Lecture Notes and Activities

SECTION B

Unit 2: The Duties of the Lessor

1. The duty to deliver the property to the lessee
   Study pp. 75-76.

   It is a lessor’s primary duty to deliver, i.e. place at the disposal of the lessee, the property let to enable the latter to use and enjoy it.

1.1 The condition in which the property is to be delivered
   Study p. 76 and Fourie NO en ’n ander v. Potgietersrusse Stadsraad 1987 (2) SA 921 (A).

   Usually the condition is determined by the express or tacit agreement of the parties. In the absence of agreement the property must be delivered in the condition reasonable fit for the purpose for which it was let. (See Mpane v Sithole 2007 (6) SA 578 (W)).

2. The duty to maintain the property in proper condition
   Study pp. 76-77.

   Even though there is a continuing duty on the lessee to maintain the property in a proper condition, nothing prevents the lessee from contractually assuming the whole or part of that duty. The lessors’ duty does not extend to damage that has been negligently intentionally caused to the property by the lessee or by those for whose acts the lessee is in law liable. (See section 4(5) of the Rental Housing Act 50 of 1999, which extends the lessee’s liability to include the actions of third parties invited onto the premises by the lessee, but which applies only in respect of residential leases.)
2.1 The lessee’s remedies if the lessor fails to deliver or maintain the property in proper condition

Study pp. 77-81.

The following remedies are possibly at the disposal of the lessee where the lessor committed a breach of his contractual duties:

(a) **Specific performance**

South African courts have often not been prepared to order specific performance against a lessor who has failed to maintain the property in a proper condition. In a positive recent development however, the court in Mpane v Sithole 2007 (6) SA 578 (W) expressed the view that there was no binding authority precluding the grant of an order of specific performance.

An alternate remedy available to lessees where lessors have failed to effect necessary repairs to the property, is that of effecting the repairs themselves and then recovering the cost from the lessor.

(b) **Rescission**

If the property is so defective that the lessee cannot reasonably be expected to accept it, the lessee is entitled to resile from the lease and vacate the premises. Note the difference in the legal position between (a) where the thing is tendered in a defective state, and (b) where the thing falls into a serious state of disrepair during the currency of the lease.

(c) **Damages**

Besides being entitled to claim for damages for a loss that he may have suffered as a result of the lessor’s breach of contract, an action for consequential damages will only be successful if the lessor knew or ought to have known of the defect and failed to remedy it. (See Fourie NO v Hansen 2001(2) SA 823 (W) and footnote 58 of your prescribed textbook.) A lessee could also sue for damages on the strength of the lessor’s contractual undertaking that he would be liable irrespective of the fact that he knew or ought to have known about the defect.

(d) **Reduction of rent**

A defect in the property let would also entitle the lessee to a reduction of the rent proportional to the diminished use and enjoyment of the property, should he abide by the lease despite such a defect. This principle was confirmed in Steynberg v Kruger 1981 (3) SA 473 (O); Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC [2007] SCA 62 (RSA) and Mpange v Sithole 2007 (6) SA 578 (W). If the inconvenience suffered by the lessee is slight, he is not entitled to a reduction of rent.
Activity 1

1. With reference to the case of Fourie NO en ’n Ander v Potgietersrusse Stadsraad 1987 (2) SA 921 (A) answer the following questions:
   
   
b) Who bears the onus of proof with regards to the existence of commodus usus?
   
c) May one add a “voetstoots” clause to a contract of lease? Was this purpose achieved in this case? Explain.

3. The duty to ensure the lessee’s undisturbed use and enjoyment

Study pp. 81-83 as well as the following cases and articles:

(a) Fourie NO en ’n Ander v Potgietersrusse Stadsraad 1987 (2) SA 921 (A).
(b) Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Ystere en Staal Industriële Korporasie Bpk 1987 (2) SA 932 (A);
(c) Sweets from Heaven (Pty) Ltd and another v Ster Kin ekor Films (Pty) Ltd and another 1999 (1) SA 796 (WLD);
(d) The lessee’s right to commodus usus. THRHR 1989 (25) pp. 124-130. L. Hawthorne;
(e) Sishen revisited: The decline and fall of the “gemenereg”. THRHR 2000 (63) pp. 668-672. L Hawthorne.

A lessor is under an obligation to permit the lessee to enjoy and use the property let to him for the duration of the lease. He therefore warrants that no one has the right in law to disturb the lessee’s use and enjoyment (commodus usus – comfortable / convenient / undisturbed use). This obligation is not necessarily limited to ensuring that the lessee has actual occupation and undisturbed control of the property let to him, but may involve a restraint upon the lessor to refrain from conduct which adversely effects the lessee’s profitable use of the property.

3.1 The lessor disturbing the lessee

Study pp. 83-84.

Although a lessor must refrain from unlawfully interfering with the lessee’s use and enjoyment of the property that has been let, he is entitled to enter the premises to effect reasonably necessary repairs. What is required of the lessor is that he should act reasonably in exercising his right to repair or inspect the premises. Section 4 (2) of the Rental Housing Act 50 of 1999 supports the proposition that the lessor may enter the premises without the consent of the lessee, provided the lessee has been given reasonable notice and provided the lessor acts reasonably with regard to the time and date chosen, the actual manner in which the inspection is carried out and the like.
3.1.1 The lessee’s remedies when he is disturbed by the lessor

Study p. 84.

Besides the normal remedies for breach of contract which are at the disposal of the lessee, an interdict could also be utilised to restrain an interfering lessor. A lessee who has been unlawfully excluded from the leased property may recover occupation by a contractual action or a *mandament van spolie*. Where deprivation of the whole or part of the use and enjoyment of the property let takes place, the lessee is entitled to *pro rata* remission of the rent for the time of deprivation.

### Activity 2

1. With reference to the case of *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A) answer the following questions:
   
   (a) What is the meaning of *commodus usus*?
   
   (b) Did the lessor commit breach of contract in respect of its common law obligations? Briefly discuss.
   
   (c) Does the indirect infringement of a lessees’ *commodus usus* amount to a breach of contract? Briefly discuss.
   
   (d) What influence does the degree of breach of the common law obligation have on the remedies at the disposal of the lessee?

3.2 Third party with superior title disturbing the lessee

Study pp. 84-85.

A lessor warrants that no person with a superior title will disturb the lessee in his use and enjoyment of the property let to him. This is the position whether eviction takes place as a result of a defect which existed in the lessor’s title at the time when the lease was entered into or as a result of the lessor allowing the adequate title he originally had to lapse before the end of the lease (e.g. by failing to pay licence fees on the payment of which his title depended).

3.2.1 The lessee’s remedies

Study pp. 85-86.

The lessee is entitled to the normal remedies for breach of contract. The lessee must actually have been evicted before the lessor can be said to be in breach. A lessee who is threatened with disturbance must inform the lessor thereof so that the latter can defend the former’s right in the property or assist him in his defence. If the evicted lessee abides by the contract he is entitled to a *pro rata* remission of rent. The lessee will have no claim for damages if he assumed the risk of eviction at the time of conclusion of the lease.
3.3 Person without superior title disturbing the lessee
Study p. 86 and *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) SA 121 (A).

A lessor does not warrant the lessee against unlawful disturbances by third parties, i.e. by persons who do not have a better title to the property than the lessee. The lessee must therefore proceed against the wrongdoer himself under these circumstances by making use of remedies like the *mandament van spolie*, interdict or delictual action for the recovery of damages.

The lessee will also be entitled to claim for damage that was caused to the property let itself by a third person, if the risk of such damage was on him. (See Clifford v Farinha 1988 (4) SA 315 (W).

3.4 Lessee disturbed by superior force
Study pp. 86-87.

The lessor is not guilty of breach of contract if the lessee is disturbed in the use and enjoyment of the property let by a superior force (*vis maior*). Under these circumstances the lessee is nevertheless entitled to a *pro rata* remission of rent. This would however not be the case where the lessee assumed the risk of the lessor’s performance becoming impossible.

4. The duty to pay rates and taxes
No reference is made in your textbook to this obligation of the lessor. For examination purposes you only have to study the following notes.

**Lessor’s obligation**

- Subject to legislation or agreement to the contrary, a lessor who is the owner of property let is under an obligation to pay all rates and taxes imposed by the state or public bodies. The lessee is liable to pay tax which may be imposed upon the produce or fruits of the property.
- The lessor is relieved of this obligation either by statute or the lessee assuming the obligation.
  - By statute
    - e.g.: Section 6 of the *Radio Act* 3 of 1952 in terms of which the possessor of a radio apparatus (includes a television) must take out the licence (this Act has been repealed by the *Telecommunications Act* 103 of 1996).
  - Lessee assuming obligation
    - Subject to any statutory provision to the contrary the parties to a lease are free to agree amongst themselves which of them will pay the taxes or other charges imposed by public bodies. If a lessee who is merely under a contractual obligation to the lessor to pay rates fails to do so, the authority concerned cannot recover them from the
lessee since there is no vinculum iuris between it and the lessee. If, despite such an agreement between him and the lessee, the lessor pays the rates he can recover them from the lessee.

In the absence of a cancellation clause, e.g. that in the event of the contravention of or failure to observe any of the conditions of the lease the lessor shall be entitled to cancel the lease, WE Cooper, in his book Landlord and Tenant, second edition, 1994 on p. 133, submits that the lessor will only be entitled to cancel if non-payment of rates is in the circumstances a breach sufficiently serious to merit cancellation. The lessor will then be entitled to send a notice of rescission and, if the lessee fails to pay within the further reasonable period that was granted to him in the notice, he will acquire the right to cancel.

Activity 3

1. In *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) 121 (A) the lessee as plaintiff claimed compensation for damage done to the property let by a third person. Discuss the court’s reaction to this cause of action.