IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.1958/03

In the matter between:

G.S. FRANCO INVESTMENT (PTY) LTD

VS

CARR CORP INVESTMENT (PTY) LTD

T/A CLEOPATRA'S

CORAM SHABANGU A J

FOR APPLICANT MR. P. FLYNN

FOR RESPONDENT MR. S. MDLADLA

JUDGMENT

21st OCTOBER, 2003

The applicant has instituted proceedings before this court by way of application brought ex parte for relief inter alia perfecting the landlord's hypothec, claiming cancellation of the lease agreement and ejectment of the respondent from the leased premises. The applicant appeared to further claim an amount E90,500-00 as arrear rentals.

The application which was brought ex parte and on a certificate of urgency was heard by the Acting Chief Justice who granted an order in terms of prayer one to four of the notice of application dated 11th August, 2003. The matter was apparently postponed to 22nd August, 2003. On the 22nd August, 2003 the matter was postponed by Justice

Matsebula with an order being made that the respondent should file "documents" if any by 26th August, 2003." There is also mention in the order of 22nd August, 2003 of an extension of the rule. I understand that the requirement that respondent is "to file documents if any" refers to opposing papers, if any, the respondent would consider appropriate to file. The matter came before me on 29th August, 2003 on which date it was postponed by agreement of the parties to 12th September, 2003 on which date the matter was argued. On that date the applicant sought an order for confirmation of the order granted by the Chief Justice in terms of prayer three of the notice of application, being for confirmation of the attachment of the movables which were upon the leased premises. The applicant also sought an order for the -

"(a) payment of rentals and other charges in the amount of E90,500-00;

(b) cancellation of the lease agreement;

(c) ejectment of the respondent and all those holding through or under it from the premises;

(d) interest on the sum of E90,500-00 at the rate of nine percent annum a tempore morae:

(e) costs of suit."

I will proceed to first consider whether the applicant is entitled to cancellation and ejectment. Mr. Flynn's

submission was that the application was entitled to cancel the lease agreement and to eject the respondent upon the mere basis that the respondent had defaulted in the payment of his rental. In other words Mr. Flynn did no seek at this stage of his submissions to rely on some kind of cancellation clause, until it was intimated to him that non-payment of rental by the tenant does not necessarily in our common law entitle the landlord to cancel the lease and eject the tenant. Indeed the proposition that a landlord is not entitled to cancel the lease and eject the tenant because the latter has defaulted in his obligations to pay rent was described by the Appellate Division of the Supreme Court of South Africa, as being trite, in SPIES V LOMBARD 1950(3) SA AD at 487 quoted with approval by J.T. R. GIBSON, in his SOUTH AFRICAN MERCANTILE AND COMPANY LAW, 1977 4th ED. at page 192 states -

"Where the tenant is in breach of his duty to pay the rent the landlord cannot cancel the contract for the breach is not regarded as material

NGWENYA V. HINDLEY 1950(1) SA (C) 846. 'It is trite law that nonpayment of rent is not per se good cause for cancellation' SPIES V LOMBARD 1950(3) SA(AD) at 487."

After quoting the abovementioned statement by the Appellate Division in SPIES V LOMBARD supra the learned author continues to describe the position of the landlord and his remedies as follows:

"he [the landlord] may, of course, sue for the rent (van der Linden 1:15.12.). But the tenant remains entitled to occupation in terms of the lease. And the fact that he can sue for the rent may be cold comfort to the landlord. 'It is true that the landlord can always sue for his rent, but lessees are not infrequently men of straw.' JOOSUB LTD V ISMAEL 1953(2) SA AD at 753. In order to avoid this situation, it is common for landlords to insist on a 'forfeiture clause' as a term of the lease. The parties, in other words, expressly agree that the landlord will be entitled to cancel the lease and eject the tenant if the latter breaches certain specified terms, one of which is usually the payment of the rent on due date."

See GIBSON J. T. R. SA MERCANTILE AND COMPANY LAW 4th ED (1977) at 193.

Similarly W.E. COOPER LANDLORD AND TENANT 2nd ED. at page 167 states "At common law a lessee's mere failure to pay rent did not, in the absence of a lex commissoria, entitle the lessor to cancel the lease unless the lessee was at least two years in arrear with his rent. "

Further support for this legal proposition is found in WILLIE & MILLIN'S MERCANTILE LAW OF SOUTH AFRICA th edition at page 250 wherein the learned authors contrast the position of the statutory tenant in South Africa from that of the common law tenant as follows:

"If the tenant fails to pay the rent when due the all-important question arises whether the landlord is entitled to claim the cancellation of the lease and the ejectment of the tenant. The answer to this question depends on the nature of the lease and on whether the lease does or does not contain what is known as a forfeiture clause. A statutory tenant under the Rents Act, as

stated earlier in detail, is liable to be ejected if he fails to pay, within seven days of the due date (or a further seven days at the discretion of the court), the rent agreed upon with the landlord or the rent prescribed by the Act.... As regards other leases, i.e. leases under the common law, in the absence of a forfeiture clause, the landlord is only entitled to cancel the lease if the tenant is in arrear with his rent for two years or more."

It is clear therefore that the textbook writers and case law authority, is to the effect that non-payment of rent per se on the part of the tenant does not entitle the landlord to cancel the lease and eject the tenant. Furthermore for a collection of the old Roman Dutch authorities on the subject (see W.E. COOPER SUPRA at page 167 footnote 94 and GOLDBERG V BUYTENDAG BOERDARY BELEGGINGS 1980(4)

SA 775 A at 786E. This common law rule was the subject of criticism by WOUTER DE VOS IN 1962 ACTA JURIDICA 167 who pointed out that the 'common law rule in the analogous case of sale was similar" but that since the law has changed, in this branch of the law, to allow the seller to give notice of rescission and on subsequent non-payment to cancel the contract, the same position should apply in the case of leases. PROFESSOR DE WOS' suggestion appears to have been accepted by the APPELLATE DIVISION OF THE SOUTH AFRICAN SUPREME COURT IN GOLDBERG V. BUYTENDAG BOERDARY BELEGGINGS 1980(4) SA 775 (A) at 786 discussed in the seventh edition of Gibson's SA MERCANTILE AND COMPANY LAW at page 189 where on the basis of the appellate division's decision in Goldberg's case supra they state

"The present position, therefore, is that where the tenant is in breach of his duty to pay the rent, the landlord may demand payment and give notice that if payment is not made within a reasonable time he will cancel the contract. Failure by the tenant to respond to the demand and pay the rent will entitle the landlord do cancel."

See J. T. R. Gibson, supra 7th edition at page 189.

It is important to note that even in the new South African position following from the Goldberg case supra the non-payment of the rental by the tenant per se does not entitle the landlord to cancel the lease and eject the tenant. The landlord is still

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required to "demand payment and give notice that if payment is not made within a reasonable time specified in the notice he will cancel" the lease. The difference in the position ushered in by the SOUTH AFRICAN APPELLATE DIVISION in the GOLDBERG'S case is that the landlord is no longer required to stipulate by way of a cancellation clause for a right to cancel, once a demand and notice to remedy the breach has not been complied with by the tenant. This right for the landlord would on the basis of the Goldberg case in South Africa be implied ex lege into a contract of landlord and tenant.

Secondly it is clear that the APPELLATE DIVISION OF THE SUPREME COURT IN SOUTH AFRICA departed from the Roman Dutch common law position following the criticism of the common law rule by Professor Wouter de Vos. This court does not have the power to depart from the Roman-Dutch common law, even if the court considers that the contemporary appropriateness of the Roman-Dutch law rule is questionable. Once the appropriateness of a Roman-Dutch law rule has become doubtful it is a matter for the legislature to intervene by passing appropriate legislation to address the situation. This position is further supported by our reception statute which takes a different form from the manner the Roman-Dutch law was received in South Africa. Our statute which has been cited as being responsible for receiving the Roman-Dutch law into Swaziland provides, in Section 3 of the GENERAL ADMINISTRATION ACT, 1905.

"The Roman-Dutch common law, save in so far as the same has been heretofore or may from time to time hereafter be modified by statute, shall be law in Swaziland."

From the above section it seems to me that the Roman-Dutch common law may only be modified statute and that unless so modified the court is bound to apply it without any amendments by the said court. In any event even if the court could modify the common law position there does not appear to be any justification for that because it is always open to the lessor to stipulate for a cancellation clause.

On the basis of the aforegoing Mr. Flynn's submission that the applicant herein is entitled to claim cancellation of the lease and ejectment of the tenant merely on the

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basis that that the tenant has breached its duty in terms of the lease to pay the rentals, cannot succeed.

The next question is whether the applicant is entitled to cancellation of the lease and ejectment of the

respondent on the basis of a cancellation clause. The applicant would be entitled to such cancellation and ejectment of the respondent if indeed there was infact a cancellation clause in the lease, that the cancellation clause has been properly pleaded and that the landlord has complied with all the requirements of the said cancellation clause before he claimed cancellation and ejectment of the respondent from the premises. It is only under this circumstances that the applicant would be in a position to place a proper reliance on the cancellation clause.

The application pleaded the right to cancel or the cancellation clause in paragraph 8.9 of its founding affidavit as follows:

"8.9. If the tenant was in breach of any of the terms of the agreement, in particular the term relating to payment of rent and remanded (sic) in such breach seven days after due date, and if the tenant failed to remedy such breach fourteen days after written notice to stop the breach, then the lease agreement would be automatically cancelled. That would be without prejudice to the landlord's rights to recover all or any arrears or rent and damages for breach of contract.

8.9.1. The landlord agreed to transfer to the tenant the restaurant and liquor licences for the premises leased. Similarly, the tenant undertook to take all steps that were necessary for the renewals necessary for the duration for the lease.

8.9.2. The costs of drawing up the lease agreement including stamp duty were to be paid by the tenant."

Paragraphs 8.9.1. and 8.9.2 of the applicant's is not necessarily connected with the cancellation clause even though the paragraphs have significantly been pleaded together in the same main paragraph with the cancellation clause. Even though paragraph 8.9 of the founding affidavit does not attempt to identify the clause in the written lease containing what is pleaded in paragraph 8.9 it would appear that such

clause is contained in paragraph sixteen of the lease agreement, which is annexed to the founding affidavit. Clause sixteen of the lease provides -

"Should the tenant be in breach of any of the terms of this agreement, in particular the term relating to payment of rent and remain in such breach 7 (seven) days after due date, and should the tenant fail to remedy any breach of the provisions of this agreement for 14 (fourteen) days after written notice to stop the breach shall have been delivered to the tenant, this lease agreement from that date be automatically cancelled and the landlord or his agents shall have the right to enter upon and repossess the leased property from any person who may be in occupation, but without prejudice to the landlord's right to recover all or any arrears or rent and damages for breach of contract."

Even though clause sixteen of the lease may raise some difficulties of interpretation as a result of the wording used therein, it appears to me that what is stipulated for is not only a right on the part of the landlord to claim cancellation and claim ejectment in the event of a breach by non-payment of rental on the part of the tenant, but the clause further provides that the exercise of any remedies as a result of a breach by the tenant of any of the terms of the lease shall follow notice given to the tenant requiring him to remedy the said breach within 14 (fourteen) days after delivery of the said written notice to the tenant. A further requirement in terms of clause sixteen, which must be satisfied before the right to claim any of the remedies available to the lessee, is that the notice calling upon the tenant to rectify the breach cannot be given before the expiry of seven days after the date upon which performance is due. For example, if the breach involved the non-payment of rent which was due on the 8th of each month the landlord would have to wait a further seven days from the eighth day of the month before giving the 14 (fourteen) days notice requiring the tenant to rectify the breach by paying the rental. This may mean that the notice of 12th June, 2003 could not properly be given in respect of rental which may have accrued for the month of June, 2003, because even if one assumes the rental payable on the 8th of each month in terms of the lease would be rental which had accrued to the landlord in respect of the current month, which month would be June, 2003 herein, seven days would not have elapsed from 8th June 2003 to 12th June, 2003.

This would be the case if the rental was payable in advance of each month, but the lease agreement does not state whether

the rental was payable in advance or in arrear. Under the common law it appears that in the absence of any express agreement to the contrary rent is payable in arrear. (See J. T. R. Gibson supra page 185. See also W.E. Cooper, LANDLORD AND TENANT supra page 154 and WILLIE & MILLIN'S, MERCANTILE LAW OF SOUTH AFRICA supra 249. It is possible that when the parties stipulated that the rental was payable on the 8th of the month they had in mind that on the eight of each month the lease the rental which had accrued in respect of the previous month became payable. In other words the rental would be payable monthly in arrear. I do not however wish to say anything more on this aspect of the matter and nothing in this judgment ought to be construed as having turned on this question.

In so far as the question whether the applicant has alleged and proven that the provisions of the cancellation clause have been complied Mr. Flynn sought to rely on paragraph thirteen of the founding affidavit and annexure MFDA referred to in that paragraph. In paragraph thirteen the applicant pleads as follows:

"During June 2003 I duly demanded payment from the respondent of all monies due to applicant and to date the money has not been paid. A copy of the letter of demand is annexed hereto and marked MFDA."

The said paragraph thirteen does not allege and prove that the conditions precedent for the exercise of the right of cancellation in terms of clause sixteen of the lease agreement and supposedly pleaded in paragraph 8.9 of the applicant's founding affidavit, have been complied with before the launching of this application. Specifically what is not stated in paragraph thirteen is that the respondent was given the 14 days to rectify the breach and that failing such rectification the applicant would consider the lease cancelled. In so far as the fourteen days notice which the applicant was required to give to the respondent to rectify the breach it only becomes apparent that the notice may have been given when one looks at annexure "MFDA". This is not a proper way to plead. Even though it is possible to consider that the letter of 12th June, 2003 which is annexure MFDA was intended to comply with the requirements of the cancellation clause, the wording of paragraph thirteen of the founding affidavit would not alert the respondent that the applicant sought to rely on clause sixteen of the lease in claiming cancellation of the lease and ejectment of the respondent from the leased premises. Indeed that explains why counsel for the applicant did not intend

to rely on the cancellation clause both in his written heads of argument and his initial oral submissions in court. Not only is there lack of an allegation that the demand contained in the letter of 12th June, 2003 gave the respondent 14 days within which to rectify the breach, but there is nothing to suggest that the demand notified the applicant that the respondent would regard the lease as cancelled, on applicant's failure to comply with the demand. (See PONISAMMY AND ANOTHER V VERSAILLES ESTATES (PTY) LTD 1973 (1) SA 372 where it was held not only that the creditor's demand must contain a notice of rescission but that such notice must be clear and unequivocal. (see MICROUTSICOS V SWART 1949(3) SA 715(A). Furthermore, the demand in order to be valid and have the effect of placing the debtor in mora must be in relation to a debt due. (see CHRISTODOULIDES & ANOTHER V S.A. DRY CLEANERS (PTY) LTD 1962(3) SA 596. The debtor cannot be liable where he has a valid defence against the creditor's claim such as the exception non adimpleti contractus, for unless the creditor has proven that he has performed or tenders his own obligations which are reciprocal to the right he is claiming he is not entitled to claim enforcement of his right. This brings me to the defence raised by the respondent in this matter.

The submission made by Mr. Mdladla on behalf of the respondent is that the applicant is not entitled to any of the relief claimed in the "Notice of application" because the alleged arrears claimed by the applicant are not due. There appears to be a number of reasons relied upon by Mr Mdladla for saying the amount claimed is not due. The reasons appear to be as follows:

(a) That no rentals accrued to the landlord in respect of the leased premises during the month of October 2002 to January, 2003, because the applicant had not performed its obligations under the lease in that the applicant failed to deliver the premises in good order and in a fit state for the purpose for which they were leased, namely the operation of a restaurant and bar, all of which required a liquor licence.

(b) That because of the fact stated in the aforegoing paragraph the respondent was unable to operate the business of a restaurant and bar, which is the purpose for which the premises were leased until on the 12th January, 2003. I may add in this regard that indeed according to clause 5 with the heading "Use of Leased Property', agreement was as follows:

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"5.1. The tenant undertakes to use the leased premises for the business of a restaurant with a liquor licence and bar with a wine and malt licence.

5.2. The tenant shall not change his business operations by including other business without the consent of the landlord first having being obtained, which consent shall not be unreasonably withheld.

5.3. The tenant undertakes to carry on lawful business only on the leased property."
Then in clause seventeen of the lease it is further provided under the heading "Licensing".

"The parties agree that the landlord will transfer to the tenant hi: Restaurant and Liquor licences for the premises leased for the duration of the lease and renewal thereof. The tenant undertakes to take all steps that are necessary for the renewals necessary for the duration of the lease." my underlining.

It seems to me that (a) the parties' agreement contemplated that the premises were leased for the purpose of operating a restaurant and bar with a liquor licence and wine and malt licence, which licences the landlord in clause seventeen undertook to transfer to the respondent.

(b) In order to enable the respondent to operate lawfully and in accordance with the law the applicant undertook to "transfer to the tenant his restaurant and liquor licenses for the premises leased for the duration of the lease and renewal thereof." It seems to me again that the quoted portion of clause seventeen read with clause five contemplates that at the commencement of the lease the applicant (landlord) the respondent will also have received the transfer of the licences, together with premises ready and fit for the purpose of carrying on the business of restaurant and bar. The parties appear in clause seventeen to clearly contemplate that the transferred licence will be available for the duration of the lease' which duration commenced at the beginning of October, 2003.

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(c) Proper delivery of the premises by the applicant to the respondent would require that at the time of delivery the premises would not only be fit for the purpose for which they were let, but would also mean that the respondent is by such delivery placed in a position to conduct the business of a restaurant with a liquor licence and bar with wine and malt license' which licences had to be transferred by the applicant to the respondent in terms of clause seventeen of the lease together with the physical delivery.

(d) The first rental which would only have accrued in accordance with the lease not only after the premises were brought into a condition where they could be said to be fit for carrying on of the restaurant and bar business, but also after the liquor licence had been transferred to the respondent to enable him to lawfully carry out the business for which the premises were leased; both of which events only occurred after 11th January, 2003. The first rental would therefore have become due on 8th February 2003.

(e) The inability to transfer the licences is also some evidence of the fitness of the premises because ordinarily the liquor licensing board is unlikely to agree to transfer the licences, until the premises are in a proper condition.

(f) Further in any event unless there had been a proper transfer of the licences in respect of the premises from the applicant to the respondent it is arguable that the applicant would not have given vacua possessio to the respondent who could be evicted for trading on the premises without a licence.

(g) The first rental which accrued in terms of the lease on 8th February, 2003 was actually paid on 10th February, 2003. As to the date of payment of the first rental the parties are agreed and I refer to paragraph ten of the applicant's founding affidavit.

(h) It seems again to be common cause that there was no payment during the month of March and April, and then a payment of E12,000 was made on 13th May,2003. This payment was less by E500 from the fixed rental.

(i) Then on 12th June, 2003 before the applicant was entitled to issue a demand for the rental for the month of June, 2003, it issued the letter of demand which is annexure MFD 4 and has already bee referred to above.

(j) According to Mr. Mdladla's submission, and if it be sustainable, the only amount in arrear and in relation to which the applicant could give notice or demand in terms of clause sixteen of the lease is an amount E25,500 in respect of the rentals for the month of March and April, 2003, which amount was paid less E500-00 by guaranteed cheque which was sent to the applicant under cover of a letter dated 18th June, 2002 and is annexure MFD5 of the applicant's own founding affidavit.

(k) The applicant could not demand payment in terms of the cancellation clause in relation to the rental which fall due on 8th June, 2003 because the seven days which was required to lapse from the date the amount became due, required by the lease had not lapsed.

However, that seems to be the basis upon which Mr. Mdladla submitted the arrear rental due and which could properly have been demanded by the letter of 12th June, 2003 was paid. A basis for this submission is found in paragraphs thirteen and fourteen of the respondent's answering affidavit wherein it is stated -

"I note the contents herein however, I fail to understand what is meant by branches (sic) and it is further correct that the applicant had with the full knowledge of the material defects within the building failed to disclose such information to me such that the respondent could not operate its business timeously and legally in terms of the lease agreement. It is correct that the respondent still intends to pursue the claim for damages."

Then in the next paragraph the respondent states-

"Whilst it may be correct that the lease agreement was signed in October, 2000. I may further add that the said agreement could not be complied with as at the stated period the premises were not in good order and neither could the tenants do business as envisaged in terms of the lease agreement."

I have already alluded to clauses five and seventeen of the lease and to their possible effect on the obligations of the parties under the lease. The failure by the respondent to effect transfer of the licence until 16th January, 2003, the closure of the premises by the Board in October, 2000 (which is the first month of the commencement of the lease) apparently in accordance with an order of the Board made on 11th January,

2002, and the objection by the City Council to the "grant" of the licence in its letter to the Chairman of the Liquor Licensing Board dated 9th December, 2003, all amongst other factors support the respondent's allegations that the premises were not delivered in a condition which rendered them fit for the purpose for

which they were leased, to the respondent.

In HUNTER V CUMNOR INVESTMENTS 1952(1) SA 735 C at 740 it was stated "One of the incidents of a contract of lease in Roman-Dutch law is that the lessor is obliged to hand over the leased premises at the outset of the lease in a condition reasonably fit for the purpose for which they are let... A failure to do so on the part of the lessor constitutes breach of contract and the lease becomes entitled to certain remedies and the defaulting lessor becomes subject to corresponding liabilities. Depending on the nature and extent of the lessor's breach, the lessee may treat it as a repudiation of the contract and quit the premises, or he may claim a proportionate reduction of the rent, or, after prior notice to the lessor, he may effect the repairs at his own expense and deduct the costs thereof from the rent."

J. T. R. Gibson 4th edition supra summarises the position as follows at page 190 -

"Where the landlord is in breach of his duty to deliver the breach is material and the tenant may treat the contract as cancelled and file for damages or claim specific performance and damages (DU PLESSES V SINGER 1931 CPD 105, WOODS V WALTERS 1921 AD 303."

See also WILLE & MILLIN supra page 243 under subheading "repairs". It is clear therefore that the failure of the applicant to deliver the leased premises in a condition which rendered them fit for the purpose for which they were leased would have amounted to a material breach which would have entitled the respondent to cancel the lease or to the other remedies mentioned above. However more importantly as mentioned earlier the respondent would be entitled to raise as a valid defence the exceptio non admpleti contractus against the applicant's claim for rental. According to this exceptio in the case of a reciprocal agreement where performance of the parties must be simultaneous or the plaintiff is required to perform before the defendant, the creditor, must in his demand tender performance or show that he has performed,

otherwise his claim can always be defeated with the exceptio non adimpleti contractus. That a defendant should be able to raise the exceptio non adimpleti contractus against a plaintiff who has not performed at all is, of course, obviously fair and reasonable. But what is the position where the plaintiff or applicant has rendered performance but his performance is defective. To allow a defendant who has accepted and is using the plaintiff's performance (either because the defect is not sufficiently serious to justify rejection of the performance or because the defendant prefers to accept rather than reject the defective performance) to raise the exceptio against the plaintiff's claim for counter performance might operate extremely unfairly against the plaintiff. The defendant will have the (often considerable) benefit of the plaintiff's performance while the plaintiff will receive nothing in return. On the other hand, to order the defendant to render full counter performance in return for the plaintiff's defective performance will be unfair to the defendant. In BK TOOLING V SCOPE PRECISION ENGINEERING 1979(1) SA 391(A) the APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA is said to have determined the abovementioned issues as follows. Any contracting party has in principle a right to the specific performance by the other party, that is he has the right, in principle, to enforce the contract strictly according to its terms. The right of a party to a reciprocal contract to withhold his own performance until the other party performs in full, is a powerful weapon to enforce full performance. In principle, therefore, a defendant who has accepted the plaintiffs defective reciprocal performance is still entitled to raise the exceptio non adimpleti contractus against the plaintiffs claim, even though the plaintiff's performance is defective in minor respects only. Where, however, fairness so requires, a court may, at its discretion, refuse to allow a defendant to raise the exceptio and order him to render a reduced performance. Having regard to the aforegoing, the applicant in an application based on a reciprocal contract must, to have his pleadings in order, allege and prove in his founding affidavit that he has rendered full performance from his side or must tender full performance.

If he is unable to prove that he has indeed performed in full and wishes the court to exercise its discretion in his favour by awarding him a reduced counter performance, he then must allege and prove:

(a) That the respondent is utilising or utilised during the relevant period the defective performance.

(b) That circumstances exist which render it fair (equitable) that the court should exercise its discretion in applicant's favour.

(c) By how much the counter performance ought to be reduced. This would normally be by the amount which it would cost the defendant to convert the plaintiff's defective performance or incomplete performance into proper performance.

See J. T. R. Gibson's seventh edition supra at page 93 note 101, commentary on the B.K. Tooling case. See also SCHOLZ V THOMPSON 1996(2) SA 409 (C).

At page thirty one HARMS LTC in AMLER'S PRECEDENTS OF PLEADING
THIRD EDITION expresses the above in this manner.

"Where a contract imposes reciprocal obligations upon the parties, performance and counter performance should generally take place at the same time. MILLMAN N.O. V. GOOSEN 1975(3) SA 141 (0) 142. Certain types of contract form an exception to this rule: thus a lessor of property must perform before he can demand rental and an employee must perform before he can claim his emoluments; similarly a contractor must himself first perform."

I should caution however, that in so far as the employment agreement is concerned the above stated common law position regarding the employee's right to claim his remuneration appears to have been changed by Section of the Employment Act, 1980 as amended.

Still dealing with the same subject LTC Harms. On the next page observes -

"If a defendant pleads the exceptio the onus will be on the plaintiff to prove his performance or his ability to perform or the fact that he is excused from performing in advance or simultaneously."

Applying the abovementioned principles it seems to follow that respondent's submission that the leased premises when delivered between October, 2002 and mid

January, 2003 were not in a condition which rendered them fit for the purpose for which they were let raised the exceptio non adimpleti contractus. The respondent says no rental became due to the applicant in terms of the lease for this period. The applicant's founding affidavit even when read with the replying affidavit does not allege and prove that the applicant had complied with its obligations in terms of the lease by delivery of the said premises in a condition fit for the purpose for which they were leased. As already stated above such allegations and prove must be contained in the founding affidavit. The onus to allege and prove this is on the applicants. The application ought to fail on that basis alone. However even if I were to take into account what is contained in the replying affidavit in respect of this aspect of the matter at best what can be said for the applicant is that there is a dispute of fact regarding this question (that is whether the applicant had delivered the leased premises at the commencement of the lease in a fit condition having regard to the purpose for which they were leased.) There was no application by the applicant that oral evidence be led to clarify this issue, even at the intimation that this might be appropriate by Mr. Mdladla. However, in any event this allegations and evidence thereof ought to have been contained in the founding affidavit. In light of the aforegoing it is not possible to find in applicant's favour that any rental accrued to the applicant in respect of the period from October, 2002 to January, 2003. Further because the premises only became ready well after the eighth day of January, 2003 the first rental in respect of the premises could only accrue on 8th day of the subsequent month which is February, 2003. In terms of the lease the rental could be paid by the tenant within a further seven days after the eighth day of February, 2003. However even if the respondent would not pay the rental within the further seven days aforesaid he would still not be in mora unless and until the applicant would place him

in mora by demanding that he rectifies the breach by paying the rental within 14 days from the date such demand is served on him. The next payment which was made successfully was in 13th May, 2003. By 12th June, 2003 the respondent was in arrear with a rental for two months which was paid on 18th June, 2003. By 12th June, 2003 when the applicant wrote the demand to respondent the condition precedent for the making of the demand in respect of the June rental had not been fulfilled because the seven days from 8th June to 12th June, 2003 had not run out.

It follows therefore at best for the applicant the arrear rentals which had not been settled by the respondent as at 12th June, 2003 amounted to E25,500-00. However the demand and the notice dated 12th June, 2003 demanded a very high amount of E88,000 which the applicant claimed was due instead of E25,500-00. As a result there is at least a doubt whether the demand was proper and for an amount which was due. In my opinion such demand was not for an amount proper and due. This demand cannot be said to be in accordance with what the parties contemplated in the cancellation clause.

Secondly as observed earlier on the demand did not contain a notice of rescission and on that basis it cannot be said it was given in accordance with what was required by the cancellation clause. In light of all the aforegoing it cannot be said that the applicant has established an entitlement to cancel the lease and eject the respondent. Similarly the applicant as already shown has not established any right to claim rentals other than the amount of E500-00 which was not included in the payment for May, 2003. However, even with regard to this E500-00 the respondent says it has a counter claim arising from the applicants' failure to deliver the premises in a fit condition on time. The respondent does not say for how much is the counter claim, something which would ordinarily defeat the respondents defence. However, in light of all the circumstances of the case I am not satisfied that the applicant has established that he is entitled even to any of the other forms of relief, namely the confirmation of the order for perfection of the landlord's hypothec and any arrear rentals as claimed. It follows therefore that the application must be dismissed with costs.

A.S. Shabangu

Acting Judge