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THE TREASURE CHEST v. TAMBUTI ENTERPRISES (PTY) LTD.

(APPELLATE DIVISION.)

1975. *March* 10, 27. VAN BLERK, J.A., HOLMES, J.A., MULLER, J.A., HOFMEYR, J.A., and VAN ZIJL, A.J.A.

Landlord and tenant.—Lease.—When lessee entitled to cancel the contract on account of inconvenience, namely leaks.—Substantial inconvenience suffered.—Lessor given the opportunity to repair leaks.—Failure to do so.—Lessee entitled to cancel the contract.

The lessee cannot cancel the lease because of "every inconvenience, however slight". The inconvenience must certainly be of a substantial and material nature.

Because the lessor of a shop had failed to repair certain leaks effectively, the lessee had repudiated the contract. The lessor had nevertheless successfully claimed arrear rent and damages in a Provincial Division. In an appeal, it appeared that the lessee had proved: (1) that he had had to endure material inconvenience as a result of leaks in the shop; (2) that the lessor had been told of those leaks on a number of occasions and had been afforded a reasonable opportunity to repair the defects in the property; and (3) that the lessor had had certain repairs done but that he had eventually not revealed the necessary willingness to repair the defects in the premises; and that he had also failed to do so.

Held, accordingly, that the lessee had had no option other than to cancel the contract, and that the appeal succeeded with costs (MULLER, J.A., dissenting).

The decision in the Transvaal Provincial Division in *Tambuti Enterprises (Pty.) Ltd.* v. *The Treasure Chest*, reversed.

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J. S. Rossouw, for the appellant: The decided cases relied on are: *Assignees, Kaiser Bros.* v. *Continental Caoutchouc*, 23 S.C. 736; *Grotius*,

3.9.12; *Voet,* 19.2.23; *Noble* v. *Lowenthal,* 1924 C.P.D. 78; *Bliden* v. *Carasov,* 1927 C.P.D. 2; *Hannay* v. *Parfitt,* 1927 T.P.D. 111; *Marcuse* v. *Cash Wholesalers (Pty.) Ltd.,* 1962 (1) S.A. 705. The approach formulated in the *Kaiser Bros.* case is unnecessarily and unrealistically strict and each case must be decided on its own facts. See Bodenstein, *Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch-Hollandsche Recht,* p. 161; De Wet and Yeats, *Die Suid-Afrikaanse Kontraktereg en Handelsreg,* 3rd ed., p. 265. See also *Salmon* v. *Dedlow,* 1912 T.P.D. 971; *Harlin Properties (Pty.) Ltd.* v. *Los Angeles Hotel (Pty.) Ltd.,* 1962 (3) S.A. 143; *Parker* v. *Beckett and Co. Ltd.,* 1911 T.P.D. 151. Levin, on behalf of respondent, was not entitled to wriggle himself out of the whole matter without more ado, by merely referring the various complaints to his architect, without determining whether the work had been properly performed. See *Hunter* v. *Cumnor Investments (Pty.) Ltd.,* 1952 (1) S.A. 735.

G. Josman, for the respondent: "....."

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Rossouw, in reply.

Cur. adv. vult.

Postea (March 27).

HOFMEYR, J.A.: The appellant was the defendant in the Court *a quo* and the respondent, the plaintiff. For convenience sake they will be referred to as the plaintiff and defendant. Plaintiff's claim was for arrear rent and damages on the ground of the defendant's alleged unlawful repudiation of the contract of lease between the parties. The Court *a quo* found for the plaintiff and granted him the amount of R2 561 with costs and 6 per cent interest on the arrear rental as from the various dates on which it became due. Plaintiff's attitude on appeal, as stated in his counsel's heads of argument, is not that he

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contests the amount of the judgment, on which the parties apparently agreed, but that he appeals against the finding that he failed to prove, on a balance of probabilities, that he was entitled to cancel the lease. There is no appeal against the finding of the Court *a quo* in regard to defendant's counterclaim. This claim for consequential damages was dismissed and he was only granted R87,50, in respect of damage to furniture, caused by the leaks, with costs on the appropriate magistrates' courts' scale.

The lease concerned was entered into in writing on 25 November 1970 and would have extended over a period of five years as from 1 February 1971 with an option of renewal for a further period of four years and 11 months. The lease was in respect of shop No. 7 in a building at the corner of Steen and Kroep Streets, Rustenburg, belonging to plaintiff. The defendant is a partnership between Mr. and Mrs. Van Breda who, to the knowledge of

plaintiff, carried on business at the said shop under the business name, the Treasure Chest, in antique furniture. The plaintiff is a private company, herein represented by its managing director, Mr. Jack Levin of Johannesburg.

Defendant's allegation is that the lease was cancelled because the roof of the shop was never impermeable and it consequently leaked whenever it rained. In these circumstances it is alleged that the plaintiff failed to deliver the premises and keep them in a suitable condition for the purposes for which they were let.

This allegation must be considered with proper consideration of the fact that the rainy season at Rustenburg falls within the summer months. Mr. Malan, a chemist whose shop adjoins that of defendant, and the defendant himself testified that the latter had moved in at about the middle of February 1971. The Judge *a quo* accepted, without deciding it, that this statement was correct, although Levin declared that defendant had moved in during December 1970. This issue is not of great importance because it was in any event proved that defendant occupied shop No. 7 during Rustenburg's rainy season.

In the light hereof it is of importance to observe that according to defendant it did not rain during the first few months of his occupation of the shop. According to the said witness, Malan, called by the defendant, it did rain during the period concerned and the shop in fact leaked. According to this witness workmen then also arrived to make his shop as well as shop No. 7 leak-proof.

This evidence was confirmed by Mr. Van Zyl, a building contractor, who operated through a company, Zybil Construction (O.F.S.) (Pty.) Ltd., and who erected the said building. He testified that originally there had been problems in regard to the leak-proofing of the shops in the building including shop No. 7. The leak-proofing of the building was done by sub-contractors, known as Marley Tiles or Marley (Pty.) Ltd., Klerksdorp. Van Zyl and the said sub-contractors solved the problems to a certain extent, until the coming of the winter months when it did not rain. According to Van Zyl the problems arose again towards the end of 1971.

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As regards this period it is, therefore, probable that the defendant was mistaken; and that it in fact rained; that his shop leaked and that there was originally work done to his shop to make it leak-proof. No suggestion is made by the plaintiff why defendant gave this incorrect evidence. The only possible benefit to him could perhaps have been his evading of questions in regard to his failure to make more strenuous complaints to the plaintiff.

Mr. Levin gave evidence to the same effect and in this regard it must be mentioned that the building was in any case only eventually completed in June/July 1972.

Mr. *Josman,* for the plaintiff, directed attention to the fact, that there is no indication that during the whole of 1971 the defendant in any way threatened to cancel the lease or even asked for a reduction of rent on the ground of an

allegation that plaintiff did not make or keep the building leak-proof. There was, e.g. no complaint about damage as a result of leaks in his letter of 8 October 1971 to plaintiff, under cover of which he forwarded arrear rentals up to date and the water levies in advance up to the end of November. During the said period he did not even place the plaintiff under the obligation to eliminate the leaks within a fixed period.

Mr. *Josman,* however, had to concede that there was no contractual obligation on the defendant to take such steps before he could cancel the lease. According to Mr. *Josman* he (Mr. *Josman)* could only use this omission by the defendant as confirmation of his submission that the shop's defects were not material or substantial.

It can be accepted that the position remained substantially the same until about 11 January 1972 when the defendant wrote the following letter to Levin: "....."

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There is the following postscript in handwriting at the bottom of the letter: "Kindest Regards."

On behalf of plaintiff great reliance was placed on this letter. One would, so it was further argued on behalf of plaintiff, at least have expected that he would have supported his plea for a reduction of rent by submitting that he was entitled thereto on account of the damage caused by the leaks, if that was indeed so.

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In his judgment the Judge *a quo* refers to this letter merely to indicate that up to that stage the defendant had not placed the plaintiff under the obligation to repair the leaks within a fixed period, coupled with a threat to cancel the lease in the event of his failure to do so. He also infers from the letter that at that time the defendant did not ask for a reduction of the rent as a result of the leaks. It is, however, almost common cause that the relationship between the parties until about the end of 1971 was still friendly and that reports by the defendant to plaintiff about leaks were not accompanied by threats. Whether it is expected of a lessee to make such statements to a lessor is discussed later. I do not think that too much should be made of this letter. Even plaintiff admits that prior to this letter, even during November/December 1971 leaks in the shop had been reported to him by the defendant, and that it had then already been indicated to him that he was expected to have the leaks repaired. There was at that stage, according to plaintiff, however, no "energetic complaint".

The friction between the parties came to a head during January 1972. It is not denied by the plaintiff that there were in fact serious and numerous leaks. The leaks mainly affected the front third of the shop. During the rainy season and especially in the evenings and over weekends the defendant had to move the furniture to the rear of the shop. Thus he was bereft of the advertising pull of his properly constructed shop window. This state of

affairs was also not seriously denied and these statements by defendant were confirmed by both Malan and Van Zyl. Lingering droplets, allegedly, oozed from the false ceiling for a couple of days after the rain. It also leaked from unpredictable places.

The conversation which gave rise to the attorney's letter of 26 January 1972 was apparently prompted by serious leaks. According to defendant there was a specific complaint about a chaise-longue which he could not sell as it had become sopping wet as a result of the leaks. The parties had a violent quarrel over the telephone. The defendant admits that he became excited and rebuked the plaintiff. It is more or less common cause that Levin said that he was "sick and tired" of hearing about leaks. Levin, however, denied that he had said, as is alleged, that the defendant could do what he thought fit. The Judge *a quo* made no finding in this regard. In any case the defendant did not understand this statement as an invitation to cancel the contract. Whatever the truth may be about this conflict in the evidence, it is clear that the defendant was upset and he felt helpless against the plaintiff. The plaintiff already failed to react to his letter of 11 January 1972, aforesaid, and he apparently also did not inform the defendant during the conversation just mentioned, as I shall presently indicate, that he was already busy attending to the defective roofing. Levin's explanation why he did not reply to the letter of 11 January 1972 was that his relations with the defendant had then already deteriorated as a result of negative occurences in regard to their transactions with furniture and that he also had the feeling that defendant was anxious to cancel the lease in order, so Levin thought, to obtain a better and cheaper shop in a building erected by Saambou. Levin also had numerous difficulties with other lessees in his building. To under-

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stand this attitude of the plaintiff does not mean that he should be excused, because it must undoubtedly have had an effect on the behaviour of the defendant.

It was also as a result of this conversation that defendant gave instructions to his attorney to write the letter dated 26 January 1972. The relevant parts of this letter read as follows: "....."

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On behalf of plaintiff the fact was again stressed that plaintiff had not previously been given a fixed period in which to perform nor had he been informed that in the event of failure, the lease would be cancelled and a reduction of rent had not even been demanded on account of the leaks. This behaviour by the defendant, as I shall later indicate, should not be over-accentuated.

Although it is also clear from the record that the allegation that the rent was withheld on account of the shop's defects was devoid of all truth, it was a senseless allegation which both parties must have identified as such and nobody was misled thereby.

As already mentioned, the defendant was apparently unaware of any steps taken in the meantime to have the defects repaired. These steps are now mentioned.

Plaintiff's architect, Mr. Ted Saffer, had already written a letter to Zybil Construction (O.F.S.) (Pty.) Ltd. on 19 January 1972 which reads as follows:

[The honourable Judge dealt with the contents of the letter and disposed of other evidence. He continued as follows].

The Judge *a quo* formulated two questions, viz., firstly, whether the inconvenience and loss suffered by defendant were of such a nature that he afterwards became entitled to cancel the lease in view of the failure to repair the roof properly; and, secondly, if the answer to the first question is in the affirmative, whether the defendant gave plaintiff sufficient time to repair the defects in regard to waterproofing, after he had given plaintiff a fixed period to do so.

In passing I mention at this stage, that, in my opinion, plaintiff's counsel correctly conceded, as I have mentioned above, that there was no contractual duty on the defendant to bind the plaintiff by a fixed period or to warn him that in default of effective repair of the roof a reduction of rent would be demanded. It was accepted by the Court and the parties, at least as far as the

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written contract was concerned, that only clause 13 and no other clause, was relevant to the decision of the case.

Clause 13 reads as follows: "....."

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At the hearing of the appeal none of the parties relied on the second half of this clause. The provision has in any case nothing to do with the defendant's right to cancel, but only with his right to claim possible damage to his property.

The first part of the clause contains in my opinion, only a facet of plaintiff's common law obligations under the lease and places him under no greater obligation than he already has under the common law.

There was also no tacit obligation on defendant to place the plaintiff under the obligation of a fixed period. The reason for this is that he had then already failed to comply with his duty to keep the premises in order. (See Wille, *Landlord and Tenant in South Africa*, 5th ed., pp. 161, 162 and the authorities quoted there). The position is then that the lessee should have given him a reasonable opportunity to repair any defects of which he was aware. What is a reasonable time, will depend on the facts of each case.

The Judge *a quo* saw the legal position as follows: "....."

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The objection made on behalf of the appellant against this formulation of the legal position, referred especially to the *dictum*—

"practically useless for the purpose for which he had hired them".

The words are derived from the case of *Assignees, Kaiser Bros.* v. *Continental Caoutchouc Co.*, 23 S.C. 736. Mr. *Rossouw* submitted that the approach in this case is too strict. Reference was made in this judgment to *D.*19.2.25.2; *Grotius*, 3.19.12 and *Voet*, 19.2.23 as well as Van Leeuwen, *Censura Forensis*, 1.4.22.17. The authority of *Voet* was many years later confirmed with approval in part V, p. 39 of Van der Keessel's *Voorlesinge oor die Hedendaagse Reg na Aanleiding van De Groot se "Inleiding tot de Hollandse Rechtsgeleerdheyd" (Van Warmelo, Coertze en Gonin*, Gonin's translation). It is now proper for this Court to apply the rule formulated by *Voet*. In passing I must mention that *Wille, loc. cit.*, at p. 158 after originally stating the rule only as "substantially unfit" for the purposes of the lease, with reference to *D.*19.2.25.2 (translation of *Monro)* declares that the premises must be "in a thoroughly bad state" before the lease can be cancelled, and with reference to *Hollandsche Consultation*, No. 312 that the premises must "threaten to go to ruin through decay", i.e. the lessee "must fear ruin through the dilapidation of the house".

These are apparently only practical examples of cases when the lessee may cancel the lease. The requirement of *nimium corruptas* in the particular passage of the *Digesta* refers specifically to the windows and doors and not

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to the premises as a whole. Other examples are also mentioned in the old authorities which need not necessarily be the fault of the lessor, for example when a neighbour closes in the leased premises by building so that insufficient light is available to it; when the enemy or pestilence makes the occupation of the premises difficult or when ghosts haunt the leased premises.

It is clear that the lessee, as is declared in the case of *Assignees, Kaiser Bros., supra* at p. 741, cannot cancel the lease on account of "every inconvenience, however slight". The inconvenience must certainly be substantial and material. Such a requirement is in accordance with the general principles which are applicable to the cancellation of contracts.

The phrase "practically useless" is certainly ambiguous. It can apparently mean either "useless in a practical manner" (i.e. in an absolute sense useless) or "virtually useless" or "almost useless". If thereby is understood "almost" or "virtually useless" there can really be no objection to it. It will then depend in each case on how the trier of the facts of the case applies the principle.

In the consideration of the present appeal the following considerations apply:

(1) The Judge *a quo* formulated his finding as follows: "....."

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The test which was, therefore, applied was stricter than was legally required—even more strict than the test formulated in the *Assignees,*

Kaiser Bros. case, and, in my opinion, it should not have been applied.

(2) Although the Judge *a quo* found that the defendant probably exaggerated the position, he also expressed the opinion that Levin understressed the effect of the leaks. Notwithstanding a measure of scepticism on the part of the Judge *a quo* on the ground that the defendant's trade figures actually improved during some of the rainy months, I am of the opinion that it was substantially and correctly accepted in the judgment that the defendant suffered material inconvenience as a result of the leaks. The defendant, supported to a certain extent by the witnesses Malan and Van Zyl, complained particularly about the fact that during the day, when it rained, he had to move his furniture to the rear of the shop, and during the night and over weekends he was also constrained to move the furniture, because he was scared that it could rain. Thus he was bereft of the advertising pull of his shop window. I think that it must be accepted that the defendant was materially denied the advantageous use of the shop. Unless his right to cancel the lease is acknowledged, he would be bound until 1976 by a lease in respect of defective and ineffective premises, unless the defects were repaired before then.

(3) The lessor was informed on an unspecified number of occasions of the leaks in the shop. It is admitted that the lessee reported the leaks in the hope that they would be repaired. One would not expect the lessee to keep notes of these complaints which were apparently

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mostly informal and not "energetic complaints". In the attorney's letter of 26 January 1972 reference is also made to at least three occasions on which the lessee approached the lessor about the leaks during the period November 1971 to the date of the letter. To accept that there were only three complaints in two and a half months, and to draw an unfavourable inference against the defendant from that, is, in my opinion, not justified. It cannot be denied that the lessor was well aware that the defendant's shop was afflicted by serious leaks.

(4) The further question is whether plaintiff was allowed a reasonable opportunity to repair the leaks. It is indeed true that on 2 February 1972 the plaintiff received a favourable report in which the architect requested that all further complaints, if any, should be referred to him. This report, as already mentioned, together with the report of Van Zyl, the builder, was sent to defendant on 3 February 1972.

In this regard it is important to note that on 10 February 1972, already, the defendant informed the plaintiff that according to his personal observation the repairs had not been satisfactorily performed. This letter was ignored by the plaintiff.

Afterwards it appeared from a letter from the builder, Van Zyl, dated 15 February 1972, that the repairs had not been completed at all. This was done, notwithstanding the report by Van Zyl which the

plaintiff, under cover of his letter of 3 February 1972, forwarded to defendant, and which letter could certainly not have had a negative content. The plaintiff should have inferred from this that there was something irregular about the reports which he had received from his technical advisers.

He, however, did nothing about it. He ordered no further investigation by his architect and did nothing further to become acquainted with the true state of affairs. The answer to the question posed will presently appear at the end of para. (5).

(5) Was the defendant in these circumstances entitled to cancel the lease in his attorney's letter of 24 February? The point is raised that defendant offered to enter into a new lease at a reduced rental and the inference is drawn that the premises could not have been entirely useless for the purposes for which they were leased. It must, however, be remembered that the offer was subject to the condition that the roof was finally and properly repaired. This offer practically amounted to a new opportunity afforded the lessor to repair the roof. As regards the rental offered, the lessor could at least have made a counter-offer if he was desirous to save the situation. The lessor was, in my opinion, subject to the remarks in the next paragraph, given sufficient opportunity to repair the defects to the shop.

(6) The last question is: did the plaintiff show the required willingness to have the repairs effected? It must be remembered that the law places this duty on the lessor. As already indicated earlier, it does not assist

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the lessor if his behaviour is understandable in view of all types of other difficulties which he encountered in regard to other premises or which were created by various causes. If he fails without lawful reason to exhibit a willingness to render the premises suitable for the purpose for which he let it, he has repudiated the contract.

During the conversation of 26 January already, the plaintiff adopted an unfair attitude by not taking the defendant into his confidence about the attempts which were then being made to repair the property. It speaks for itself that the attorney's letter of 26 January 1972 would not have been written if Levin had informed the defendant of what was happening. The inference is further that defendant had no hope of reaching anything by negotiation.

The abrupt letter of 3 February 1972 together with the doubt about the effectiveness of the repairs created by Van Breda's personal inspection, further undermined the defendant's confidence in plaintiff's *bona fides*. When Van Breda's letter of 10 February caused no reaction and the rains of 20 and 24 February resulted in, as Van Breda expected, further leaks, the defendant apparently saw no other way out of the difficulty than to have the letter of cancellation of 24 February 1972 written.

It would perhaps be unfair, as submitted on behalf of plaintiff, to judge his willingness to have the necessary repairs done, only on his reaction to the

letter of 10 February. The short period between this letter and the letter of cancellation of 24 February could perhaps be regarded as too short for this purpose. The real frame of mind of a party, here the plaintiff, as revealed by his agent, can, however, be inferred by his subsequent behaviour. It remains a fact that the plaintiff never reacted to defendant's letter of 10 February 1972 and that the letter of cancellation of 24 February 1972 containing the offer also remained unanswered even in the first letter, that of 5 May 1972 from plaintiff's attorneys, which the defendant received thereafter. The so-called repudiation by the defendant was not accepted by the plaintiff and in the letter it was in any case not alleged that plaintiff had insufficient opportunity to remedy the defects or that plaintiff was then still prepared to effect the repairs. On the contrary the attitude was adopted that: "....."

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The letter continues as follows: "....."

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Clause 17 was not proved before the Court and plaintiff did not rely on it during the hearing. It must further be mentioned that in a letter from plaintiff's attorneys, dated 13 June 1972, an attempt was made to indicate that defendant had misunderstood the passage just quoted and that the plaintiff only meant to say that the objections were too technical to warrant a discussion by him.

The conclusion is, in my opinion, clear that eventually the plaintiff did not exhibit the required willingness to remedy the defects to the premises; and

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also did not do it. The defendant had no alternative but to cancel the contract.

In all these circumstances the appeal succeeds with costs and the order in favour of plaintiff in the Court *a quo* is altered by deleting the existing order and substituting it by an order for plaintiff to the amount of R650,71, being the balance of the arrear rent.

As regards costs of the trial:

(i) Plaintiff succeeded with his claim for arrear rent to a total amount of R650,71; except for R100,71 the total amount was paid into Court. In this Court it was not an issue. Costs according to the magistrates' courts' scale would normally be suitable.

(ii) The defendant succeeded with his counterclaim for the amount of R87,50 with costs on the magistrates' courts' scale. In this Court it was not an issue.

(iii) Defendant's success in the appeal means that he succeeded in regard to the main issue, viz. whether he was entitled to cancel the lease on account of the leaking roof. I think it is fair to say that almost all the

evidence in regard to the claim in convention was in connection with this important issue.

What is now necessary is an order in regard to costs in the Court *a quo* which will be fair to both sides and to give to each what is due to him, taking into account (i), (ii) and (ii), *supra*.

With this object in view and taking into account the record as a whole, I think it will be proper to make one order only, viz., that defendant is entitled to 80 per cent of his costs in the Court *a quo*, according to the Supreme Court scale. The order will include the costs which were granted in respect of the counterclaim. If the latter costs have already been paid by plaintiff, the amount now granted, should be reduced accordingly.

It, therefore, amounts to this: that the amount of costs granted to the defendant in respect of the claim in convention as well as in respect of the counterclaim amounts to 80 per cent of his total costs on the Supreme Court scale.

It is ordered accordingly.

VAN BLERK, J.A., HOLMES, J.A. and VAN ZYL, A.J.A., concurred with HOFMEYR, J.A.

HOLMES, J.A.: "....."

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MULLER, J.A.: In my opinion, the appeal should be dismissed with costs. The facts of the case are given in the judgment of my Brother, HOFMEYR, J.A., and as my judgment is a minority judgment, I shall only briefly indicate why I do not agree with the judgment of the majority. I refer to the parties as Levin (the lessor) and Van Breda (the lessee).

Van Breda moved into the leased premises, a shop, in February 1971 when the building was not entirely completed. According to the witness Malan there were then problems in connection with rainwater leaking from the roof. The leaks were repaired and during the winter of 1971 there were no problems. When the rainy season came at the end of 1971 there were again problems with leaks. How serious the leaks in Van Breda's shop were, is difficult to determine. I agree with the learned Judge *a quo* that it would appear as if Van Breda exaggerated the seriousness thereof, while Levin, on the other hand described it as of less importance than it really was. For the purposes of this judgment I shall accept that the leaks were of such a nature that Van Breda would have been entitled to cancel the lease should Levin have failed to repair the defects. The question is then whether Levin was unwilling to remedy the defects or failed to do it within a reasonable time. And, as far as this is concerned, the *onus* of proof was on Van Breda.

It is common cause that Van Breda at the end of 1971 and at the beginning of 1972 on more than one occasion reported to Levin that the roof was leaking. It would appear, however, that he could not have complained seriously, because in his letter of 11 January 1972, in which he asked for a reduction of rent, no mention was made of the problems with the leaks.

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It was after this letter had been written by Van Breda that he had the conversation with Levin over the telephone and he then complained that it was leaking in his shop and that his possessions had been damaged by water. When this conversation took place, we do not know. What we do know, is that the architect, Ted Saffer, wrote to Van Zyl, the builder, on 19 January 1972.

At that stage the architect and Van Zyl's foreman had already inspected the roof and in his letter he pointed out defects in the waterproofing of the roof which had to be rectified. As a result of this letter the builder instructed the sub-contractor, who was responsible for the waterproofing of the building, to do the necessary repairs. Repairs were made. It is not clear precisely when the work was done. It must indeed have been before 1 February 1972.

In regard to the work done, Oosthuizen of Marley Tiles (the sub-contractors) testified that the waterproofing had been properly checked and rectified and that a test had been executed in order to determine whether there were still any leaks. The test which had been executed was to place the roof of the building under water. Oosthuizen explained that rainwater which falls on the roof is not led away by gutters, but by steel pipes which are built into the concrete pillars or columns of the building. These pipes were closed and sand was dumped on the roof so that a dam was formed. This was filled with water with a garden hose to a depth of six inches. The water was left on the roof for several hours, but there were no leaks. Thereafter the downpipes were opened and the water flowed down. It was then observed that water was oozing from the concrete pillars. Oosthuizen was of opinion that the oozing was caused by the large quantity of water on the roof which suddenly flowed down the downpipes. He did not expect ordinary rainwater to cause such oozing.

After the work had been completed, the architect on 2 February 1972 reported in writing to Levin that the work had been properly performed and that no further problems were expected. Levin sent a copy of the architect's letter to Van Breda, together with a copy of a letter which he had received from the builder, Van Zyl. The last-mentioned letter is not available, but it can be accepted with justification that Van Zyl was also satisfied with the work, otherwise Levin would not have forwarded a copy of his letter to Van Breda. Here I must mention that on 26 January 1972 and indeed before the work was completed, Van Breda sent a letter to Levin through his attorneys. In that it was stated that Van Breda had on at least three occasions complained about the leaks, that the leaks were serious and that unless they were remedied within 14 days Van Breda would cancel the lease. In this letter it was also said that rental had in the past been retained because the leaks were such that the shop could not be properly used. That was a lie. The rent was in arrear because Van Breda could not pay it.

On 10 February 1972 Van Breda's attorneys wrote to Levin that Van Breda himself had inspected the repairs and that, in his opinion, they were not properly executed. This letter concludes as follows: "....."

Thereafter a further letter dated 24 February 1972 from Van Breda's attorney followed in which it was stated that as a result of rain on 20 and 24 February 1972 leaks again occurred and that Van Breda was cancelling the lease.

On appeal before us it was argued that Levin's behaviour was not reasonable. He, according to counsel, failed to effect the repairs to the roof timeously and, in any case, the roof was not made waterproof.

I cannot agree with this submission. Shortly after Van Breda complained about the leaks in January 1972 the architect, and through him the builder, was instructed to do the necessary work and that was completed before the end of the month. According to Oosthuizen the work was properly done and the expectation of both Oosthuizen and the architect, who inspected the work, was that there would be no further problems.

Counsel, however, referred to the letter of 10 February 1972 which Levin received from Van Breda's attorneys, and to which I have already referred and he argued that Levin should then immediately again have had the roof inspected. I cannot agree with that argument. On that date Levin had the reports from his architect and builder to which I have already referred. There would have been no reason why he should have thought that Van Breda's opinion (as a layman) about the waterproofing of the roof would have been better than that of the architect and builder (who were experts).

In the same connection counsel also referred to a letter from the builder, Van Zyl, dated 15 February 1972 to Levin in which he was informed of the oozing of water at the columns in which the downpipes ran. According to counsel Levin should immediately have had that matter investigated. The said letter must have been dispatched from Rustenburg on or after 15 February 1972 to Levin in Johannesburg. There is no indication that it reached Levin before there was again a leakage on 20 February 1972. In any case, it appears from Van Zyl's evidence, that the oozing was so slight that it only caused some dampness in the building.

It was also argued that Levin should have kept Van Breda fully informed of the fact that repairs were in fact being done and also of the nature thereof. I cannot see why he should have done that. As soon as work had been completed he forwarded the reports of the architect and builder to Van Breda. In any case, Van Breda could not have been unaware of the repairs. Not only the architect, but also the builder, Van Zyl and Oosthuizen of Marley Tiles inspected the shop and Oosthuizen testified that he had discussed the leaks with Mrs. Van Breda, who was a partner in the business of Van Breda.

A further submission was that Levin erroneously adopted the attitude that the leaks were not his responsibility, but that of the architect and builder. For this submission reliance was placed on a passage in Levin's evidence as well as on a letter from Levin's attorneys dated 5 May 1972. In my opinion neither Levin's evidence nor the said letter (if it is read together with a subsequent letter from Levin's attorneys) affords any justification for such a submission. All that Levin wanted to convey was that he as layman had to depend on the advice of his architect and builder.

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In *Salmon* v. *Dedlow,* 1912 T.P.D. 971, a case about the right of a lessee to claim compensation in respect of damage caused to his property by leaks, WESSELS, J., said the following: "....."

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A lessor cannot of course escape his obligations by appointing another person to do the work *(Hunter* v. *Cumnor Investments,* 1952 (1) S.A. 735 (C) at pp. 742-3). If the architect and builder did not take care that the repairs were properly done Levin would not have satisfied his contractual obligations. But there is the evidence of Van Zyl and Oosthuizen that the work was properly performed, and that it was indeed also properly tested. Against that there is only the evidence of Van Breda (a layman) that he was not satisfied with the work and that he expected further leaks.

How it occurred that after a few weeks on 20 and 24 February there were again leaks was not revealed at the trial and we do not know what the cause of that was. I would have expected that, tested against the behaviour of a reasonable person, Van Breda would have afforded Levin a further opportunity to determine the cause of the new leaks. That he did not do. He cancelled the lease summarily.

In my opinion, Van Breda did not satisfy the *onus* to prove that Levin failed to do the necessary repairs or that he acted unreasonably.

For the said reasons I would have dismissed the appeal.

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