of the acceptance of the offer. Client paid the deposit and on 11th February, 1969 attorneys Snijman and Smullen acting for the S.A. Permanent Building Society addressed a letter to your attorneys, Mr. P. C. Langenhoven, requesting a full description of the property and asking to be informed concerning the guarantees required for the amount of R5 250.

Client complied in full with his duties in terms of the contract.

To date hereof you have failed to see to it that the property is transferred into the name of client despite the fact that client paid several visits to your attorneys and despite the fact that he offered on several occasions to pay the transfer costs of approximately R300 in at your attorneys' office.

Client is not prepared to allow this state of affairs to drag on indefinitely and please note that you are hereby requested to see to it that the property is registered in client's name before or on 12th August, 1969, failing which client will resile from the contract, cancel same and hold you responsible for the damage suffered as a result of your breach of contract. The damage includes client's expenses in obtaining a loan, interest on R1 750 paid in to Messrs. Schoeman and Van Aarde, and costs for improvements already effected by him in his capacity as *bona fide possessor*.

We forward a copy of this letter to your attorney, Mr. P. C. Langenhoven and another copy to Messrs. Schoeman and van Aarde for their friendly perusal."

On the 17th June, 1969, Mr. Langenhoven replied to the above letter on behalf of the defendant. In this he explained that the deed of transfer in question could not be found and that steps were being taken to obtain a copy. The letter concludes:

"As soon as these matters have been rectified, we shall immediately proceed with the transfer. I can already inform you now that it is very unlikely that this property will be registered in your client's name by the 12th August."

On the 17th June, 1969, the S.A. Permanent Building Society addressed a letter to plaintiff referring to the delay in registering the transfer. The final paragraph of this letter reads as follows:

"We regret to inform you that should the loan not be registered within a month from the date hereof, or should you be unable to give us an assurance that it will be registered in the near future, we would have to consider withdrawing the loan. This would of course not prevent you from applying again for a loan at a time when transfer can be effected without unnecessary delay."

On 15th July, 1969, plaintiff's attorney received a letter (dated 1st July, 1969) from Mr. Langenhoven requesting payment of the transfer costs, in accordance with an annexed concept statement of costs, "in terms of your letter of the 13th June." (This is a reference to the

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letter by plaintiff's attorney demanding performance from defendant before or on 12th August). A cheque for R216 was sent under cover of a letter dated 24th July, 1969, to Mr. Langenhoven in payment of the latter's costs. The letter also contained an undertaking to pay any balance which might be outstanding. Subsequently, on 31st July, 1969, plaintiff's attorney posted two documents signed by plaintiff and required for purposes of transfer, to Mr. Langenhoven.

On 22nd August, 1969 the S.A. Permanent Building Society informed plaintiff in writing that

"because of the lengthy period required to register a bond, our directors have decided to withdraw your loan".

On 22nd August, 1969, plaintiff's attorney wrote to defendant as follows:

"We refer you to our letter of 13 June, 1969, and would like to point out that up to the date hereof you have failed to comply with your obligations in terms of the contract to register the property in our client's name. Please note that as from the date of sending of this letter the contract between you and client is cancelled and you are held liable for all damage suffered by client as a result of your breach of contract. We shall ascertain the amount and shall communicate with you again shortly."

To this letter Mr. Langenhoven replied on 2nd September, 1969, as follows:

"I refer to your letter of the 26th August, 1969, and would like to point out again that the circumstances which hampered my client were beyond his powers of control and that at this stage transfer can be given within the period needed by the Deeds Registries Office to register transfer. There are in other words no delays hampering registration at present.

I again refer to my letter of 17th June explaining my client's problem to you and I must state that my client is of the opinion that your client was unreasonable with reference to the time allowed to my client to effect transfer. That it was unreasonable appears from the fact that had we been granted two more weeks the matter would probably have been finalised. In these circumstances and in view of the fact that your client has withdrawn his guarantees, my client considers it to be breach of contract and hereby demands that your client furnishes guarantees or alternatively incurs the forfeiture in terms of para. 1 (*a*).

This demand is made in addition to any claim for damages which my client may have against your client."

The combined summons in this matter was issued on 12th November, 1969, and plaintiff claimed payment of (1) R1 750 (viz. the amount of the deposit paid to defendant), (2) interest on the said amount at a rate of 6 per cent annually *a tempore morae,* (3) an amount of R260,15 for damage suffered by the plaintiff in consequence of defendant's alleged breach of contract and (4) costs of suit.

It is unnecessary to refer to the pleadings in detail. Plaintiff's case in the Court *a quo* was that he had obtained the right to cancel by virtue of the said written demand, dated 13th June, 1969 (also containing a notice of rescission), after the expiry of the period mentioned in the demand and that he exercised this right on 16th August, 1969, by way of the written cancellation of the contract of sale. The gist of defendant's defence was that the written demand and notice of rescission of 13th June, 1969, were invalid, that defendant was therefore not *in mora* after the expiry of the period mentioned therein and that plaintiff did therefore not acquire a right to cancel. This defence would rest mainly on two grounds, viz., (1) that the demand of 13th June,

1969, was presumptuous, and (2) that the period therein allowed for performance was unreasonably short.

The Court *a quo* held that plaintiff was entitled on 13th June, 1969, to demand performance, as he had then already duly performed in terms of the contract of sale. A further contention on behalf of the defendant, viz., that the demand was in any case presumptuous as defendant was not *in mora* on 13th June, 1969, was also rejected by the Court *a quo.* Concerning the second ground, viz., that the period allowed for performance was unreasonable, the Court *a quo* found for the defendant.

The Court held, *inter alia*, that the question whether defendant was allowed a reasonable period for performance, should be considered and answered in view of all the existing circumstances at the time the demand was made and which had a bearing on the reasonableness or not of the period for performance stipulated in the demand, despite the fact that those circumstances only arose after the conclusion of the contract and that at the time the contract was entered into it could not have been within the contemplation of the parties that those circumstances would affect the period for performance.

After considering the circumstances which existed on 13th June, 1969, the Court *a quo* held that

". . . plaintiff's attorney . . . allowed a period sufficient for a normal transfer", but too brief in the circumstances where defendant had first to apply for a certified copy of the lost deed of transfer.

As appears from the provisions of the contract of sale, the parties did not expressly stipulate a date on which the property had to be transferred to plaintiff, and defendant was therefore in law bound to perform, in this respect, within a reasonable period. (See *Celliers* v. *Papenfus and Rooth*, 1904 T.S. 73 at p. 79). The suspensive condition (clause (9) of the contract) was fulfilled when plaintiff's application for a loan was granted by the S.A. Permanent Building Society on 31st January, 1969. Mr. Langenhoven was instructed on 5th February, 1969, to take the steps necessary for transferring the property into plaintiff's name. The deposit of R1 750 was paid to the estate agents in terms of the provisions of clause (1) (*a*) of the contract of sale. The balance of the purchase price (R5 250) would have been paid in cash against registration. On 11th February, 1969 the attorneys of the S.A. Permanent Society wrote a letter to Mr. Langenhoven informing him that they were instructed to see to the registration of a bond by Mr. Nel over the property, the registration of which was to take place simultaneously with the transfer of the property. The concluding paragraph of this letter reads as follows,

"Please let us have a description of the property in order to enable us to prepare the bond documents, as well as particulars of any guarantees which you may require."

Plaintiff also paid several visits to Mr. Langehoven in order to pay the transfer costs. On 13th June, 1969, plaintiff's attorney in a letter to Mr. Langenhoven, offered to pay the transfer costs "as soon as we are in receipt of your *pro forma* statement of account".

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In view of what was mentioned above, the Court *a quo* in my opinion correctly held that on 13th June, 1969, when the letter of demand and notice of rescission were sent to defendant, plaintiff had sufficiently performed in respect of his duties to furnish a guarantee and to pay the costs of transfer. It is abundantly clear from Mr. Langenhoven's further course of action and subsequent letters that he was at no time of the opinion that plaintiff had failed to comply with his duties, and that the delay in completing the transfer was due to a delay on his part in this

respect. On 13th June, 1969, defendant could therefore not in law have relied on the defence that transfer of the property could not be claimed because the plaintiff had failed to comply with his contractual duties. (See, *inter alia*, *Wolpert* v. *Steenkamp*, 1917 A.D. 493 at p. 499; de Wet and Yeats, *Kontraktereg en Handelsreg*, 3rd ed., p. 111). On 13th June, 1969, plaintiff was able, willing and also offered to furnish the guarantee and pay the costs of transfer (see Steyn, *Mora Debitoris*, p. 42).

I proceed to deal with the contention that the demand, including the notice of rescission, was nevertheless presumptuous, firstly, because a reasonable period for performance had not yet elapsed on 13th June, 1969 and, secondly, because the period allowed for performance in the letter of demand was unreasonable. Concerning this contention, it is expedient briefly to refer to certain aspects of the development of our law in respect of *mora debitoris* in so far as they relate to cancellation.

In view of the nature and contents of the present contract, the general rule applies, viz. that the seller has to perform as soon after the conclusion of the contract as may reasonably be expected. (See *Grotius*, 3.3.51; Steyn, *Mora Debitoris*, p. 63; *Mackey* v. *Naylor*, 1917 T.P.D. 533 at p. 537). This duty arises from the operation of the contract itself; a notice demanding performance (whether or not mention is made of a period within which performance must be made) is no pre-requisite for the existence of the duty. Mere delay on the seller's part to perform as soon as is reasonably possible had neither in Roman and Roman-Dutch law nor has in our present law the result that the seller falls into *mora* without more ado. In other words, this delay has no effect on the legal position of the contracting parties in so far as it concerns the origin of *mora*. The purchaser could, on the authority of cases such as *Ras* v. *Simpson*, 1904 T.S. 254, and *Griesel* v. *du Toit*, 1948 (2) S.A. 562 (T), claim performance *in forma specifica*, and, alternatively, pray for the cancellation of the contract should the other party fail to perform within a period laid down by the Court. Should the creditor desire to place the debtor *in mora*, he has to notify him in an unequivocal way that performance is demanded before or on a specified day. This demand does not aim at the cancellation of the contract, but merely serves to determine a date on which the debtor must comply with the creditor's enforceable claim where no such date has been expressly or tacitly specified in the contract. If the period allowed is reasonable, the debtor would fall into *mora* should he still fail to perform on the expiry of the period. (*De Wet and Yeats, op. cit.*, p. 109). Unless otherwise stipulated in the contract, this demand may be made at any time after the con-

clusion of the contract, provided the claim is enforceable and a reasonable time is allowed to comply therewith. (See de Vos, "*Mora Debitoris and Rescission*", 1970 *S.A.L.J.* p. 311). Indeed, in such a demand the plaintiff only claims what he is entitled to. Several cases (*inter alia*, *Breytenbach* v. *van Wijk*, 1923 A.D. 541; *Strachan & Co. Ltd.* v. *Natal*

Milling Co. (Pty.) Ltd., 1936 N.P.D. 327; *Lewis Brothers Ltd.* v. *Ries*, 1912 E.D.L. 455; *Britz* v. *Du Preez*, 1950 (2) S.A. 756 (T)), do in fact refer to an elapse of time before the making of a demand, but obviously, as appears from the context, not in the sense contended for by defendant's counsel, viz., that a demand can only be made on a debtor after the expiry of a reasonable period.

As soon as a debtor falls into *mora* his duties are heightened and extended; e.g. he is bound to compensate the creditor for damage suffered as a result of the *mora*, and he carries the risk that the *res vendita* may accidentally be destroyed. (See *Steyn, op. cit.*, p. 83). These duties are additional to those already incurred in terms of the contract.

Neither Roman law nor Roman-Dutch law granted the creditor under a contract like the present one, a right to resile from the contract merely because of the fact that the debtor was *in mora* (*Steyn, op. cit.*, pp. 21, 97). In the case of a contract of sale provision was usually made for this by way of a special stipulation, the so-called *lex commissoria*. This stipulation is nowadays often encountered in contracts of sale and is inserted for the purpose of creating a right of cancellation.

At the time of the conclusion of a contract the parties thereto desire the fulfilment, and not the cancellation, of the contract. Where the parties have, for some or other reason, not decided on a date for fulfilment, or where they have decided on such a date, but failed to stipulate for a *lex commissoria*, problems may arise where the debtor, contrary to expectations at the time when the contract was entered into, fails to perform on the date specified, or as soon after the conclusion of the contract as is reasonably possible. The innocent creditor's remedies in such a case were confined to a claim for fulfilment (coupled with an alternative prayer for cancellation), or to the measure of relief flowing from the fact that the debtor was *in mora*. The debtor's said breach of contract did, however, not entitle the creditor to withdraw from the contract. That this state of affairs may lead to unsatisfactory results, especially concerning possible prejudice to the innocent creditor, is obvious. The exigencies of present-day commercial intercourse demand that fulfilment of contracts like the one presently under consideration should not be unreasonably delayed. The inherent fairness and practical use of a legal rule granting a creditor the right to cancel in cases where the fulfilment of an important contractual obligation has been unreasonably delayed, was felt everywhere (in this country as well as abroad—see *Steyn, op. cit.*, pp. 24, 117). This is why our law, under influence of English law, eventually granted, in suitable circumstances, a right to cancel a contract to a creditor where his debtor was *in mora* in respect of an important contractual obligation. E.g., in *Young* v. *Land Values,*

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Ltd., 1924 W.L.D. 216 a right to repudiate was granted on the ground that the delay amounted to a breach of contract in respect of an essential obligation. At p. 226 TINDALL, J., said the following: "....."

161 B

In his judgment TINDALL, J., *inter alia*, referred to *Breytenbach* v. *Van Wijk, supra.* At p. 549 the following *obiter dictum* of WESSELS, J. A. appears: "....." ...

161 C

(that a right to resile from the contract arises as soon as *mora* occurs) "....."

161 D

In *Young* v. *Land Values, Ltd., supra, mora* was equated to breach of contract, while the *obiter* in *Breytenbach* v. *Van Wyk, supra,* rather refers to the origin of a right of cancellation as a result of *mora.*

In *Microutsicos and another* v. *Swart,* 1949 (3) S.A. 715, this Court had to deal with a case where a contract of sale in fact contained a period within which performance was to be effected, but no *lex commissoria* was provided for. At p. 730 after, *inter alia,* referring to Steyn, *Mora Debitoris,* and *Breytenbach* v. *Van Wijk, supra,* FAGAN, A.J.A., said: "....."

161 F

As appears from the judgment in the Microutsicos case, the Court confined itself strictly to the facts, viz. a contract of sale coupled to a provision as to the time within which performance had to be effected (without a *lex commissoria*) and a notice of rescission addressed to the debtor *after* he had fallen into *mora* and which, in the Court's opinion, allowed a reasonable time in the circumstances for fulfilment. The question whether a notice, in the nature of a notice of rescission, can be addressed to a debtor *before mora* arises, was never raised.

The concept, "time is not of the essence of the contract", was derived from English legal terminology, and relates to the English rule concerning the right to withdraw from a contract of sale similar in nature to the one presently under consideration in cases of unreasonable delay. The doctrine of *mora debitoris* is of course foreign to English law, although unreasonable delay in fulfilling a contract may serve as a basis for a right to resile from the contract where "time is not of the essence of the contract".

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In Halsbury, *Laws of England,* 3rd ed., vol. 8, p. 165, the following is said: "....."

162 B

After the expiry of a reasonable time after the conclusion of a contract the innocent creditor who aims at a possible cancellation, may notify the debtor that, unless he performs before or on a specified day

(allowing a reasonable period) he (the creditor) shall consider the contract to be cancelled. English practice therefore envisages only one notice, a so-called "notice of rescission", in case of "unreasonable delay". The notice of rescission was adopted by our practice, but has nothing in common with a demand giving rise to *mora* and should not be confused with it.

Had English law been grafted onto our own law, equating the concept of "unreasonable delay" to *mora*, the result would have been that a "notice of rescission" could only be given after the debtor had already fallen into *mora* because of notice of demand. *Steyn, op. cit.*, pp. 108-9 is of the opinion that should English law be adopted, this should take place "with full consideration of the principles of our law". This would require two independent notices, viz. a notice of demand to place the debtor, *in mora* according to our law, (with the concomitant heightening and extension of his duties, to which reference has already been made), and a "notice of rescission", according to English law, which is given to the debtor after he has been placed *in mora*. This would mean in practice that a reasonable period would have to elapse after the date of the notice of demand and before the "notice of rescission" is given and that this latter notice should also allow a reasonable period (apparently taking into consideration all the relevant circumstances). Whereas a creditor usually only addresses a letter of demand to his debtor when the former is of the opinion that unnecessary delay has occurred, this would have the result in practice of eventually allowing three periods to a debtor. *Steyn, op. cit.*, p. 109 suggests that we should rather look to German law for the necessary guidance, because even though this would mean an adoption of foreign law, it would "perfectly" fit into our law, thus avoiding all danger of coming into conflict with the basic principles of our law. *Steyn's* very useful monograph was published in 1929, and since then this branch of the law has been further developed by our Courts.

The question whether two separate notices, as Steyn suggested, are essential to give rise to a right of cancellation, has as far as I know, never been conclusively answered. In *Hammer* v. *Klein and Another*, 1951 (2) S.A. 101 (A.D.) at p. 108A, this question was raised but not decided.

I referred above to the fact that our law was defective in this respect and that our Courts were therefore forced to allow a right of cancellation on account of *mora*, in circumstances where such relief was unknown to Roman and Roman-Dutch law. It appears from the case of *Microutsicos, supra*, that this Court attached consequences to

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mora which were foreign to the principles of Roman-Dutch law, viz., a right to cancel on account of a notice of rescission. In other words, from now on *mora* does not only lead to a heightening and extension of a debtor's obligations, but also to an extension of a creditor's

rights. A notice of rescission allows him to cancel the contract in the same way as a *lex commissoria* would have done.

The question arises why two separate notices and two separate periods should be required where a creditor prefers, on account of unreasonable delay, to resile from a contract rather than to claim performance? When *mora* arises, a reasonable period in which to fulfil has already elapsed, and the debtor has already failed to comply with his contractual obligations as soon as was reasonably possible after the conclusion of the contract. The development in our case law indicates that legal consequences have been attached to *mora* over and above those which already existed, viz., the creditor's right to claim compensation for damage suffered as a result of *mora*, and a shifting of the risk in respect of the accidental destruction of the *res vendita*. The creditor now in addition has the choice to resile from the contract after giving the debtor reasonable notice of his intention to do so. There is, in my opinion, no reason why the two legal systems should be reconciled simply by adding the period for fulfilment as contemplated by a notice of rescission in English law to the period preceding *mora* according to Roman-Dutch law. Where, as mentioned above, our case law attaches an additional consequence to *mora* in certain circumstances, viz., the existence of a right of cancellation after sending a notice of rescission to the debtor, the practical necessity for insisting on two separate notices, falls away. When a creditor demands, as he is entitled to do, that his debtor complies with his contractual obligations before or on a certain date, he may, for the sake of expedience, in the same notice inform the debtor that he reserves the right to withdraw from the contract, should the debtor fail to comply with his obligations within the period specified. (See *De Wet and Yeats, op. cit.*, p. 115). This cannot be unfair towards the debtor; he is allowed a reasonable opportunity to comply with his contractual duties. It cannot be said that a creditor in this way unilaterally forces a *lex commissoria* upon the debtor. Should a dispute arise as to the reasonableness or otherwise of the period allowed, it would be adjudicated upon by the Court with regard to all the material circumstances. Only where a creditor acts reasonably as far as the notice is concerned, can *mora* arise, and only then may the right to cancel be exercised. In the case of a contract of sale the parties are free to stipulate that performance may not be claimed prior to a certain date.

It must therefore be concluded, in my opinion, that where a creditor contemplates the possibility of withdrawing from a contract because of *mora*, he may in the same notice, used to place the debtor *in mora*, also inform the latter that should he fail to perform within the period stipulated, the creditor reserves the right to cancel the contract. In so

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far as the notice serves to place the debtor *in mora*, it operates according to trite principles of Roman-Dutch law. In so far as the notice

aims at the possibility of withdrawal from the contract, it only relates to an additional extension of a creditor's rights after *mora* has arisen. It is also unnecessary to relate this right of cancellation in any way to the English legal principles concerned. It follows from the above that in our law the expiry of a reasonable period after the conclusion of a contract is no prerequisite for the giving of the joint notice.

I next deal with the contention that the notice of demand (including the notice of rescission) was legally of no force or effect as the period allowed to defendant to perform, was unreasonable. In this connection I firstly refer to a question which was neither raised in the Court *a quo* nor in this Court, viz. which party carries the burden of proof in respect of the issue regarding the unreasonableness of the period allowed for performance. In the article, already cited, by Prof. De Vos, "*Mora Debitoris* and Rescission", 1970 *S.A.L.J.*, p. 304 at p. 311, it is suggested, with reference to the case of *Fluxman* v. *Brittain*, 1941 A.D. 273, that the *onus* rests on the debtor.

In my opinion several cases support this view. (See e.g. *Mackay* v. *Naylor*, 1917 T.P.D. 533; *Wellington Board of Executors Ltd.* v. *Schutex Industries (Pty.) Ltd.*, 1952 (3) S.A. 170 (C); *Raw* v. *Rohrs and Another*, 1954 (2) S.A. 235 (N) at p. 237C-H). In my opinion considerations of equity strengthen the contention that the *onus* should rest on the debtor where the latter's attitude is that the demand is void because the period therein allowed was unreasonable. (See *Fluxman* v. *Brittain, supra* at p. 295, and *Pillay* v. *Krishna and Another*, 1946 A.D. 946 at p. 954).

In the present case, for reasons which will soon become apparent, it is, however, unnecessary to decide the above-mentioned question, and it is possibly also undesirable to do so, as this was not canvassed in argument. For the purposes of this appeal I accept in defendant's favour that the *onus* rests on the plaintiff concerning the question whether the period allowed in the notice of demand constituted a reasonable opportunity to perform in the circumstances.

In his plea defendant states that he

"admits that he was unable to effect transfer of the property sold, into plaintiff's name before or on 12th August, 1969, but says that it was impossible to do so because the deed of transfer of the said property was lost due to circumstances beyond his powers of control, and that he had to apply in terms of the provisions of the Deeds Registries Act, 47 of 1937, for a copy before he could pass transfer to plaintiff".

The probabilities indicate that the deed of transfer had already been lost prior to the conclusion of the contract, but that defendant was unaware of this fact. It appears from the evidence that the possibility that this circumstance could play a role in determining the period within which defendant could reasonably be expected to perform, was never contemplated by the parties at the time the contract was entered into. It further appears from the evidence that had this circumstance

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not arisen, defendant would probably have been able to comply with his obligation at a time considerably prior to even 13th June, 1969.

The Court *a quo* indeed found that if the delay which ensued because of this eventuality be left out of consideration, the period allowed for fulfilment in the notice of demand cannot be said to be unreasonable.

The question is therefore whether the Court may, in determining what a reasonable period for fulfilment would be, take into consideration any circumstance which at the time the contract was concluded, could not have been reasonably within the contemplation of the creditor as being material to the calculation of the period within which the debtor could reasonably be expected to comply with his obligations. Several cases in my opinion support the view that such a circumstance should not be considered by a Court. (See *Adler* v. *De Waal*, 8 N.L.R. 88, a judgment of the Privy Council in connection with an appeal from the Natal Supreme Court, 5 N.L.R. 251). The case dealt with an alleged delay in delivering certain shares. At p. 80 the following was said: "....."

165 D

In *Goldschmidt* v. *Adler*, 3 S.C. 117, a case also dealing with the reasonableness of a period within which shares had to be delivered, the following was said at p. 122 of the judgment: "....."

165 E

In *Young* v. *Land Values Ltd., supra*, the sellers of immovable property could not effect transfer within a certain period as they themselves had not yet received transfer. At the time of the conclusion of the contract this fact was unknown to the purchaser. With reference to *Adler* v. *De Waal, supra*, TINDALL, J., said the following at p. 224: "....."

165 F

I next refer to *Willowdene Landowners (Pty.) Ltd.* v. *St. Martin's Trust*, 1971 (1) S.A. 302 (T), where an appeal from the judgment of COLMAN, J., 1970 (3) 132 (W), was heard by the Full Bench. The only issue on appeal was whether respondent (the Trust) allowed appellant a sufficient period within which to perform. At p. 305G CLAASSEN, J., said the following: "....."

165 H

I agree with the learned Judge's objective approach in the passage cited. In determining a period for fulfilment which is reasonable for both creditor and debtor it is, in my view, essential to take into consideration, firstly, the knowledge of the parties at the time the contract was concluded, of any circumstances which could affect fulfilment and,

secondly, similar circumstance which, although unknown to one or both of the parties, were reasonably foreseeable as circumstances which could affect the time for performance. In considering the question whether a reasonable time was allowed for fulfilment one should first look for the presence of material circumstances of the nature specified above, which could reasonably lead to a delay in fulfilment. Secondly one must calculate, with reference to the evidence, what period should reasonably have been allowed in view of such material circumstances. In this calculation the position as it existed at the time the demand was made, must be considered in determining the time to be allowed. The parties would have realised at the time of the conclusion of the contract that registration of transfer would necessarily take some time and that the time which should reasonably be allowed therefor, would depend on the relevant circumstances at the time registration is effected. From the evidence it appears that this period varies from time to time. In the case of certain contracts it could be reasonable to take unforeseen and unforeseeable circumstances into consideration, e.g., in the case of contracts of sale providing for periodical delivery stretching over a period of years, the parties would have contemplated the possibility that unforeseeable circumstances could in future affect the period of performance.

It therefore appears in my view that the Court *a quo* has erred in the present case when, in answering the question whether the notice of demand allowed a reasonable period for fulfilment, it took into account the delay occasioned by the necessity of obtaining a certified copy of the deed of transfer. It appears from the evidence that neither plaintiff nor defendant realised, nor was it reasonably foreseeable, that delay of this nature would delay transfer of the property for several months. All that could reasonably have been within the contemplation of the parties at the time the contract was entered into, was that delivery could probably be effected within the period usually required for finalising transactions of such a nature. (See *Celliers* v. *Papenfus and Rooth, supra* at p. 79). The Court *a quo* held that the period allowed in the notice of demand "was sufficient for a normal transfer", but too brief "where a copy of the title deed had to be obtained first". Experts testified at the hearing as to what a reasonable time would be in the case of an ordinary transfer unimpeded by obstacles of the nature encountered in the present case and which caused the delay. I shall not deal with this in detail. The preponderance of evidence supports the finding of the Court *a quo* that, approached objectively, the period of two months allowed for fulfilment in the notice of demand, was reasonable if the delay caused by the fact that defendant's deed of transfer could not be found, is left out of consideration. The more so if the considerable period which had elapsed prior to the notice of demand, is also taken into account.

In his plea, and also in the evidence adduced on behalf of defen-

dant, the defendant alleged that his failure to fulfil within the said period, was not due to his fault, but due to the fortuitous circumstance that the deed of transfer could not be found, thereby causing unavoid-

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able delay and making it impossible for him to comply with his obligations within the period allowed in the notice of demand. In my opinion this defence cannot succeed, even should it be supposed that the defendant could have relied on this circumstance as an excuse for his delay, if the delay had not been due to his own fault. The deed of sale was already signed on the 3rd October, 1968, and defendant must have realised that his obligation to effect transfer within a reasonable period, would arise on the fulfilment of the suspensive condition. Plaintiff undertook to furnish an "approved bank or other guarantee" for the amount of R5 250 within 120 days after 3rd October, 1968 (i.e. before or on 31st January, 1969). The deposit of R1 750 was apparently paid even before 3rd October, 1968. Occupation of the property would be given on 1st February, 1969, against payment of R50 as monthly rental as from that date to date to registration. It should therefore have been within defendant's contemplation that he could at any time after the beginning of February, 1969, be required, depending on performance on plaintiff's part, to take the necessary steps for effecting transfer and that he would need his deed of transfer for that purpose. Defendant was aware of the fact that he did not have the deed of transfer in his possession. It nevertheless appeared that only on 7th February, 1969, defendant (through his attorney) attempted to obtain the deed of transfer. This was followed by further time consuming (and, in my opinion, leisurely) attempts to find the deed of transfer continuing up to more or less 10th June, 1969, before it was decided to apply for a certified copy. The measures taken in the attempt to find the missing deed of transfer are in no way indicative of a realisation on defendant's part that he had to perform within a reasonable time, especially not if one bears in mind that unnecessary delay of transfer could lead to the withdrawal by the S.A. Permanent Building Society of the loan. Defendant's excuse for the delay, viz., that plaintiff failed to impress upon him the necessity for a quick registration, is unconvincing. It appears in my opinion from the evidence that defendant realised for a considerable time prior to 13th June, 1969 (the date of the notice of demand) that plaintiff's claim for fulfilment was enforceable, and that he (defendant) had the duty to perform within a reasonable time. In the above circumstances I am satisfied that the alleged impossibility of complying within the reasonable time fixed by the demand was due to defendant's own fault.

It therefore follows, in my opinion, that defendant had been *in mora* on the termination of the period of two months, and was still *in mora* when appellant exercised his right to withdraw on 26th August, 1969.

It was not contended on behalf of the defendant that should the ap-

peal succeed, the plaintiff would not also be entitled to R260,15 as damages.

The appeal succeeds with costs, including the costs of two counsel. The order of the Court *a quo* is substituted by the following order:

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Judgment in favour of plaintiff in accordance with paras. 1, 2, 3 and 4 of his claim.

TROLLIP, J.A., and MULLER, J.A., concurred in the judgment of WESSELS, J.A.

JANSEN, J.A.: On 3rd October, 1968, appellant (hereinafter called the plaintiff) purchased a house from respondent (hereinafter called defendant) in terms of a written contract of sale. The contract contained express provisions, *inter alia*, to the following effect:

(1) It was subject to plaintiff's obtaining a loan of 75 per cent from a building society;

(2) Plaintiff would pay a deposit of R1 750 at the time of signature (subject to a forfeiture "should plaintiff fail to effect the necessary payments" or to comply with "any condition" of the contract; payment was to be made to an estate agency which would retain the deposit "in trust . . . pending registration";

(3) The balance of the purchase price of R7 000, viz. R5 250, was to be paid "in cash against registration of transfer";

(4) An "approved bank or other guarantee" was "to be provided within 120 days from the date" of the contract;

(5) Plaintiff would "pay all transfer costs, transfer dues and other costs".

(6) Occupation of the property would be given to the plaintiff on 1st February, 1969, in respect of which plaintiff would pay "R50 rent per month until the date of registration".

The deposit was paid and despite the date mentioned in (6) above, plaintiff already moved into the house on 3rd December, 1968; his application for a loan to a building society was granted and, on 11th February, 1969 the building society's attorneys wrote to defendant's attorney:

"Please let us have a description of the property in order to enable us to prepare the bond documents, as well as particulars of any guarantees which you may require."

On 13th June, 1969, transfer had still not been effected, and plaintiff's attorney wrote, *inter alia*, as follows to defendant:

"To date hereof you have failed to see to it that the property is transferred into the name of client despite the fact that client paid several visits to your attorneys and despite the fact that he offered on several occasions to pay the transfer costs of approximately R300 in at your attorneys' office.

Client is not prepared to allow this state of affairs to drag on indefinitely and please note that you are hereby requested to see to it that the property be registered into client's name before or on 12th August, 1969, failing which client will resile from the contract, cancel same and hold you responsible for the damage suffered as a result of your breach of contract. The damage includes client's expenses in obtaining a loan, interest on R1 750 paid in to Messrs. Schoeman and van Aarde, and costs for improvements already effected by him in his capacity as *bona fide possessor*."

Transfer remained outstanding, and on 26th August, 1969, plaintiff's attorney cancelled the contract in writing.

Defendant disputed the validity of the cancellation and subsequently plaintiff sued defendant in the Transvaal Provincial Division for the return of the deposit of R1 750 (which had in the meantime been paid to defendant), interest thereon *a tempore morae*, damages in the amount of R260,15 and costs. After the hearing of evidence the Court (HIEMSTRA, J.) held that the period mentioned in the notice of 13th June, 1969, had been too brief and that the purported cancellation was invalid, and he dismissed the claim with costs. Plaintiff appeals against this.

169

From the arguments it is clear that we have to deal here with a branch of the law where the principles of Roman-Dutch law and of English law have become mixed and they are sometimes confused, a branch of the law where controversy is rife. (Cf. *inter alia*, I. van Zijl Steyn, "*Mora Debitoris* volgens die Hedendaagse Romeins-Hollandse reg", published in 1929; G. A. Mulligan, "*Mora*," 1952 *S.A.L.J.* 276; Wouter de Vos, "*Mora Debitoris* and Rescission," 1970 *S.A.L.J.* 304; De Wet and Yeats, *Kontraktereg en Handelsreg*, 3rd ed., pp. 107-116; Wessels, *Law of Contract*, 2nd ed. para. 2853 *et seq.*). In an endeavour to obtain clarity I will first discuss certain aspects of the Roman-Dutch law, followed by English law and our case law before going into the facts of the present case.

Looking only at the seller's obligations under this mutual contract, one finds here an obligation to transfer without any provision as to the time when this must be effected. The question then arises what, according to Roman-Dutch law principles, the effect of such an obligation is in respect of the efflux of time. It must be accepted as an *a priori* that the performance is such that its nature remains materially the same whether transfer is effected now or later (e.g. in a year's time). We also do not have to deal here with the problems which arise in cases where performance has from the start been objectively impossible or became so or where it appears that the debtor is not in a position to perform within any determinable period, or where he refuses to perform and repudiates his obligations. In view of this the position is as follows. The general rule in cases of contracts where no date for performance has been specified, is that performance immediately becomes due and enforceable. De Groot, *Inleiding*, 3.3.5. may be cited as an example of one of our old writers who is to this effect (with one qualification, however):

"But where no date has been specified, then it is understood that the debt may immediately be claimed, except where performance, as in the case of the passing of transfer of a house, necessarily takes some time."

Van Zijl Steyn (*op cit.* 78) has the following view:

"According to our law, if the parties have failed to specify a date for performance, the debtor must immediately or as soon thereafter as is reasonably possible, comply with his obligations."

In *Mackay* v. *Naylor*, 1917 T.P.D. 533 at pp. 537-8, this is put in another way: "....."

169 G

The latter formulation is to be preferred: the former may create the impression that the debtor is without more ado compelled to perform immediately, failing which he commits a breach of contract. This is not the case. The real state of affairs is that the debtor is liable to perform, right from the start but cannot be compelled to do so before performance is demanded. The creditor should demand performance from the debtor *oportuno loco et tempore* and this is constructed in the following way: the creditor must inform the debtor that he is to perform on or before a specified date, but he must allow a reasonable period (cf. *De Wet and Yates*, pp. 109-10). It is unnecessary to decide at pre-

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sent whether the demand (*interpellatio*) must be in writing and how a reasonable period is to be determined. It seems possible, however, to determine this period with reference perhaps *inter alia* to the question whether the contract requires haste, the time usually required to perform in a case of such a nature, taking into account what possible delaying factors the parties have or should have foreseen, and the preparations which the debtor should resonably have made, as he knew that performance could be demanded. But, let me repeat, I refrain from giving a final opinion in this respect.

Breach of contract only enters the picture on the termination of the period mentioned in the demand if the debtor has at that stage still not complied with his obligation to perform. As *van Zijl Steyn*, p. 40 *et seq.* says, certain other objective and subjective prerequisites, *inter alia* the requirement of fault, must be satisfied. If all the requisites are satisfied, the debtor is in breach of contract for as long as he fails to perform. This is referred to as negative breach of contract or *mora*. The creditor's right to claim performance remains intact, but the debtor's liability has expanded on account of his *mora*: he is now liable for any damage which the creditor may suffer because of the delay, and he bears the risk of the accidental destruction of the *res* (*van Zijl Steyn*, p. 83 *et seq.*). As the obligation is still aimed at fulfilment, it follows that the debtor is still compelled and entitled to perform and the extension of his liabilities would lapse, should he make a proper offer to perform (*van Zijl Steyn*, p. 113 *et seq.*).

These general principles apply also to mutual obligations arising from a bilateral agreement, as, e.g. a contract of purchase and sale. But a further question arises: may one party be relieved from his obligations because of the *mora* (in contrast to defective performance) of the other party, i.e. may he resile from the contract, cancel it? It must again be emphasized that I do not here discuss the case where the other party's performance has become objectively impossible or where it appears that he will not be in the position to perform ever or in the near future, or where he repudiates his obligations. According to *van Zijl Steyn*, pp.

111-112, the existence of a general right to cancel on account of *mora* is unknown to the principles of Roman-Dutch Law. From this it follows that the appropriate remedy still remains a claim for performance, supplemented by a claim for damages on account of the delay. A right to cancel is therefore not a legal consequence of *mora*, but *Van Zijl Steyn* accepts the possiblity that such a right may be agreed upon (expressly or tacitly) at the conclusion of the contract.

I deal next with the English law. The common law required a plaintiff to prove "....."

170 H

(Fry on *Specific Performance,* (1911) 4th ed., sec. 1072). In the case

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of a bilateral contract this could apparently, in a specific case, amount to a cancellation by one party because of the other party's delay to perform within a reasonable time. Since the Judicature Act, 1873, principles of Equity have played a major part in this branch of the law. According to *Fry,* sec. 1075, time is of the essence if the parties have expressly or tacitly so agreed. He points out (sec. 1079) that "....."

171 A

With reference to *De Waal* v. *Adler*, 12 A.C. 141 at p. 145—an appeal to the Privy Council from Natal—he says (sec. 1084) the following: "....."

171 B

As a general rule time would not be of the essence where no period has been stipulated. Although the debtor must perform within a reasonable time and falls into default on the termination of the reasonable period without a demand having been made and is liable to pay damages, the creditor does not, merely because of this acquire a right of cancellation. He may, however, in Equity acquire such a right by addressing a notice of rescission to the debtor. *Fry,* sec. 1093, states that this is a recent development in Equity and was unknown in 1821.

The Australian author Stonham, *The Law of Vendor and Purchaser,* gives a useful summary of the rules applicable. He writes: "....."

172 A

The basis of the right to cancel seems to be fairness, and the determination of what is a reasonable time takes place accordingly. As an unusual remedy is obtained in this way, it is not surprising to find that

Stonham (with reference to an Australian case) places the *onus* of proving that all the requisites have been complied with, on the person desiring to use the notice as a basis for withdrawing from the contract. It must be stressed that cancellation is not a normal result either of a contract or of a breach of contract: it is a right which is only obtained on additional grounds after a breach of contract has occurred.

Against this background of the English and Roman-Dutch law, reference must be made to a few of our cases. It was accepted in *Murphy* v. *Labuschagne and Another,* 1903 T.S. 393 at p. 399, that "....."

172 C

Reference was made to the exceptional cases of a "special pact" and where "time was of the essence." The Court found that the case under consideration constituted no exception, and continued: "....."

172 D

The Court obviously had the English "notice of rescission" in mind. In *Breytenbach* v. *Van Wijk,* 1923 A.D. 541 at p. 549, WESSELS, J.A., said, *inter alia,* the following "....."

172 E

Despite the use of the word *mora,* it is difficult to avoid the conclusion that the learned Judge had basically the English "notice of rescission" in mind. (Cf. *Kangisser and Another* v. *Rieton (Pty.) Ltd.,* 1952 (4) S.A. 424 (T) at p. 429D).

In *Young* v. *Land Values Ltd.,* 1924 W.L.D. 216, the purchaser of six erven on a monthly instalment basis sued the seller for cancellation of the contract of sale and return of the amounts already paid. The contract of sale had been altered on 20th September, 1923, by a subsequent agreement to the effect that the purchaser would be entitled to transfer against payment of a global amount of £135. No period was stipulated and transfer had apparently to be effected within a reasonable time. On the same day the purchaser offered to provide the necessary bank guarantee and the attorney personally undertook to pay the transfer fees. The guarantee was in fact only provided on 8th November, 1923, but the delay was due to the seller. After several enquiries by the purchaser and excuses by the seller, the latter was notified on 20th December, 1923 that (in the words of the judgment, p. 223): "....."

172 H

Transfer was still delayed despite further enquiries, and on 7th March, 1924, the purchaser cancelled the contract.

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TINDALL, J., considered the following question:

"Is a delay of four months (i.e. from 8th November, 1923 until the date of cancellation) under the circumstances unreasonable?"

He decided that it was. He apparently further accepted, with reference to *Breytenbach* v. *van Wijk, supra,* that because of the notice of 20th December the seller was placed *in mora,* and continued (at p. 225): "....."

173 D

The reference to *Myers* v. *Sieradski,* 1910 T.S. 869, is not so clear. In that case the Court had to deal with a contract of service and the breach was positive. Reference was in fact made in the *Myers* case to the so-called principle in *Federal Tobacco Works* v. *Barron & Co.,* 1904 T.S. 483, but TINDALL, J., did not decide *Young's* case on that basis —otherwise the reference in his judgment to placing *in mora* would have been superfluous. By referring to the duty "to pass transfer within a reasonable time" as "an essential term", the learned Judge obviously did not intimate that time was of the essence, but indeed that the duty *to pass transfer* was material to the contract. This is relevant because a breach in respect of a term which is not material, cannot found a right to cancel (*Aucamp* v. *Morton,* 1949 (3) S.A. 611 (A)). Hence the use of the words "vital terms" in *Microutsicos and Another* v. *Swart,* 1949 (3) S.A. 715 (A) at p. 730, in a passage to be cited later. It seems to be obvious that where a positive breach of contract does not give rise to a right of cancellation, a negative breach can do so even less, and that a notice of rescission consequent upon a delay in respect of an unimportant term, cannot make such a term material (cf. *Stonham,* sec. 1458; *Mulligan,* pp. 290-1). If one looks at *Young's* case as a whole, then it seems that (despite the reference to "our own law") TINDALL, J., applied the English law of "notice of rescission" in that case.

In *Bredenkamp* v. *Du Toit, Halsbury's* exposition of the "notice of rescission" was followed, relying on *Murphy* v. *Labuschagne, supra.* In *Britz* v. *Du Preez,* 1950 (2) S.A. 756 (T) at pp. 760-1; *Kangisser and Another* v. *Rieton (Pty.) Ltd.,* 1952 (4) S.A. (T), and Pretorius v. *Greyling,* 1947 (1) S.A. 171 (W), effect was given to similar notices.

From the above it appears that it has often been accepted in our practice that a notice of rescission may lead to a right of cancellation. This has been derived from the English doctrine of "notice of rescission" and sometimes reference is directly or indirectly made to a requirement of preceding default. (Cf. *Murphy* v. *Labuschagne and Another*; *Breytenbach* v. *Van Wijk; Bredenkamp* v. *Du Toit; Britz* v. *Du Preez*). One also gains the impression that in these cases where effect has been given to such a notice of demand, the debtor had at an earlier stage been informed that the creditor required performance to be effected, but never-

theless delayed in doing this (*Pretorius* v. *Greyling* seems to be an exception). In *St. Martin's Trust* v. *Willowdene Landowners (Pty.) Ltd.*, 1970 (3) S.A. 132 (W) at p. 135C, COLMAN, J., expressly referred to this aspect. He mentioned the "elapsed period" which preceded the "*mora* notice" (in the sense of a notice of rescission) and referred to the uncertainties in this connection. In finding that a right of cancellation arose in that particular case, he added that: "....."

174 D

In cases where a period for performance had been stipulated, i.e. where *dies interpellat pro homine*, the doctrine of the "notice of rescission" also gained acceptance. In *Microutsicos and Another* v. *Swart*, 1949 (3) S.A. 715 (A) at p. 730, FAGAN, A.J.A., said the following: "....."

174 E

Thus, in the case of an obligation to which a period for performance has been added, fusion occurs between our concept of *mora* and the English "notice of rescission". Once the debtor is *in mora*, the creditor may acquire a right of cancellation by way of a notice of rescission. Here *mora* is equated to the English concept of preceding "default".

Logic would demand that in the case of an obligation to which no period for performance has been added, *mora* should also supplant "default". This is in fact the attitude of *van Zijl Steyn*, pp. 108-109. In his view this would reconcile the English doctrine of "notice of rescission" with Roman-Dutch law and be the least dangerous to the principles of the latter system. From this it would follow that two notices of demand would be necessary in order to create a right of cancellation: the Roman-Dutch notice of demand to place the debtor *in mora*, followed by the English "notice of rescission". As *van Zijl Steyn* also mentions, this would conform to German law which is also rooted in Roman law. That the debtor should be allowed two opportunities to perform, is not strange—this is moreover also the case in English law. There may possibly be only three opportunities if the creditor fails to be *vigilans*—

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he may by way of a notice of demand determine the first period as soon as the debt becomes enforceable, and should performance be delayed due to his failure to do so, he can only blame himself. But be it as it may, it is quite possible that the three opportunities would not necessarily allow more materially time than two, depending on the extent to which the preceding elapse of time has been taken into account in determining reasonable periods.

It is, however, difficult to reconcile our case law in all respects with *mora* as a substitute for "default" in cases where no period for perfor-

mance has been stipulated. It may be accepted that also in this case, with analogy to an obligation coupled with a period for performance, the creditor would be entitled to give a notice of rescission where his debtor is already *in mora*. The question is, however, whether the converse is also true, viz. that the creditor is unable to do this unless his debtor is *in mora*. There appears a passage in *Hammer* v. *Klein and Another*, 1951 (2) S.A. 101 (A) at p. 107G-H which seems to indicate this, but on analysis it appears to mean that a notice of rescission would be invalid where the debtor is not *in mora*, unless the notice would serve to place the debtor *in mora*. In *casu* the bank guarantee in question was still unenforceable when the demand was made. Concerning the cases (mentioned above) in which effect was given to notices of rescission, it cannot be denied that in most cases the debtors had been aware of the fact that performance was required and had already delayed at the time when the notices of demand were served on them, but it is not clear whether they were already *in mora* despite the absence of the type of demand generally regarded as a requisite therefor. Their delay seems rather to conform to the English "default".

Even though it might be apparent from our cases in general that a valid notice of rescission may be given in cases of obligations where no period for performance has been stipulated, despite the fact that the debtor is not *in mora*, it is nevertheless clear that the "default" requirement has not generally disappeared. In fact, its neglect would constitute a grave infringement of our law of contract and would also be contrary to the whole English basis of the "notice of rescission". According to Roman-Dutch law the creditor is entitled to demand performance from the debtor as soon as the debt becomes enforceable. Should the debtor fail to perform within the period allowed, he may then fall into *mora*, i.e. commit a (negative) breach of contract from which certain results flow. A right of cancellation is, however, not one of these. Such a right should have been stipulated (*lex commissoria*). Should the creditor be in a position to blend his notice of demand with a valid notice of rescission at all times, this would mean, at its worst, that the creditor could immediately on the conclusion of the contract give a double notice of demand resulting in cancellation should the debtor fail to perform within the period stated. He therefore really acquires a *lex commissoria* to which the debtor has never agreed and in all probability never would have agreed. Such a possibility is not only unacceptable in view of the basic principles of our law, but also wholly contrary to the doctrine of "notice of rescission" in its country of origin. Already in 1879 FRY, J., said the following in *Green* v. *Seven*, 13 Ch. 589 at p. 599: "....."

176 B

It is true that *de Wet and Yeats*, as well as *de Vos* do not object in principle to a double notice of demand, but it is uncertain whether they would accept the extreme situation mentioned here. Once the

debtor is in "default", no objection can be raised against a double notice of demand.

In view of the above the position seems to be that, inspired by English law, our cases have accepted the possibility of acquiring a right of cancellation consequent upon a notice of rescission in respect of contracts with or without a time clause. The English requisite of a preceding "default" (as prerequisite of a valid notice of rescission) has also been taken over from English law and adapted. In the case of contracts having a time clause, *mora* took its place: *dies interpellat pro homine* and should performance still be lacking on the termination of the period, the debtor would be *in mora* as from that date, whereupon a valid notice of rescission may be given provided a "reasonable" period is allowed. In the case of contracts without a time clause the debtor does not (as already explained) fall into *mora*, according to our law, without an *interpellatio*. After the notice of demand has been given and the debtor has, because of this, fallen into *mora* then a valid notice of rescission (allowing a reasonable time) may forthwith be given. In such a case the English requirement of preceding "default" has been satisfied because of the preceding *mora*. There are, however, cases (as already mentioned) where notices of rescission have been held to be valid in the case of contracts without a time clause, despite the fact that the debtor had not been placed *in mora* by a preceding formal notice of demand. Here *mora* has not supplanted the English requirement of "default", but on the other hand the requirement of "default" has not been discarded: it was accepted expressly or by implication that the debtor was in "default" because his delay exceeded a reasonable time (despite the fact that he apparently had not been *in mora* because of the absence of an *interpellatio*). How much remained of the English "default" requirement in our law, is uncertain, but our cases justify the view that the debtor is still required to have known that performance was demanded and that he knew that his delay was unreason-

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able before a notice of rescission may be validly given. The position according to our case law may therefore be summarised as follows: in all cases where the debtor already is *in mora*, the creditor may acquire a right of cancellation by giving notice of rescission to the debtor. If the debtor is not *in mora*, the creditor may not do this except in one case: in the case of a contract without a time clause a notice of rescission may create a right of cancellation despite the fact that the debtor is not *in mora* (in the absence of a formal *interpellatio*), provided he is in "default" according to English law (which, according to our cases, means that the debtor should at least have known that the creditor demanded performance, but nevertheless delayed for an unreasonable period).

This view must not be considered as confirmation of cases such as *Federal Tobacco Works* v. *Barron & Co.*, *supra*, which, in view of the

apparently valid criticism levelled against them, will have to be reconsidered at a suitable time. Mere delay in performing within a reasonable time does not now, where a notice of rescission is given, become breach of contract in general with a right of cancellation as its consequence, but merely represents an independent ground on which a creditor may in certain cases, by giving a notice of rescission, acquire a right of cancellation where the debtor is not already *in mora*, but may be placed *in mora* by a notice of demand.

The question how the period is to be determined in the case of a notice of rescission, has been discussed in cases such as *Young* v. *Land Values, supra; Microutsicos* v. *Swart, supra*; *St. Martin's Trust* v. *Willowdene Landowners Ltd., supra.* The latter case offers the most exhaustive discussion of this question and must be read in the light of certain further considerations mentioned on appeal. (*Willowdene Landowners (Pty.) Ltd.* v. *St. Martin's Trust,* 1971 (1) S.A. 30 (T)). A few general remarks will suffice here. There is a material difference between the concept "reasonable period" in the case of an ordinary notice of demand and in the case of a notice of rescission: in the case of an ordinary notice of demand the creditor is exercising a contractual right; in the case of a notice of rescission he attempts to acquire an extra-contractual right in equity. From this it follows that what the parties did foresee or should have foreseen at the time of the conclusion of the contract may possibly be conclusive, while this will not be so in the latter case. In the case of a notice of rescission all the circumstances should be considered—as they are at the relevant time and in the light of what has gone before. Merely to consider delaying factors of a foreseeable nature, would hamper considerations of equity too much. A summary of factors to be considered in determining what a reasonable period would be, could only serve as guidance and would not amount to a complete catalogue. (Cf. *Stonham*, 1475, cited above).

We may now return to the present case. Mainly two questions are in issue: whether the notice of rescission was presumptuous and whether the period allowed was reasonable.

It is clear that when plaintiff gave the notice of rescission on 13th June, 1969, he had not yet furnished "an approved bank or other guarantee" as stipulated in the contract and had also not paid "all transfer costs, transfer dues and other costs". The defendant was, however, satisfied with the building society's letter requesting him to furnish par-

ticulars of any guarantees required. It was moreover clear that the necessary guarantees would be available on demand. There was also at that stage no necessity to pay the other costs as these had not yet been estimated by the defendant. In these circumstances it appears that the notice of rescission cannot on this ground be held to have been invalid. It is true that the notice of rescission does not contain an offer to provide the guarantee or to pay the costs, but in the circumstances it is quite

clear that the notice embraced this—reference is made to the letter of the building society's attorneys and that plaintiff "offered on several occasions to pay in the transfer costs of approximately R300 at your attorney's office". Defendant did also not contend that the notice of rescission was defective on this ground.

The question further arises whether defendant's delay on 13th June, 1969, was such as to give rise to the possibility of a valid notice of rescission. The contract had been entered into on 6th October, 1968. It was indeed conditional, but the parties must have expected the loan to be granted—plaintiff already moved into the house on 3rd December. On 11th February, 1969, it was quite clear that matters had progressed so far that the building society would provide the necessary guarantees on demand. From the evidence it appears, and this is a safe margin, that in the usual course of events, tranfer could have been effected within three months from that date. The reason why this was not done, is that it subsequently appeared that the building society in whose favour a bond had been registered over the property, no longer had the deed of transfer in its possession. On 20th February the building society's head office wrote a letter from Grahamstown saying that the deed had been sent to a firm of attorneys in Pretoria. Enquiries by defendant's attorney revealed, at approximately the end of the last week of April, 1969, that the deed had subsequently been sent from Pretoria to attorneys in Vereeniging. Further enquiries were made there. In the meantime plaintiff paid a visit to defendant's attorney at the beginning of April and was assured that he (the attorney) was trying his utmost to obtain the deed. At the end of April plaintiff made further enquiries and again approximately 14 days later. On about 10th June, 1969, defendant's attorney considered applying for a copy of the deed, but on the information at his disposal he was not yet sure that the deed had in fact been lost.

Against this background the notice of rescission was received on 13th June, 1969. Was defendant's delay sufficient to justify the notice? Defendant knew from 11th February that transfer was requested, and it can be accepted that a reasonable time had expired on 13th June, 1969. (It was, however, not contended that defendant was at that time *in mora*—presumably because until that date no formal *interpellatio* had been made). It would be difficult to blame defendant for the fact that he was unaware on 11th February that the deed of transfer was missing; he can at most be blamed for the fact that his attorney failed to urge others, on whose information he had to rely, to expedite matters and to complete certain preliminaries. It is not obvious whether the delay in the circumstances constituted sufficient "default" for the purposes of

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a notice of rescission. I shall, however, accept (without deciding) in plaintiff's favour that this was the case.

The next question which must be considered, is whether the period

of approximately two months which was allowed, was "reasonable". It could perhaps have been theoretically possible to effect transfer within that period, but in view of the fact that the deed was missing, the practical difficulties in obtaining the affidavits required from people at various places, the delay in connection with the necessary advertisements, etc., it would have been very difficult to do so. Plaintiff's own attorney conceded that two months was an unreasonably short period for doing all this (although he considered it to be an ample period for a normal transfer). This was also the view of the trial Judge and it would be difficult to differ from him. The fact that the period allowed in a notice of rescission is rather on the brief side, is not necessarily a conclusive indication that the period is "unreasonably" brief. Where it is, e.g. clear that a lengthier period would have been of no avail, or that further delay would cause special damage to the sender of the notice, it is quite possible that the period would not for that reason only be held to be unreasonable. On the other hand to accept as "reasonable" a period within which performance can only with difficulty be effected, could easily reduce a notice of rescission to an artifice. In the present case there are not many reasons which could justify the brevity of the period. There was no danger that transfer would never be effected or not within the near future: defendant was neither unwilling nor unable; the only obstacle was the missing deed. Concerning the question whether defendant could be blamed for his attorney's conduct, the trial Judge said the following:

"I am of the opinion that defendant's attorney could have saved a few weeks here and there had he been aware of the urgency of the matter, but the general picture is not one of unreasonable neglect. He was dependent on the co-operation of others who had no interest in the matter."

It would be difficult to fault this view. It also does not seem that plaintiff was suffering continuous damage, e.g. that compared to the interest on the bond and the rates payable by him after transfer, the payment of rent amounted to continuous damage.

Plaintiff relies, however, mainly on the letter of 31st January, 1969, in which the building society advised him that a loan had been granted and wherein the following appears.

"Unless the society's attorneys are, within ten days of this notice provided with and approve of all the documents and particulars needed for the registration of the bond, the grant of the loan may be withdrawn without further notice. The directors further reserve the right to cancel, for any reason whatsoever, the loan at any time before registration of the bond."

Delay would therefore, according to plaintiff, have contained the danger of cancellation. It, however, does not appear that the building society had prior to 13th June given any indication of impatience. When he sent the notice of rescission, plaintiff was aware that the fact of the missing deed was the cause of the delay. It does not appear that he knew that the building society would in fact cancel his loan. It must, however, be accepted that such a danger existed. Moreover, on 17th June (after the notice of rescission had been sent) the building society wrote as follows:

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"We regret to inform you that should the loan not be registered within a month from the date hereof, or should you be unable to give us an assurance that it will be registered in the near future, we would have to consider withdrawing the loan. This would of course not prevent you from applying again for a loan at a time when transfer can be effected without unnecessary delay."

The building society in fact withdrew the loan on 22nd August, 1969. It nevertheless seems probable from the evidence that had plaintiff taken steps to put the building society's mind at rest, this would not have happened. There was moreover always the possibility of applying again, as is evident from the letter of 17th June.

If one looks at the whole position as on 13th June, 1969 and in the light of the preceding events, then it appears on the one hand *inter alia* that plaintiff awaited transfer for more than a reasonable period and that he was entitled thereto, that there was always the possibiliy of the building society's withdrawing the loan; on the other hand plaintiff failed to take the trouble to place defendant *in mora* at an earlier stage thereby indemnifying himself against loss due to the delay, he failed to consult the building society, and he suddenly, without making further enquiries, stipulated a period making it very difficult, if not impossible, for defendant to perform. Despite the lengthy period of time since 11th February and the fact that despite the missing deed, matters could have been expedited, it nevertheless appears that the danger of the loan being withdrawn was not so imminent and unavoidable that the plaintiff was justified in stipulating a period on 13th June, allowing insufficient time for transfer. In these circumstances the period must be considered unreasonable and the notice of rescission invalid for the purposes of giving rise to a right of cancellation. In my view the appeal should be dismissed with costs.

POTGIETER, J.A., concurred in the judgment of JANSEN, J.A.

Appellant's Attorneys: *Couzyn, Hertzog and Horak,* Pretoria; *Naudé and Naudé,* Bloemfontein. Respondent's Attorneys: *Dyason, Douglas, Muller and Meyer,* Pretoria; *McIntyre and van der Post,* Bloemfontein.

Karbaum v. *Liquor Licencing Board, S.W.A.*

213 D

"The applicant is only a nominee of the actual principal, to wit, South-West Breweries Ltd., as revealed by the papers before the Board. This company is the holder of various other liquor licences in South-West Africa and in terms of the provisions of sec. 67 (2) of Ord. 2 of 1969 the licence applied for may not be granted."