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The Lessor's Duty of Maintenance

by

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Declaration

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October 2019

Summary

This study is a general one which deals with the need to clarify the law with regard to the lessor's duty of maintenance and to provide solutions to the necessary problems. This area of law is shown to be problematic through the analysis and evaluation of the development of case law. The cases used to show this development are *Arnold v Viljoen*, *Steynberg v Kruger*, *Ntshiqqa v Andreas Supermarket*, *Thompson v Scholtz*, *Mpange v Sithole*, and *Ethekwini Metropolitan Unicity Municipality v Pilco Investments* among others. The common law is also considered specifically the *exceptio non adimpleti contractus* when dealing with the case law analysis. The cases furthermore indicate problematic aspects which need to be dealt with as well as aspects which have been dealt with insufficiently by the courts. The impact of certain legislative provisions on this area of law are also dealt with. These provisions are the Rental Housing Act (and regulations), the Consumer Protection Act as well as the amendments to the Rental Housing Act, which are not yet in force. Certain foreign legal systems are then analysed and compared to our legal system. This comparison is done to provide solutions and suggest improvements and alterations where necessary to the problematic aspects of the lessor's duty of maintenance and to further illustrate the need for clarity in regard to this area of law.

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Chapter 1: Introduction

1.1 Research problem

This study is motivated by the need to clarify the law with regards to the lessor's duty of maintenance and provide solutions to the problem. This area of law is shown to be problematic through the evaluation of case law and the contradictory judgments which results in uncertainty and the impact of the Rental Housing Act 50 of 1999, the Consumer Protection Act 68 of 2008 and the Rental Housing Amendment Act 35 of 2014 which has altered the common law position.

Therefore, the dissertation entails a general study in which case law will be evaluated to determine how the current law has developed and the impact of the Rental Housing Act (and regulations) and the Consumer Protection Act on the lessor's duty of maintenance as well as the amendments to the Rental Housing Act, which are not in force yet. Foreign legal systems are also referred to and compared to our legal system. This illustrates the need for clarity and certainty in regard to this area of law. The main research questions of the study are as follows:

1. How has case law developed with regard to the landlord's duty of maintenance?
2. What is the impact of the Rental Housing Act (and regulations) and the Consumer Protection Act on the lessor's duty of maintenance as well as the amendments to the Rental Housing Act which are not yet in force?
3. What is the law of selected foreign legal systems with regard to the landlord's duty of maintenance and how do these compare with the South African position?

Each of these questions are discussed in the three main chapters of this dissertation respectively. An overview follows in the next paragraph.

1.2 Overview of chapters

I address the first research question in chapter 2 by analysing the development of case law. The main cases used are *Arnold v Viljoen* 1954 (3) SA 322 (C), *Steynberg v Kruger* 1981 (3) SA 473 (O), *Ntshiqqa v Andreas Supermarket* 1997 (3) SA 60 (Tk), *Thompson v Scholtz* 1999 (1) SA 232 (SCA), *Mpange v Sithole* 2007(6) SA 578 (W),

and *Ethekwini Metropolitan Unicity Municipality v Pilco Investments* [2007] ZASCA 62. The common law is also considered and close attention is specifically paid to the *exceptio non adimpleti contractus*. The cases indicate problematic aspects which need to be dealt with as well as aspects which have been dealt with inadequately by our courts.

I address the second research question in chapter 3 by considering and analysing the impact that certain legislative provisions have on this area of law. Specifically, the relevant sections are those in the Rental Housing Act, the Consumer Protection Act and the amendments to the Rental Housing Act which are not yet in force. The relevant constitutional provisions are also mentioned in this analysis. The condition of the property at the start of the lease is considered first, followed by the statutory duty to maintain and the applicable residual provisions as well as the related remedies. Through the analysis of the impact of these provisions, problematic aspects which need to be dealt with are shown as well as aspects which have been dealt with unsatisfactorily by the current legislation.

I address the third research question in chapter 4 by analysing and comparing our law to selected foreign legal systems, which examples are used to suggest improvements and alterations where necessary. The foreign legal systems that are considered and compared to South African law are English law, US law, Dutch law and German law. Austrian law is also briefly mentioned. This analysis is done by first considering the statutory duty to maintain, the agreement to maintain, the applicable residual provisions as well as the related remedies in South African law and comparing these remedies to the position in the mentioned foreign legal systems. Through the analysis of these systems, solutions to these problematic aspects are suggested and guidance is provided for the aspects which have been dealt with inadequately by the South African legal system.

Chapter 2: Developments in case law

In this chapter, I analyse how case law has developed by discussing various cases chronologically, such as *Arnold v Viljoen* 1954 (3) SA 322 (C), *Steynberg v Kruger* 1981 (3) SA 473 (O), *Ntshiqqa v Andreas Supermarket* 1997 (3) SA 60 (Tk), *Thompson v Scholtz* 1999 (1) SA 232 (SCA), *Mpange v Sithole* 2007(6) SA 578 (W), and *Ethekwini Metropolitan Unicity Municipality v Pilco Investments* [2007] ZASCA 62. I also mention the relevant constitutional provisions and consider the common law, specifically, the *exceptio non adimpleti contractus*. Through the analysis of these cases, I demonstrate the problematic aspects which need to be dealt with as well as aspects which have been dealt with insufficiently by the courts.

2.1 Continuous occupation of the property

In *Arnold v Viljoen* the lessee refused to pay rent for the months of January and February and claimed that he was discharged from his duty to pay rent due to the lessor's breach of contract as the property was not in the required condition at the commencement of the lease.¹ The lessee stated that the rent was not owed for those two months as he had not had beneficial occupation and use of the property.² The court rejected this statement and found that the occupation of the property by the tenant is decisive of their obligation to pay rent and not whether the occupation was full and beneficial.³ The court also recognised the principle of the *exceptio non adimpleti contractus* (hereafter the *exceptio*) but restricted its application to only some reciprocal contracts and found that the lessee was only allowed a claim for damages.⁴ Therefore the court held that the lessee was liable for the rent of January and a proportionate share of February as the test of a lessee's obligation to pay rent is whether he was in possession or in occupation of the property and not whether such use was beneficial or not.⁵ This finding of the court is criticised by Cooper on the basis that it is unsubstantiated and constructed on a misunderstanding of the core issue

¹ *Arnold v Viljoen* 1954 (3) SA 322 (C) (hereafter *Arnold*).

² *Arnold* (note 1 above).

³ S Viljoen *The law of landlord and tenant* (2016) 239.

⁴ Viljoen (note 3 above) 241.

⁵ *Arnold* (note 1 above).

which is that a landlord cannot claim the full rental amount if he has failed to fulfil his obligation, namely to give the lessee the full beneficial use and enjoyment of the property and that a claim for damages should be considered as a separate matter.⁶ The court also failed to expand further on the application of the *exceptio*.⁷ Therefore, this judgment shows that the maintenance duty of the lessor is deemed to be less important to perform as the lessee's reciprocal duty to pay rent as the lessee has to continue paying rent even if he is not receiving the full use and enjoyment of the property due to the lessor's breach.

However, numerous cases have reverted to the method where the lessee can continue with the occupation of the property at a reduced rent which is proportional to the lessee's reduced enjoyment and use of the property.⁸ In *Steynberg v Kruger*, the court decided that a lessee was permitted to claim for damages and a significant reduction in rent as the property was not suitably useable for the purpose for which it was let and in regards to the degree of the deprivation, the lessee would have been allowed to terminate the lease, which the lessee decided not to do.⁹ This is in contrast to the judgment of *Arnold v Viljoen* above as the lessee had to pay the full amount of rent and is more in line with the values of equity and fairness. Therefore the *ratio* and outcome of *Arnold v Viljoen* were accordingly not approved in this case.¹⁰ The methodology of this judgment was followed in the case *Mpange v Sithole* as shown below.¹¹

In *Ntshiqqa v Andreas Supermarket* it was held that the interpretation that the assessment for a lessee's liability for rent was whether or not he was in occupation of the leased property, and not whether such occupation was beneficial or not and that the lessee was therefore liable for rent for the time of occupation and consequently only had a claim for damages in respect of loss of beneficial occupation, was incorrect.¹² Therefore the court criticised *Arnold v Viljoen* and its outcome was not followed.¹³ The court held that the lessor had failed in his obligation of placing and maintaining the property in a reasonably fit condition for the purpose for which it was

⁶ Viljoen (note 3 above) 241.

⁷ *Arnold* (note 1 above).

⁸ Viljoen (note 3 above) 241.

⁹ *Steynberg v Kruger* 1981 (3) SA 473 (O) (hereafter *Steynberg*).

¹⁰ *Steynberg* (note 9 above).

¹¹ *Mpange v Sithole* 2007(6) SA 578 (W) (hereafter *Mpange*).

¹² *Ntshiqqa v Andreas Supermarket* 1997 (3) SA 60 (Tk) (hereafter *Ntshiqqa*).

¹³ *Ntshiqqa* (note 12 above).

let and that the defects complained of were not merely insignificant but resulted in the lessee's beneficial occupation of the property to be compromised and diminished, thereby warranting him to a reduced rental for the month of December.¹⁴ It was further held that a lease agreement was a reciprocal contract in which the duties to make performance were accepted each as an equivalent return for the other, with the effect that a defendant was allowed to raise the defence of the *exceptio*.¹⁵ It was further held that it has been repeatedly stated by our courts that the *exceptio* precludes any contractual claim by a malperforming plaintiff and that this shows that the interpretation that a lessee who is in occupation of the property leased to him is liable to pay the full amount of rent even though the property is defective is incorrect.¹⁶ It was moreover held that since the principle of reciprocity gives rise to a right to withhold one's performance until the other party has performed, the respondent was permitted to withhold his performance as a method to enforce the appellant's counter-performance.¹⁷ The court also held that the respondent's refusal to pay the December rental did not create a breach of the agreement and that consequently the appellant's use of the *lex commissoria* was unfounded.¹⁸ Therefore, this judgment shows that the reciprocal duties are of equal importance which is in contrast to the judgment of *Arnold v Viljoen* as shown above as the lessee is allowed a reduction of rent which is in line with *Steynberg v Kruger*. The judgment also went further than the previous judgments by implying that a lessee who is moderately deprived of the beneficial enjoyment and use of the property may also raise the *exceptio* as a defence.¹⁹

2.2 The defence of the *exceptio*

The defence of the *exceptio* was raised in *Thompson v Scholtz* when the lessee refused to pay rent.²⁰ The court held that payment of a monetary nature could serve as compensation for the purchaser's consequential loss, but that it could never function as a substitute for the loss of occupation experienced by the defendant during

¹⁴ *Ntshiqqa* (note 12 above).

¹⁵ *Ntshiqqa* (note 12 above).

¹⁶ *Ntshiqqa* (note 12 above).

¹⁷ *Ntshiqqa* (note 12 above).

¹⁸ *Ntshiqqa* (note 12 above).

¹⁹ T Naudé 'The principle of reciprocity in continuous contracts like lease: what is and should be the role of the *exceptio non adimpleti contractus* (defence of the unfulfilled contract)?' (2016) 27 *Stell LR* 326.

²⁰ *Thompson v Scholtz* 1999 (1) SA 232 (SCA) (hereafter *Thompson*).

the period of which he had been deprived of the occupation of the farmhouse.²¹ The court referred to the two main proposals in the judgment of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*.²² The first proposal is that the *exceptio* is accessible to a party whose performance is wanted by the other contracting party, whose reciprocal performance has not yet been rendered, as a defence.²³ Therefore the flaw of the plaintiff's performance does not have to be so severe as to validate its rejection or the termination of the contract by the defendant for the *exceptio* to apply.²⁴ The second proposal in *BK Tooling* was mentioned but not applied in the present case as the interference with the lessee's use of the property was only temporary and partial.²⁵ It was held that the reduction of rental involved an approximation, done by the innocent party, of the extent to which the payment he owed should have been reduced and which corresponds to his reduced use and enjoyment of the lessor's performance.²⁶ It was further held by the court that it was not possible to determine the decrease of the occupational interest with any obvious formula or method and that it was therefore necessary to take an all-encompassing view of the situation and to take all appropriate aspects into consideration.²⁷ This case does not clarify whether the first proposal in *BK Tooling*, namely the availability of the *exceptio*, can be applied to partial deprivation of use and enjoyment as the court only stated that the second suggestion does not apply.²⁸ This shows that the first suggestion in *BK Tooling* is only applicable in the occurrence of a total deprivation of the property and not a partial one.²⁹ Therefore, the only logical inference to be gathered from this case is that the *exceptio* serves no role in the situation of a partial deprivation as it is up to the lessee to estimate the reduced rental.³⁰ This is in contrast to the implication of the above judgment of *Ntshiqqa v Andreas Supermarket* where the *exceptio* could be raised as a defence where the lessee is partially deprived. However, both of these judgments still acknowledge the reduction of rent as a remedy and this judgment clarified how the reduction of rent can be determined.

21 Thompson (note 20 above).

22 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A).

23 Thompson (note 20 above).

24 Thompson (note 20 above).

25 Thompson (note 20 above).

26 Thompson (note 20 above).

27 Thompson (note 20 above).

28 Naudé (note 19 above) 331.

29 Naudé (note 19 above) 331.

30 Naudé (note 19 above) 331.

2.3 The scope of the landlord's maintenance duty

The scope of the landlord's maintenance duty was qualified and defined in *Rebel Discount Liquor Group v La Rochelle Erf 615 Investments*.³¹ In this case the lessee closed his business and cancelled the lease agreement due to a succession of armed robberies and burglaries which allegedly posed a danger to the protection and wellbeing of its employees.³² As a result, the lessor viewed the lessee's actions as a repudiation of the lease agreement and claimed damages for loss of rental and rent arrears.³³ The lessee rejected this claim on the grounds that it had justifiably cancelled the lease as the lessee did not have undisturbed use and enjoyment of the premises due to the armed robberies and burglaries, which the lessor could have prevented, the constant use of the premises posed a danger to the lives and safety of the lessee's employees, and the lessor was unsuccessful in maintaining the premises in a suitable condition for which it was let.³⁴ The fundamental issue was therefore whether the lessee could terminate the lease on the grounds that the lessor breached his duty to maintain the premises by not providing proper security.³⁵ The court confirmed the heart of a lease as the transfer of the enjoyment and use of the thing by the lessor to the lessee for an arranged period of time.³⁶ Additionally, the lessor's main duty is to deliver the thing let in the correct condition.³⁷ In other words the lessee must be able to enjoy and use the thing after which the lessor must maintain the premises in this condition.³⁸ The court determined that the lessee had failed to prove that the troubles caused by the criminal conduct should be linked to the lessor's failure to maintain the property.³⁹ Furthermore, the court held that the duty of the lessor to deliver and maintain the property in a reasonable condition relates to the physical condition of the property and its features which includes both the creation of the building and its fixtures or fittings.⁴⁰ The maintenance duty of the lessor is therefore restricted and does not cover the

³¹ *Rebel Discount Liquor Group (Pty) Ltd v La Rochelle Erf 615 Investments CC (A1043/04) [2005] ZAWCHC 88 (30 November 2005)* (hereafter *Rebel Discount Liquor*).

³² *Rebel Discount Liquor* (note 31 above).

³³ *Rebel Discount Liquor* (note 31 above).

³⁴ *Rebel Discount Liquor* (note 31 above).

³⁵ *Rebel Discount Liquor* (note 31 above).

³⁶ *Rebel Discount Liquor* (note 31 above).

³⁷ *Rebel Discount Liquor* (note 31 above).

³⁸ *Rebel Discount Liquor* (note 31 above).

³⁹ *Rebel Discount Liquor* (note 31 above).

⁴⁰ *Rebel Discount Liquor* (note 31 above).

providing of security.⁴¹ The court further stated that the duty to keep a business and employees safe from criminal conduct lies with the lessee as the lessee can install burglar bars, security gates and security personnel.⁴² The same opinion would also probably apply to residential property.⁴³ This shows that the lessor's obligation of maintenance can be limited in certain circumstances but this limitation does not apply to the previous cases and therefore does not exempt the lessor from his duty in those instances.

The method followed in *Mpange v Sithole* also confirms the remedy that a tenant may remain in occupation of the sub-standard premises, although on this occasion, the court decided to reduce the rent.⁴⁴ This is because, in theory, a tenant who stays in occupation of the leased property is still getting some use and enjoyment from the property and must therefore pay an amount of rent that is proportional to his reduced use and enjoyment.⁴⁵ Therefore, it would be an uncommon occurrence, although not an impossible one, for a court to release the tenant from his required duty to pay rent due to the lessor's inability to maintain the property.⁴⁶ The lessee is also permitted to request that the property be transformed into the condition as agreed upon and that the lessor would in such an occurrence be obligated to make the necessary repairs.⁴⁷ This shows that reduction of rent is still a possible and recognised remedy as the lessee should only pay for the use and benefit that he is receiving which is in line with the previous court decisions as shown above. However this judgment does show that the courts are still reluctant to allow a lessee to withhold the full amount of rent as both parties must still perform their duties.

2.4 Specific performance

The courts have also been disinclined to grant specific performance where the lessor has breached his maintenance duty as it would be problematic for the court to supervise and enforce its order.⁴⁸ Viljoen argues that this line of reasoning is unacceptable and that this position has been moved away from by several cases,

⁴¹ Viljoen (note 3 above) 228.

⁴² *Rebel Discount Liquor* (note 31 above).

⁴³ Viljoen (note 3 above) 229.

⁴⁴ *Mpange* (note 11 above).

⁴⁵ Viljoen (note 3 above) 244.

⁴⁶ Viljoen (note 3 above) 244.

⁴⁷ *Poynton v Cran* 1910 AD.

⁴⁸ *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246(W).

particularly when one considers that specific performance might be the only meaningful remedy available to the lessee in some instances.⁴⁹ The alternative remedy would be where the lessee accepts doing the repairs himself and later either subtracts the costs from the rent or recovers the costs from the lessor, which is only available to lessees who have the necessary skills or financial means to make such repairs. This means that poor tenants, who are generally not financially able to make such repairs themselves, would not be able to use this remedy.⁵⁰ This shows that although specific performance is an available remedy, it is hardly used by the courts which leaves a vulnerable group, namely poor tenants, at the mercy of their lessor which illustrates either the need for another option or that the courts must grant more specific performance orders.

The case of *Mpange v Sithole* necessitates discussion because of the fact that it addresses the current concern of the lessor's maintenance duties where the property leased is in a decrepit state and the tenants are particularly vulnerable.⁵¹ Naudé mentions that this is the first reported judgment in which a court allowed specific performance of a lessor's duty to deliver and maintain the leased property in an adequate condition for which it was let.⁵² The central issue in this case concerned the existing remedies available to lessees who have a choice between homelessness and living in an unsafe building.⁵³ The court stated that, irrespective of previous courts' hesitancy to grant these orders, the two main remedies available to such lessees are an order for specific performance in which the lessor is obliged to commence maintenance in order to make the building into a suitable condition for the purpose for which it was let and an order to the effect that the lessees can pay a reduced rental which is proportionate to their deprived use and enjoyment of the property.⁵⁴ The assertion was that the building was inappropriate for the purpose for which it was let.⁵⁵ The court confirmed the common law standard that a lessee is allowed the complete use and enjoyment of the property for the period of the lease.⁵⁶ The lessor's equivalent duty is therefore to both maintain and deliver the property in a condition that is

⁴⁹ *Mpange* (note 11 above).

⁵⁰ *Mpange* (note 11 above).

⁵¹ Viljoen (note 3 above) 246.

⁵² Viljoen (note 3 above) 246.

⁵³ *Mpange* (note 11 above).

⁵⁴ *Mpange* (note 11 above).

⁵⁵ *Mpange* (note 11 above).

⁵⁶ *Mpange* (note 11 above).

reasonably suitable for the reason for which it has been let.⁵⁷ This duty includes the obligation that lessees should not be exposed to any preventable dangers to property or life and that lessees should be able to inhabit the property safely.⁵⁸ This statement was made in the situation of a defective premises and should probably not be construed to extend the lessor's obligation to protect lessees against interferences by criminals.⁵⁹ The *Rebel Discount Liquor Group* case is therefore still the main authority concerning interferences by criminals as mentioned above.⁶⁰ Based on the facts, the court in *Mpange* held that the property was unfit for residential use as the lessor had failed to provide and maintain the property in the necessary condition.⁶¹ The court also held that the lessee's access and continued use of the property did not imply that they relinquished their right to a safe and habitable dwelling.⁶² The remedies available to the lessees were cancellation, a claim for specific performance, damages (either in addition or in the alternative) or a reduction in rental.⁶³ It was held that cancellation of the lease would fail to afford any relief to low-income lessees who would struggle to find housing in the inner city during housing shortages.⁶⁴ An important requirement for the alternative method of dispute resolution is that the lessee must have the financial means or necessary skills to undertake the required repairs as mentioned above.⁶⁵ Due to the fact that the lessees were financially unable to fix the repairs themselves, the court emphasised the concern that the lessees would probably have to continue to occupy a property that posed a risk to their health and safety, infringed their dignity and impaired their privacy if the remedy of specific performance was not available to them.⁶⁶ The constitutional rights of the lessees contained in sections 10, 14 and 26(1) of the Constitution, 1996 would accordingly be implicated if they continued to occupy the property.⁶⁷ The court decided that although previous courts have been reluctant to grant specific performance, there is no decision or principle prohibiting the court from granting such an order.⁶⁸ Moreover, bearing in mind the constitutional rights of privacy,

⁵⁷ Viljoen (note 3 above) 247.

⁵⁸ *Mpange* (note 11 above).

⁵⁹ Viljoen (note 3 above) 247.

⁶⁰ *Rebel Discount Liquor* (note 31 above).

⁶¹ *Mpange* (note 11 above).

⁶² *Mpange* (note 11 above).

⁶³ *Mpange* (note 11 above).

⁶⁴ *Mpange* (note 11 above).

⁶⁵ Viljoen (note 3 above) 248.

⁶⁶ Viljoen (note 3 above) 248.

⁶⁷ *Mpange* (note 11 above).

⁶⁸ Viljoen (note 3 above) 248.

dignity and access to adequate housing, the court was bound by section 39(2) of the Constitution to develop the common law in a way that allows it to grant this remedy in an occurrence such as that of the present case.⁶⁹ The alternative remedy where the lessees could reduce their rent was subsequently considered.⁷⁰ The court acknowledged the principle established by the judiciary that where a lessee continues with occupation of the leased property, he will be liable for the full rental, irrespective of the fact that his use was compromised due to disrepair and held that a reduction of rental for the duration, until the lessor does the necessary repairs, will be a suitable reaction as the lessee's rights under sections 10, 14 and 26(1) of the Constitution are effected through the continued occupation of such property.⁷¹ The court therefore rejected the string of cases that held that where the lessee continued with occupation, irrespective of the state of the property, he would be liable for the full rent.⁷² The court consequently followed *Ntshiqqa v Andreas Supermarket*.⁷³ Finally the court recognised that an order for the reduction of rent does not fix the poor condition of the property, but it does serve as motivation for the lessor to commence repairs so that he can regain the full amount of the rental.⁷⁴ The main benefit of this remedy is that it acknowledges the important landlord-tenant relationship, namely between the landlord and the tenants.⁷⁵ This also shows that the remedy of reducing the rent can sometimes be inadequate and that the courts need to take a more robust approach when the lessees are particularly vulnerable in order to ensure fairness and equity.

It is unlikely that this decision addressed the real issue of slumlords renting decrepit buildings to low-income lessees, although the magnitude of this socio-economic challenge is probably beyond the scope of a single judgment.⁷⁶ Nevertheless, the court failed to safeguard the lessees from an unsafe building and ensure that they were protected, which raises apprehension about the effectiveness of the decision.⁷⁷ When considering the real threat of people inhabiting a dilapidated building, a mere reduction of rent as a remedy is inadequate as they are still paying

⁶⁹ *Mpange* (note 11 above).

⁷⁰ *Mpange* (note 11 above).

⁷¹ *Mpange* (note 11 above).

⁷² Viljoen (note 3 above) 249.

⁷³ *Ntshiqqa* (note 12 above).

⁷⁴ *Mpange* (note 11 above).

⁷⁵ *Mpange* (note 11 above).

⁷⁶ Viljoen (note 3 above) 249.

⁷⁷ Viljoen (note 3 above) 249.

rent to a lessor who receives the rental payments but who fails to maintain the property.⁷⁸ A more forceful approach by the court was therefore required in terms of which both the lessor and the real owner would both be held accountable if they are two separate people.⁷⁹ A number of other options could be that the lessees would be released from paying rent altogether, since the court held that the property was unfit for human occupancy, that the court allows the lessees to stop paying rent until the lessor, in co-operation with the owner, starts the necessary repairs, or that the lessor take the necessary steps in order to liaise with the owner to repair the property, failing which the lessor must commence the repairs himself as a party that enters into a landlord-tenant relationship and accepts the role of lessor has a duty to maintain the property, just as he has the right to receive rental payments.⁸⁰ Therefore a claim for a reduction of rent for diminished beneficial occupation should be seen as being valid, subject to the usual rules pertaining to reduction.⁸¹ This further illustrates the need for a more robust approach by the courts in which this socio-economic problem is less tolerated.

2.5 Proportionately reduced rent

Other recent decisions have held that the lessee who received reduced enjoyment and use must pay a reduced rent that is proportionate and is not entitled to withhold the full amount of rent.⁸² In *Ethekwini Metropolitan Unicity Municipality v Pilco*, the court held that if the amount was easily ascertainable, the lessee could set the amount off against the lessor's claim for rent; if not, then the lessee is obligated to pay the full amount of rent as agreed upon in the lease and could then retrieve from the lessor the amount owed afterwards.⁸³ The court rejected the lessee's argument that he did not have to pay rent at all because a third party occupied a portion of the property which is in breach of the lessor's responsibility to give undisturbed use and enjoyment.⁸⁴ The court held that the lessee was obliged to pay the rent but that because the lessee was deprived of the use of a section of the property, which was being used by another

⁷⁸ Viljoen (note 3 above) 249 – 250.

⁷⁹ Viljoen (note 3 above) 250.

⁸⁰ Viljoen (note 3 above) 250.

⁸¹ G Glover *Kerr's Law of sale and lease* (2014) 382.

⁸² Naudé (note 19 above) 327.

⁸³ *Ethekwini Metropolitan Unicity Municipality v Pilco Investments* [2007] ZASCA 62 (hereafter *Ethekwini*).

⁸⁴ *Ethekwini* (note 83 above).

person who was making pre-cast fencing, the lessee would be permitted to a reduction of rent over the period in which full use and enjoyment was denied, proportional to his reduced use and enjoyment of the property.⁸⁵ Accordingly, this shows that there are contradictory High Court decisions on whether a lessee has a right to refuse to pay the full amount of rental in the situation of partial deprivation of use and enjoyment and on the exact role and operation of the *exceptio* in lease agreements.⁸⁶ The Supreme Court of Appeal also did not clarify the issue satisfactorily in *Thompson and Ethekwini*.⁸⁷ This illustrates the need for clarification and certainty as there are conflicting High Court decisions which creates confusion and the operation of the *exceptio* has still not yet been determined.

According to Naudé, only a few modern writers have specifically deliberated on whether a lessee, who had partial use and enjoyment, may rely on the *exceptio* to refuse to pay the full amount of rent, as opposed to only proportionally reducing the rent to that of his reduced use and enjoyment of the property.⁸⁸ Piek and Kleyn, writing before *Ntshiqqa*, explicitly state that the lessee may not rely on the *exceptio* to withhold the full rent in such a scenario as the old authorities and South African case law do not mention such a remedy.⁸⁹ Due to the fact that the lessor was permitted to claim a *pro rata* rental, they infer that the lessee may not rely on the *exceptio*.⁹⁰ On the other hand, Sharrock takes the opposing view when regarding the lessor's duty to give beneficial use and enjoyment and states that the lessee's use and enjoyment should not be restricted.⁹¹ He further states that if the lessor unlawfully limits the lessee's use and enjoyment of the property, then the lessee should have the normal contractual remedies as well as a claim for a reduction of rental that is proportionate or the lessee may alternatively refuse to pay rent and if sued for payment by the lessor, raise the *exceptio*.⁹² Currie states that the rejection of the *Arnold v Viljoen* case is correct as there is no basis in law or principle for handling lease any differently from other reciprocal contracts.⁹³ Apparently, no other writer has specifically considered whether

⁸⁵ *Ethekwini* (note 83 above).

⁸⁶ Naudé (note 19 above) 331.

⁸⁷ Naudé (note 19 above) 331.

⁸⁸ Naudé (note 19 above) 331.

⁸⁹ Naudé (note 19 above) 331-332.

⁹⁰ Naudé (note 19 above) 332.

⁹¹ Naudé (note 19 above) 332.

⁹² Naudé (note 19 above) 332.

⁹³ Naudé (note 19 above) 333.

the full rental may be withheld in the case of a partial deprivation.⁹⁴ However, a number of writers accept that the *exceptio* may be relevant in the situation of lease, without specifically considering its operation in the instance of a reduction in beneficial use.⁹⁵ Thus academic writers either do not specifically consider or are not in agreement on the exact remedies that the lessee has when receiving partial use and enjoyment of the property.⁹⁶ Many of them make vague statements that the *exceptio* is available in this situation but without clearly considering the consequences thereof.⁹⁷ This is similar to the above court cases as it further provides uncertainty in the sense that both acknowledge the *exceptio* and the option of withholding the full amount of rent without providing further clarification on its operation and consequences or the *exceptio* is not considered at all in some instances.

There are at least two approaches which can be deduced from the current case law and literature on the remedies of reduction of rent and withholding of rent.⁹⁸ The first approach is the interpretation that the lessee who received partial use and enjoyment is only allowed to reduce the rent proportionally and is not allowed to also withhold the rent.⁹⁹ Therefore, if the lessee received no beneficial use and enjoyment, a proportionate reduction would entitle the lessee to reduce the rent to zero.¹⁰⁰ This approach would illustrate the principle of reciprocity as well as fairness which underlie the *exceptio* as well as its restriction in *BK Tooling* which also underlies the remedy of reduction of rent.¹⁰¹ The second approach is that the *exceptio* applies as an alternative remedy to reduction in rent, which includes the instance where the lessee has received partial use and enjoyment of the property.¹⁰² Therefore, it would not be a breach for the lessee, who received partial use, to withhold the full amount of rent until the lessor reinstates the full use and enjoyment of the property.¹⁰³ These approaches serve as possible solutions for the above mentioned issues and are also dealt with in the subsequent chapters.

⁹⁴ Naudé (note 19 above) 333.

⁹⁵ Naudé (note 19 above) 333.

⁹⁶ Naudé (note 19 above) 335.

⁹⁷ Naudé (note 19 above) 335.

⁹⁸ Naudé (note 19 above) 335.

⁹⁹ Naudé (note 19 above) 335.

¹⁰⁰ Naudé (note 19 above) 335.

¹⁰¹ Naudé (note 19 above) 335.

¹⁰² Naudé (note 19 above) 335.

¹⁰³ Naudé (note 19 above) 335.

A proportional reduction of rent as a remedy for a lessee who received partial use and enjoyment of the leased property is the only recognised remedy by Roman, Roman-Dutch and South African authority so that a right to withhold the full amount of rent with reference to the *exceptio* is not available as a further defence in such a situation.¹⁰⁴ Nevertheless, the judgment in *Ntshiqqa*, which applied the *exceptio* and the rules on the relaxation thereof in *BK Tooling*, has not been explicitly overruled and has frequently been mentioned with support by academic writers.¹⁰⁵ However, this creates uncertainty about the lessee's exact obligations and remedies which shows the need for clarification.¹⁰⁶

2.6 Concluding remark

In conclusion, the analysis of case law above shows that there are contradictory judgments about whether the full amount of rent can be withheld, how the *exceptio* applies and if it is in fact applicable. These are problematic aspects which need to be dealt with sufficiently by the courts as these judgments have created uncertainty which shows the need for clarification with regards to this area of law, particularly the uncertainty which surrounds the *exceptio* as even academic writers are unsure of its application. Therefore solutions and certainty are necessary.

¹⁰⁴ Naudé (note 19 above) 350 – 351.

¹⁰⁵ Naudé (note 19 above) 351.

¹⁰⁶ Naudé (note 19 above) 351.

Chapter 3:

The impact of the relevant legislative provisions

In this chapter, I analyse the impact of the relevant legislative provisions on the lessor's duty of maintenance, specifically the sections in the Rental Housing Act 50 of 1999, the Consumer Protection Act 68 of 2008 and the Rental Housing Amendment Act 35 of 2014 which is not yet in force. I also mention the relevant constitutional provisions. This analysis is done by first considering the condition of the property at the start of the lease term followed by the statutory duty to maintain and the applicable residual provisions as well as the related remedies. Through the analysis of these provisions, I demonstrate the problematic aspects which need to be dealt with as well as aspects which have been dealt with insufficiently by the legislation.

3.1 The condition of the property

The landlord has an obligation from the start of the lease to place the lessee in occupation of property that is in the condition agreed by the parties or without specific agreement, the property must be reasonably adequate for the purpose leased.¹ It is necessary to first consult the contract in order to determine whether it identifies in what condition the property should be made available.² If, after the lease has been entered into, the lessor agrees to make certain additions but fails to make them, he is in breach of his obligation to place the property in the condition as agreed upon.³ If the parties fail to include an express or tacit term, then the residual position will apply which is that the lessor is obliged to place the property initially in a condition that is reasonably fit for the purpose for which it was let.⁴ This includes the property being free of defects.⁵ The purpose of a lease is determined by considering how the property is going to be used by the lessee.⁶ The purpose can be expressly stated in the lease or it may be determined from the terms of the lease.⁷ If the purpose is not clearly expressed or is

¹ G Glover *Kerr's Law of sale and lease* (2014) 382.

² Glover (note 1 above) 382.

³ Glover (note 1 above) 382-383.

⁴ *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 3 SA 143 (A).

⁵ Glover (note 1 above) 383.

⁶ Glover (note 1 above) 383.

⁷ Glover (note 1 above) 383.

not obvious from the terms of the lease, it may be determined by considering all the relevant circumstances.⁸ The rule in such an instance is that the purpose is presumed to be the use to which the property was previously put or to which the landlord must have known the tenant intended it to be put.⁹ The residual common law duty to place the property in a reasonably fit condition for the purpose for which it was let is made compulsory for residential leases due to the Rental Housing Act 50 of 1999 (hereafter the RHA).¹⁰ This shows that the RHA has legislatively enforced the common law position.

Although the Rental Housing Amendment Act 35 of 2014 (hereafter the RHAA) is not in force yet, section 4B(11) read with section 1 is primarily intended to approve the common law position for residential tenants.¹¹ According to section 4B(11), a positive duty is placed on the landlord to provide the tenant with a habitable dwelling.¹² Section 1 of the RHAA introduces and defines the concept of habitability to be a dwelling that is suitable and safe for living and includes sufficient space, protection from the elements and health threats, physical safety of the tenant and the tenant's household and visitors and a structurally adequate building.¹³ This list is non-exhaustive and will probably include additional features when interpreted by the courts in the future.¹⁴ Furthermore, if a dwelling does not comply with the laws that regulate the safety of residential buildings in general, then it would also likely be inadequate.¹⁵ Although the inclusion of such a definition is innovative and necessary, the enforceability is questionable especially when considering the fact that many poor tenants still reside in dilapidated buildings.¹⁶ This shows that although these legislative provisions are welcomed, they will not solve these problematic aspects alone especially if they are not enforced properly. Additionally, this type of definition is possibly envisioned to protect a specific group of tenants, namely tenants who lack the necessary bargaining power for acceptable accommodation.¹⁷ The success and impact of this definition is therefore dependant on whether vulnerable occupants would

⁸ Glover (note 1 above) 383.

⁹ Glover (note 1 above) 383.

¹⁰ Glover (note 1 above) 385.

¹¹ S Viljoen *The law of landlord and tenant* (2016) 200.

¹² Viljoen (note 11 above) 200.

¹³ S 1 of the Rental Housing Amendment Act 35 of 2014 (hereafter the 'RHAA').

¹⁴ Viljoen (note 11 above) 200.

¹⁵ Viljoen (note 11 above) 200.

¹⁶ Viljoen (note 11 above) 200.

¹⁷ Viljoen (note 11 above) 200.

be able to apply it in a court or Rental Housing Tribunal and whether the landlord would be ordered to meet the terms of the definition, especially when he is not the owner.¹⁸ Therefore there is need for clarity in this regard.

Section 4B(4) of the amended RHA additionally requires that the tenant and the landlord must both, before the tenant occupies the dwelling, inspect the dwelling to determine the existence of any defects or damage so that the landlord's responsibility for rectifying the defects or damage can be determined.¹⁹ Since this provision will only apply when it is put into operation by proclamation, section 5(3)(e) of the RHA is still the main authority in this situation.²⁰ Section 5(7) necessitates that a list of such defects must be attached to the lease.²¹ This shows that, in theory, a lessee and lessor should be in the same position of power where a lessee can demand these changes and the lessor then performs them. However, this is often not the case in practice as the more vulnerable tenants do not have the option of inspecting the property beforehand and waiting for the lessor to correct the defects before they can live there as they may need the property more urgently.

In terms of the common law, there is a recognised exception to the lessor's liability, which is that if the lessee knows of the defect and is still willing to occupy the property on the understanding that he, and not the lessor, will bear the risk, then he has no claim against the lessor for any loss that may result from the defect.²² However, the lessor is still liable if both parties are aware of the defect and the lessee, although he takes occupation, expects the lessor to remedy it and it is the lessor's duty to do so.²³ If a lessee inspects the property before taking occupation and makes no opposing comment, it may be considered that he accepts the risk of loss resulting from those defects which he sees, or which he can reasonably be expected to see.²⁴ However, if he is not an expert, he does not have to bear the risk of loss resulting from the defects which an expert would have noticed but which he reasonably did not notice.²⁵ Even if a lessee expressly acknowledges that he has received the property in a good condition and has undertaken to maintain it in that condition, he does not

¹⁸ Viljoen (note 11 above) 200.

¹⁹ S 4B(4) of the RHAA.

²⁰ S 5(3)(e) of the Rental Housing Act 50 of 1999 (hereafter the 'RHA').

²¹ S 5(7) of the RHA.

²² Glover (note 1 above) 385-386.

²³ Glover (note 1 above) 386.

²⁴ Glover (note 1 above) 386.

²⁵ Glover (note 1 above) 386.

accept the risk of structural defects.²⁶ Additionally, a lessee does not accept the risk if, after inspection and before going into occupation, he states his approval with the condition of the property and the problem only becomes apparent during the occupancy.²⁷ Considering the duties and rights regarding habitable property in the amended RHA as mentioned above, it would seem that such an exception would not necessarily apply to property falling under this Act.²⁸ Therefore, there is a need for more clarity and certainty in this regard.

3.2 Maintenance

3.2.1 Statutory duty to maintain

In addition to the duty to deliver the property in a habitable condition, an additional duty is placed on the landlord, in terms of section 4B(11) of the RHAA, to maintain the property in a habitable condition throughout the duration of the lease.²⁹ Section 1 introduces the definition of maintenance which includes the repairs and upkeep that is required to guarantee that a dwelling is in a habitable condition.³⁰ These duties of the landlord are phrased in such a way as to imply that they cannot be waived.³¹ Once the RHAA becomes law, the residual provisions will be confirmed but the express clauses which place maintenance duties on tenants might no longer be an option.³² Additionally, the description of a habitable dwelling will serve a substantial role when interpreting the landlords' duties to both maintain the premises and guarantee the delivery of an adequate building.³³ However, this is not the position yet.³⁴ This shows that due to the fact that the RHAA is not in force yet, there is uncertainty regarding this position, which in turn shows that it needs to be put in operation to provide certainty. It also demonstrates that maintenance duties can no longer be placed on the tenants, which alters the current position.

In the South African rental housing framework, the landlords' maintenance duties are currently primarily based on common law principles which apply to all landlords

²⁶ Glover (note 1 above) 386.

²⁷ Glover (note 1 above) 386.

²⁸ Glover (note 1 above) 386.

²⁹ S 4B(11) of the RHAA.

³⁰ S 1 of the RHAA.

³¹ Viljoen (note 11 above) 201.

³² Viljoen (note 11 above) 201.

³³ Viljoen (note 11 above) 201.

³⁴ Viljoen (note 11 above) 201.

regardless of the sector in which they operate.³⁵ Therefore, there is no distinction between the maintenance duties of a public sector landlord and a private landlord.³⁶ Since the RHAA is envisioned to improve the RHA, it could be implied that the landlord's duty to provide the tenant with a habitable dwelling and maintain it in that condition throughout the lease would probably then apply to all private and social sector tenants.³⁷ However, this is not necessarily the case with public sector tenants and the legislature would have to determine whether these tenants should be able to claim a specific standard of housing.³⁸ Such a right would have to be weighed up with the financial impact of the right and the motivation of guaranteeing adequate rental housing for the poor.³⁹ This illustrates that even after the RHAA has been enforced, there will still be uncertainty around whether the duty to provide a habitable dwelling does indeed apply to all tenants irrespective of their sector and that the legislature would need to introduce another amendment in which public sector tenants would be included or, conversely, expressly states their exclusion to provide certainty.

3.2.2 Agreement to maintain

All property needs regular maintenance in order to avoid deterioration and the parties to a landlord-tenant relationship therefore typically include particular clauses in order to regulate the responsibilities of each party in this respect.⁴⁰ This is a sensible thing to do for two reasons: firstly, because it is good planning for the parties to know who bears responsibility for each duty.⁴¹ Secondly, if the residual position applies, the common law position is that where the duty to maintain ends, the lessee's duty to take care of the property begins but there is inevitably a grey area on the boundary of these duties that can result in disputes.⁴² Where the express clause is clear, there is no problem but such clauses are not always clear and therefore often necessitate interpretation.⁴³ If there is an express clause which overrides the residual position that the landlord must maintain the property, then the courts will interpret this clause

³⁵ Viljoen (note 11 above) 206.

³⁶ Viljoen (note 11 above) 206.

³⁷ S 14(2)(g) of the Social Housing Act 16 of 2008.

³⁸ Viljoen (note 11 above) 206-207.

³⁹ Viljoen (note 11 above) 207.

⁴⁰ Viljoen (note 11 above) 207.

⁴¹ Glover (note 1 above) 387.

⁴² Glover (note 1 above) 387.

⁴³ Glover (note 1 above) 387.

strictly.⁴⁴ If a landlord alleges that a tenant breached his maintenance duty, then the landlord must prove the condition of the property at delivery and its condition when the lease is terminated.⁴⁵ There is therefore no presumption that the property was in an adequate condition upon delivery.⁴⁶ If a tenant breaches his maintenance duty, the landlord would then be allowed to claim damages for actual and consequential loss as well as cancel the lease if the breach has resulted in a significant deterioration of the condition of the property.⁴⁷

The 'fair wear and tear' clause is a clause that is frequently used and which can relate to either the outside or inside of the property.⁴⁸ This phrase refers to the dilapidation which occurs due to lapse of time, weather and normal daily use and the effect of the phrase is to leave the responsibility of fair wear and tear with the landlord.⁴⁹ However, if the tenant does have a duty to repair and fails to effect these repairs and keeping the place in order, he then cannot rely on the exception of fair wear and tear as the tenant's use would then be considered unreasonable.⁵⁰ A 'fair wear and tear' clause can be construed in two ways: firstly to place a duty on the landlord to react to fair wear and tear maintenance issues during the term of the lease or secondly, to place the duty on the tenant for the duration of the lease.⁵¹ If such a clause is unclear, then it will be interpreted against the landlord as he retains any responsibility which he has not clearly shed as mentioned above.⁵² The importance of remembering that the lessor is contracting out of his residual obligations is apparent also when a meaning has to be given to the word "maintain".⁵³ If a lessee undertakes to maintain the property in good condition, he does not have to put the property initially into that condition as that duty still remains with the lessor.⁵⁴ A lessee, who undertakes to maintain the property in the same good condition as he found them, need not repair structural defects nor put the property into a better condition than it was when he took occupation.⁵⁵ This, however, must be understood to refer to the overall condition of

44 Viljoen (note 11 above) 207.

45 Viljoen (note 11 above) 208.

46 Viljoen (note 11 above) 208.

47 Viljoen (note 11 above) 208.

48 Viljoen (note 11 above) 209.

49 Glover (note 1 above) 387.

50 Viljoen (note 11 above) 209.

51 Viljoen (note 11 above) 209.

52 Glover (note 1 above) 389.

53 Glover (note 1 above) 389.

54 Glover (note 1 above) 389.

55 Glover (note 1 above) 389.

the property as repairing may involve replacing worn-out items with new ones and the new items will then be in a better condition than the old ones were when the lessee first took occupation.⁵⁶ If the lessee fails to make the repairs which he has undertaken to perform in the contract, then the lessor has an action for damages, both for the actual loss and for consequential loss.⁵⁷ Thus, the lessor may claim the cost to himself of making the repairs which the lessee undertook to make but did not make and in certain instances, his loss of profit.⁵⁸

3.2.3 Residual provisions that regulate maintenance

There has always been a residual obligation which the law enforces in a lease agreement in the absence of an express or tacit agreement to the contrary.⁵⁹ The general rule is that the parties are allowed to agree expressly or tacitly on maintenance issues and that residual provisions are only incorporated into a contract in the absence of an express or a tacit agreement.⁶⁰ Delivery of the property is therefore not enough as the landlord is required to maintain the property throughout the lease, since this duty is continuous.⁶¹ Cooper argues that the maintenance of the property includes the responsibility to replace malfunctioning parts with new parts as well as to structurally alter defective parts to confirm that the tenant can use and enjoy the property.⁶² However, the landlord is not required to make repairs if the tenant caused the state of disrepair.⁶³ Subject to the nature and extent of the necessary repairs, the tenant might be forced to vacate the property in some instances if the landlord is required to make such repairs.⁶⁴ If the repairs are urgent and cannot be properly performed whilst the tenant is in occupation or the property cannot be safely inhabited, then the general rule will not apply and the tenant would have to leave the property.⁶⁵ In such a scenario, the landlord must give the tenant reasonable notice and allow the tenant a reduction in rent for the period during which the tenant lived elsewhere.⁶⁶ The tenant

⁵⁶ Glover (note 1 above) 389.

⁵⁷ Glover (note 1 above) 391.

⁵⁸ Glover (note 1 above) 391.

⁵⁹ Glover (note 1 above) 386-387.

⁶⁰ Glover (note 1 above) 387.

⁶¹ Viljoen (note 11 above) 212.

⁶² Viljoen (note 11 above) 224.

⁶³ Viljoen (note 11 above) 225.

⁶⁴ Glover (note 1 above) 392.

⁶⁵ Viljoen (note 11 above) 225.

⁶⁶ Viljoen (note 11 above) 225.

would also be granted a reduction in rent where the repairs are performed in a section of the leased property and the tenant continues to use the remainder of the property.⁶⁷ The amount of remission of rent is determined by taking into account the extent of the deprivation so that it is proportionate to the tenant's loss of use and enjoyment.⁶⁸ However, remission of rent will not be granted if the repairs are minor or cause insignificant inconvenience to the tenant.⁶⁹ Surely then in the instance where the lessee has to vacate the property for repairs to be performed the reduction of rental is an inadequate remedy as the lessee will have to continue paying rent for the impaired property in addition to the rent he will be paying for the new dwelling that he is currently occupying.

As mentioned above, landlords must deliver the property in a condition fit for which it is let and ensure that the condition remains fit throughout the lease.⁷⁰ However, the landlord's duty to deliver the use and enjoyment of the property is limited to the property and the condition thereof which means that an external factor such as criminal activities fall outside the scope of this duty since the condition of the property, as a habitable dwelling, is not affected by these activities.⁷¹ Safety measures such as electric fencing and burglar bars are not essential to constitute a habitable dwelling and must therefore be implemented by the tenant to guarantee his own safety.⁷² Therefore, even though section 1 of the RHAA includes the physical safety of the tenant in the definition of a habitable dwelling, it is improbable that it would include safety from criminal activities as the alternative would result in a situation where all landlords would be held liable, which it is believed places an unreasonable obligation on landlords to ensure the safety of their tenants.⁷³ However in a country like South Africa where criminal activity occurs often, safety measures should probably be considered to be essential in order for a dwelling to be habitable and whilst the sole burden of ensuring safeguards should not be placed on the lessor entirely, the lessor should be given some duties to ensure that the lessee would be reasonably safe.

⁶⁷ Reg 5 of the Western Cape Unfair Practices Regulations PN 22 of 2002.

⁶⁸ Viljoen (note 11 above) 226.

⁶⁹ Viljoen (note 11 above) 226.

⁷⁰ Viljoen (note 11 above) 230.

⁷¹ Viljoen (note 11 above) 230.

⁷² Viljoen (note 11 above) 230.

⁷³ Viljoen (note 11 above) 230.

A lessee does not have to tolerate any improper infringement of his right to peaceful occupation of the property.⁷⁴ Causing unnecessary inconvenience is such an infringement and therefore a lessee is entitled by means of an interdict to prevent his lessor from carrying out repairs which are unnecessary or which, even if they may be classed as necessary, could be made after the termination of the lease.⁷⁵

Keeping in mind the above mentioned legislative provisions, sections 55 and 56 of the Consumer Protection Act 68 of 2008 (hereafter the CPA) specifically refer to consumer contracts concerning goods.⁷⁶ According to section 1 of the CPA, goods are defined as a legal interest in land or any other immovable property other than an interest that falls within the definition of service.⁷⁷ Since the definition of service includes access to or use of any premises or other property in terms of a rental, sections 55 and 56 therefore do not apply to leases.⁷⁸ Additionally, section 54 refers specifically to the performance of services which implies that the section relates to services more similar to the supply of work for specific purposes rather than the letting and hiring of a thing over a period of time.⁷⁹ According to Glover, the common law of lease, supplemented by the RHA where relevant, seems to cover the necessary issues adequately without the need for the definitional boundaries of the CPA to be stretched.⁸⁰

3.2.4 Remedies

Numerous remedies are available to the tenant where the landlord breaches his maintenance duty as it amounts to positive malperformance of the contract.⁸¹ If there is a major breach then the tenant would be allowed to cancel the lease.⁸² The tenant can only cancel the lease if the disrepair that occurred during the course of the lease renders the property unusable for the purpose for which it was let.⁸³ Cooper argues that this test is irrational and that the courts should rather make use of the reasonable man test, in other words, if the property is defective to the extent that no reasonable

⁷⁴ Glover (note 1 above) 393.

⁷⁵ Glover (note 1 above) 393.

⁷⁶ Glover (note 1 above) 394.

⁷⁷ S 1 of the Consumer Protection Act 68 of 2008.

⁷⁸ Glover (note 1 above) 394.

⁷⁹ Glover (note 1 above) 394.

⁸⁰ Glover (note 1 above) 394.

⁸¹ Viljoen (note 11 above) 230-231.

⁸² Viljoen (note 11 above) 231.

⁸³ Viljoen (note 11 above) 231.

man can be expected to live there, then the tenant can vacate the property and cancel the lease.⁸⁴ Any unjustified delay by the landlord to make the repairs which leads to losses suffered by the tenant can be recovered through a separate action for damages.⁸⁵ If the tenant fails to request that the landlord make the necessary repairs and makes the repairs himself, the landlord would then not be required to repay the tenant.⁸⁶ Therefore, the landlord must first be notified of the disrepair and given a reasonable time to make the necessary repairs before the tenant can do it himself.⁸⁷ However, if the tenant requests the repairs and the landlord fails to fix them, the tenant will then be able to either sue for specific performance or make the repairs himself, in which case he can either deduct the costs of the repairs from the rent due or claim the costs from the landlord.⁸⁸ The tenant can also choose to accept the inferior property and continue with the lease, in which case he can claim that the rent be reduced in proportion to his deprived use.⁸⁹ This principle corresponds with the reciprocal obligations undertaken by the parties.⁹⁰ However, as already mentioned, the deprivation must be more than a trivial inconvenience.⁹¹

A general problem exists where the tenant is financially unable to perform the repairs himself.⁹² A residential landlord's continuous refusal to maintain the leased property is currently not specifically addressed in the South African rental framework.⁹³ Therefore, some statutory development involving the types and severity of remedies is possibly required to compel landlords to maintain their property.⁹⁴ The courts' reluctance to grant specific performance further exacerbates this situation. Hence there is a need for statutory certainty in this regard as South Africa has vulnerable tenants that are in need of more protection and who cannot perform the repairs themselves.

In contrast to the principle that the tenant can continue to occupy substandard property at a reduced rent as stated above, several decisions have held that the tenant

⁸⁴ Viljoen (note 11 above) 231.

⁸⁵ Viljoen (note 11 above) 231.

⁸⁶ Viljoen (note 11 above) 232.

⁸⁷ Viljoen (note 11 above) 232.

⁸⁸ Viljoen (note 11 above) 232.

⁸⁹ Viljoen (note 11 above) 233.

⁹⁰ Viljoen (note 11 above) 233.

⁹¹ Viljoen (note 11 above) 233.

⁹² Viljoen (note 11 above) 238.

⁹³ Viljoen (note 11 above) 238.

⁹⁴ Viljoen (note 11 above) 238.

would be liable for the full rental amount if he continues to occupy the property, regardless of the fact that his use is diminished.⁹⁵ This approach has been strongly criticised especially when considering that it is in conflict with the principle of reciprocity of obligations which arise from a reciprocal contract as well as principles applicable to the *exceptio non adimpleti contractus*.⁹⁶ A lessee who is authorised to terminate a lease and vacate the property may therefore decide to remain in occupation.⁹⁷ It would consequently be irrational to hold such a tenant liable for rent, since he has been deprived of his beneficial use of the property, which is the core of the agreement.⁹⁸ Arguably, a tenant should be able to claim a reduction in rent if his use and enjoyment has been diminished, regardless of the fact that he decided to remain in occupation.⁹⁹ Moreover, if the tenant is deprived of his total beneficial use and enjoyment, he should still be able to decide on whether he wants to continue with the lease, in which instance he should be able to claim a total reduction of rent as the principle of reciprocity of obligations permits that if the landlord fails to provide the tenant with the full use and enjoyment of the property then the tenant is relieved from his obligation to pay the rent.¹⁰⁰ Contract law principles make it apparent that parties to a reciprocal agreement can only claim performance if they fulfil their obligations otherwise the defendant can rely on the *exceptio*.¹⁰¹

The tenant can also request that the property be placed in the condition as agreed upon and the landlord would then, in such a scenario, be required to make the necessary repairs.¹⁰² However, the courts have been reluctant to grant specific performance where the landlord breached his maintenance duty as it would be difficult for the court to oversee and enforce its order as mentioned above.¹⁰³ The logic for this reluctance is that the courts believe that the tenants can either do the repairs themselves and then deduct the costs from future rents or claim the costs associated with the repairs from the landlord.¹⁰⁴ However, a fundamental part of this requirement

⁹⁵ Viljoen (note 11 above) 239.

⁹⁶ Viljoen (note 11 above) 239

⁹⁷ Viljoen (note 11 above) 240.

⁹⁸ Viljoen (note 11 above) 240.

⁹⁹ Viljoen (note 11 above) 240.

¹⁰⁰ Viljoen (note 11 above) 240.

¹⁰¹ Viljoen (note 11 above) 240-241.

¹⁰² Viljoen (note 11 above) 244.

¹⁰³ Viljoen (note 11 above) 244.

¹⁰⁴ Viljoen (note 11 above) 247-248.

is that the tenant must have the financial means to perform such repairs.¹⁰⁵ In the situation where the tenants are particularly vulnerable, they would not have the necessary skills or financial means to perform such repairs. It has been said that it may be imperative to grant the order to promote the spirit, purport and object of the Bill of Rights, specifically the rights to health, privacy, dignity and adequate housing.¹⁰⁶ Therefore the courts should grant specific performance in the instances that require it in order to be aligned with the relevant constitutional provisions.

3.3 Concluding remark

In conclusion, the RHA has altered certain principles of the common law position whilst legislative enforcing others and the impact that the RHAA will have on the current law still remains to be seen. Currently, the CPA does not affect the lessor's duty of maintenance as it has been deemed unnecessary to expand the definition in the CPA in order to provide the necessary protection as it is believed by academics that the RHA provides sufficient protection. However the RHAA is not yet in force and this position may change. The constitutional provisions play a role on the interpretation of the RHA, the common law and the remedies as shown above. Through the analysis of these provisions I have illustrated that there are problematic aspects which need to be dealt with for certainty and clarity as well as aspects which have been dealt with insufficiently by the legislation which need to be cured.

¹⁰⁵ Viljoen (note 11 above) 248.
¹⁰⁶ Glover (note 1 above) 395.

Chapter 4:

Comparative analysis of foreign legal systems

In this chapter, I analyse and compare South African law with foreign legal systems and suggest improvements and alterations where necessary. The foreign legal systems that are compared to South African law and commented on is English law, US law, Dutch law and German law. Austrian law is also briefly mentioned. This analysis is done by first considering the statutory duty to maintain, the agreement to maintain, the applicable residual provisions as well as the related remedies of South African law and comparing it to the position of the foreign legal systems. Through the analysis of these systems, I demonstrate the problematic aspects which need to be dealt with as well as aspects which have been dealt with insufficiently by the South African legal system. This is shown below.

4.1 Statutory duty to maintain

4.1.1 English law

In English law, an assortment of statutory interventions have been introduced to place some obligations on landlords with regard to the condition of the leased property.¹ The purpose for such impositions has mainly been to help tenants who lack the bargaining power to negotiate for decent rental housing.² This was illustrated in *Southwark LBC v Mills* [2001] 1 AC 1 8C-D where the court held that the purpose of these laws is to protect specific tenants from the bleak approach of the common law.³ However, the laws are disjointed and generally fail to protect tenants from poor housing conditions.⁴ This is similar to our current law as numerous low-income tenants still currently reside in dilapidated buildings due to unsuccessful enforceability.⁵ It is also similar to our law in the sense that the definition of habitability is possibly intended to protect a certain group of tenants, namely those who lack the bargaining power for acceptable accommodation.⁶

¹ S Viljoen *The law of landlord and tenant* (2016) 201.

² Viljoen (note 1 above) 201.

³ *Southwark LBC v Mills* [2001] 1 AC 1 8C-D.

⁴ Viljoen (note 1 above) 201.

⁵ Viljoen (note 1 above) 200.

⁶ Viljoen (note 1 above) 200.

Section 8(1) of the Landlord and Tenant Act 1985 makes provision for two implied contractual terms in residential leases.⁷ This section states that the condition of the dwelling must be fit for human habitation at the start of the lease and that the landlord will maintain the house in a fit condition throughout the term of the lease.⁸ A house is unfit if it is not reasonably suitable for occupation due to the fact that it suffers from one of the listed defects in section 10 of the Act which includes stability, freedom from damp, drainage and water supply.⁹ However, this section is applicable only if the property can be made habitable at a reasonable expense.¹⁰ Additionally, the landlord must also first be notified of the relevant defects before he can be held liable for the disrepair.¹¹ This is similar to the position in South African law.

Regarding the requirement of notice in section 8, the landlord must also be informed of any defects and the notice must be reasonable before he can be held liable which means that the landlord is exempted from liability for sudden injuries or loss due to undetectable defects.¹² However the scope of this provision has been diminished due to the Court of Appeal decision in *Quick v Taff Ely BC* where the court gave a narrow interpretation of the concept of disrepair.¹³ The court determined that disrepair is related to the physical condition and not to the lack of facility or inefficiency.¹⁴ Similarly, in *Irvine v Moran* the structure of the building was held to include features that gave the property its essential appearance, stability and shape, which meant that the entire residence was therefore not covered by this section.¹⁵ In addition to the restrictive approach adopted in *Quick v Taff Ely BC* as mentioned above, the courts have also limited the landlord's obligation to repair to exclude any liability to improve the property after the commencement of the lease.¹⁶ The result of this approach has been to effectively exempt the landlord from liability for inherent design defects in the property.¹⁷ Consequently, this means that the standard of repair varies according to the location and quality of the properties therefore dilapidated

⁷ Viljoen (note 1 above) 201.

⁸ Section 8(1) of the Landlord and Tenant Act 1985 (hereafter the 'LTA').

⁹ Viljoen (note 1 above) 201.

¹⁰ Viljoen (note 1 above) 201.

¹¹ Viljoen (note 1 above) 201.

¹² Viljoen (note 1 above) 202.

¹³ *Quick v Taff Ely BC* [1986] QB 809 (hereafter '*Quick v Taff*').

¹⁴ *Quick v Taff* (note 13 above).

¹⁵ *Irvine v Moran* [1991] 1 EGLR 261.

¹⁶ Viljoen (note 1 above) 203.

¹⁷ Viljoen (note 1 above) 203.

buildings in poorer neighbourhoods would consequently require a minimal repair obligation.¹⁸ This is similar to South African law where the repair obligation is less enforced in run-down neighbourhoods due to poorer tenants being unable to force the lessor to perform the necessary repairs due to lack of protection from the legislation.

The extent of the landlord's obligation in relation to the tenants' safety seems limited, as he must take reasonable care in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.¹⁹ This obligation applies to the defects that existed when the lease commenced and those that occurred during the term of the lease.²⁰ The defect must be a result of the landlord's action or omission to give effect to his obligation to repair or maintain the property.²¹ Nevertheless, the section does expand the landlord's maintenance duty as it applies to tenants and visitors if the landlord ought to have known of the defect and it automatically applies if the landlord has a right to access the property in order to commence repairs.²²

The observation of housing quality has been rationalised by the provisions in the Housing Act 2004, which states that local authorities are under an obligation to ensure that the housing conditions in their areas are assessed in order to detect the necessary actions that might be required.²³ The problem with this development is that the provisions are enforced by the local authority, which means that the provisions are unlikely to find application with regard to council housing.²⁴ Nevertheless, the Decent Homes Standard will compel social landlords to maintain their property.²⁵ This shows that local authorities are under an obligation to ensure that the provisions of the Housing Act 2004 have been complied with which is an effective method in ensuring that social landlords maintain their property and such a method should be considered for South African law.

According to section 79(1) of the Environment Protection Act 1990, a statutory nuisance occurs where the property is in a state that is prejudicial to health, which can

¹⁸ Viljoen (note 1 above) 203.

¹⁹ Viljoen (note 1 above) 204.

²⁰ Viljoen (note 1 above) 204.

²¹ S 4(3) of the LTA.

²² Viljoen (note 1 above) 204.

²³ S 3(1) of the Housing Act 2004.

²⁴ Viljoen (note 1 above) 205.

²⁵ Viljoen (note 1 above) 205.

arguably relate to structural defects in the property.²⁶ However, the purpose of this provision is not to regulate dangerous buildings and the resulting harm in the form of personal injuries but rather to prevent certain statutory nuisances from occurring.²⁷ The application of this section has been narrowed due to a restrictive interpretation by the courts as the House of Lords held in *Birmingham City Council v Oakley* that a statutory nuisance meant the presence of some feature which is prejudicial to health in that it is a source of possible infection of disease or illness such as dampness, mould, dirt or the presence of rats and therefore that it no longer applies to structural defects in the property as was initially believed.²⁸

4.1.2 US law

According to US law, the majority of US jurisdictions now impose a duty on landlords to both deliver and maintain their residential property in a fit, safe and habitable condition which duty is founded on legislation, case law or both.²⁹ However, if the landlord is an agency of the federal government, federal courts have not been receptive to tenants' attempts to derive private rights of action from federal housing statutes.³⁰ The main reason seems to be that if additional duties are placed on social landlords, the financial impact that these obligations might bring about could place these landlords under more pressure to deliver a specific standard of dwellings.³¹ This is similar to South African law where it is deemed to be undesirable to place additional duties on social sector landlords and that the financial impact is a key factor for the determination of not placing such additional duties on such landlords.

4.2 Agreement to maintain

4.2.1 English law

In English law, the majority of leases contain a variety of express covenants in terms of which the landlord is obliged to undertake several duties, including repairs and maintenance.³² The point of departure is that the parties are free to negotiate the

²⁶ S 79(1) of the Environment Protection Act 1990.

²⁷ Viljoen (note 1 above) 205.

²⁸ *Birmingham City Council v Oakley* [2001] 1 AC 617 (HL).

²⁹ Viljoen (note 1 above) 206.

³⁰ Viljoen (note 1 above) 206.

³¹ Viljoen (note 1 above) 206.

³² Viljoen (note 1 above) 208.

content of these covenants, however, the balance of bargaining power dictate that the burdens of the relationship rests more heavily on the tenant than the landlord.³³ Therefore if a landlord undertakes an express obligation, the court will interpret the covenant strictly.³⁴ This is similar to South African law where the tenant is more heavily burdened by the landlord-tenant relationship and that because of this the courts interpret the shedding of obligations by the landlord more restrictively.

The responsibility of maintenance is not always dealt with in the lease and neither party might end up with any obligation in this regard.³⁵ Disrepair is not the same as damage because one of the parties must have an obligation to undertake repairs before there can be any form of disrepair.³⁶ A number of incentives must be taken into account when considering the placement of the duty to maintain as a tenant might be more interested in the standard of the property since he makes use of the property on a daily basis, although the deteriorating nature of a lease might discourage a tenant from undertaking repairs and maintenance for long periods of time.³⁷ On the other hand, a landlord might view an obligation to repair and the right to receive rent as independent, although the condition of the property is likely to have a direct effect on the landlord's long-term investment.³⁸ A clear public interest exists in relation to the condition of buildings in general, since dilapidation and decay affects modern society and the economy.³⁹ This public interest view is a similar stance to that of South African law.

4.3 Residual provisions regulating maintenance

4.3.1 English law

In English law, most of the rules concerning habitability are contained in legislation, while some have developed in the law of negligence.⁴⁰ A precise formula of protection for tenants regarding the habitability of their dwellings does not exist, which renders this area of English landlord-tenant law complex and insufficient.⁴¹ Regardless of

³³ Viljoen (note 1 above) 208.

³⁴ Viljoen (note 1 above) 208.

³⁵ Viljoen (note 1 above) 208.

³⁶ Viljoen (note 1 above) 208.

³⁷ Viljoen (note 1 above) 208-209.

³⁸ Viljoen (note 1 above) 209.

³⁹ Viljoen (note 1 above) 209.

⁴⁰ Viljoen (note 1 above) 213.

⁴¹ Viljoen (note 1 above) 213.

some measures already introduced during 1885, the result is that there is no actual minimum standard required when letting residential property.⁴² However, two recent developments in this area of law are noteworthy, namely recommendations made by the Law Commission and the impact of the European Convention on Human Rights.⁴³ The Commission has recommended that a new statutory code should be introduced to place all repairing obligations upon the landlord.⁴⁴ The existing law should therefore be reversed in the absence of an express clause stating that the tenant should be liable for repairs.⁴⁵ This approach could be followed in South African law where a statutory code is introduced which places all repairing obligations on the lessor which would limit confusion between the parties.

In addition to these developments, the court in *Smith v Marrable* established an implied condition regarding leased furnished houses and that it should be reasonably fit for human habitation at the start of the lease.⁴⁶ Therefore if the landlord fails to give effect to this obligation, the tenant can repudiate the lease without notice.⁴⁷ However, this protection is limited due to the requirement of the dwelling being furnished.⁴⁸ Furthermore, the obligation that the tenant must use the property as his home does not give rise to an implied obligation on the landlord to ensure that any flaws are remedied in order to provide a dwelling that is fit for human habitation.⁴⁹ If the dwelling is not fit for human habitation the tenant can vacate and institute a claim for damages.⁵⁰ Therefore, there is no implied warranty of habitability in the English landlord-tenant framework and this area of law has arguably become stagnant in comparison to other jurisdictions, specifically US law.⁵¹ In terms of the common law, there are therefore two situations when two distinct implied covenants regarding the landlord's duty to maintain the property apply, namely where a furnished dwelling is let, the property must be fit for human habitation and where multi-occupied dwellings are let, reasonable care must be taken by the local authority landlord to maintain

⁴² Viljoen (note 1 above) 213.

⁴³ Viljoen (note 1 above) 213.

⁴⁴ United Kingdom Law Commission *Landlord and Tenant: Responsibility for State and Condition of Property* (1996) Law Com No 238 para 7.10.

⁴⁵ Viljoen (note 1 above) 214.

⁴⁶ *Smith v Marrable* (1843) 11 M & W 5 (hereafter '*Smith v Marrable*').

⁴⁷ *Smith v Marrable* (note 46 above).

⁴⁸ Viljoen (note 1 above) 214.

⁴⁹ *Lee v Leeds CC* [2002] 1 WLR 1488.

⁵⁰ Viljoen (note 1 above) 215.

⁵¹ Viljoen (note 1 above) 215.

common parts of the building.⁵² Therefore the latter implied covenant does not apply to private sector lease agreements.⁵³

If there is a repair obligation on either party, such obligations must be considered separate from minimum standards regarding the condition of leased property since a repair obligation concerns the remedying of something that has deteriorated.⁵⁴ If the parties agree that the landlord is responsible for the renewal of the property, then such an obligation is wider than just repairs.⁵⁵ If the tenant is responsible for repairs, the parties often include the exception of fair wear and tear, which means that the tenant would be excused from disrepair that resulted from the ordinary use of the property.⁵⁶ English courts have also been reluctant to hold landlords liable in the case where crimes were committed against tenants by third parties.⁵⁷ A landlord therefore bears no responsibility to prevent trespassing by third parties.⁵⁸ This is similar to the position in South African law as shown above. Contrasted to this is a duty, which is currently developing in US landlord-tenant law, to protect the residential tenant from criminal activity.⁵⁹

4.3.2 US law

In US law, housing codes that regulated the maintenance of residential structures only became common during the 1960s.⁶⁰ During this time, an implied assurance by the landlord to provide property that was suitable for human habitation was not considered part of everyday rental agreements.⁶¹ The majority of states then adopted laws in the 1970s with the effect that implied assurances are now enforced by statute.⁶² These statutes regulate the maintenance of residential structures and public officials are required to ensure that the property complies with certain standards by either claiming injunctive relief or imposing fines against non-compliant owners.⁶³ If a state or municipality does not have one of these codes, the implied warranty of habitability will

⁵² Viljoen (note 1 above) 216.

⁵³ Viljoen (note 1 above) 216.

⁵⁴ Viljoen (note 1 above) 224.

⁵⁵ Viljoen (note 1 above) 225.

⁵⁶ Viljoen (note 1 above) 225.

⁵⁷ Viljoen (note 1 above) 229.

⁵⁸ Viljoen (note 1 above) 229.

⁵⁹ Viljoen (note 1 above) 229.

⁶⁰ Viljoen (note 1 above) 216.

⁶¹ Viljoen (note 1 above) 216.

⁶² Viljoen (note 1 above) 216-217.

⁶³ Viljoen (note 1 above) 217.

find application.⁶⁴ The courts also started to consider covenants in leases to be dependent, which means that the one party's obligation to comply with his duties is contingent on whether the other party complies with his obligations.⁶⁵ Breach by one party therefore relieves the other party from complying with his obligations.⁶⁶ This is similar to South African law with regard to the *exceptio non adimpleti contractus* and this interpretation should serve as a guide as to why the *exceptio* should apply in lease agreements in South Africa even if the lessee receives partial use and enjoyment of the property.

However, it remains unclear whether a landlord could be held liable for harm caused to a tenant as a result of criminal acts of third parties.⁶⁷ In *Kline v 1500 Massachusetts Ave Apartment Corp* 439 F 2d 477 (DC Cir 1970) the court held that the chain of causation was not interrupted by acts of third parties and it is therefore possible in some instances to establish a link between the landlord's failure to secure a building and the tenant's injuries.⁶⁸ The court therefore used a negligence theory to hold the landlord liable for the criminal attack of a third party on the tenant.⁶⁹ A similar reasoning was followed in *Trentacost v Brussel* where the New Jersey Supreme Court held that a landlord has a duty to protect tenants from foreseeable crime and to provide reasonable safeguards, which forms part of the guarantee of habitability.⁷⁰ This is in contrast to South African law where protection from criminal activity was deemed to be too burdensome for the lessor and that it is the responsibility of the lessee to provide the necessary safeguards. However the negligence theory and chain of causation adopted by the US courts should serve as a guide in South African law in giving the lessor more responsibility for protecting the lessee from criminal activity in South Africa.

4.3.3 Dutch law

According to Dutch law, the landlord is obliged to remedy defects provided that it is in line with what the tenant desires.⁷¹ If it is impossible to remedy the defect or if the

⁶⁴ Viljoen (note 1 above) 217.

⁶⁵ Viljoen (note 1 above) 220.

⁶⁶ Viljoen (note 1 above) 220.

⁶⁷ Viljoen (note 1 above) 229.

⁶⁸ *Kline v 1500 Massachusetts Ave Apartment Corp* 439 F 2d 477 (DC Cir 1970).

⁶⁹ Viljoen (note 1 above) 229.

⁷⁰ *Trentacost v Brussel* 82 NJ 214 (1980).

⁷¹ Artikel 204 Burgerlijk Wetboek Boek 7.

remedying thereof requires expenses beyond what is reasonable in the specific circumstances for the landlord to bear, then the landlord will be exempted from remedying the defect.⁷² This obligation however does not apply to minor defects since tenants are obliged to fix such small defects.⁷³ However, the obligation of undertaking all the other repairs and the associated costs may not be shifted to the tenants.⁷⁴ The tenant must notify the landlord of the relevant defect and if he fails to do so, the tenant will be held liable for damages due to his omission.⁷⁵ This is in contrast to South African law where the obligation and associated costs of making the necessary repairs can be shifted to the tenant and if after the tenant has notified the landlord of the defect and he fails to act, then the tenant can fix the defect and either claim the cost from the landlord or set off payment against the rent. This is undesirable as it can be difficult to get money back from the landlord. Therefore the approach in Dutch law is much more desirable as it offers more protection to the lessee by not allowing certain repair obligations to be shifted to the lessee.

4.3.4 German law

In German law, landlords are generally responsible for repairs, which includes decorative repairs.⁷⁶ However, the majority of landlords include a clause in the lease stipulating that the tenant is responsible for such repairs and often also minor repairs.⁷⁷

4.4 Remedies

4.4.1 English law

In English law the point of departure was, until recently, to interpret the parties' obligations as being independent of each other.⁷⁸ Accordingly, to allow a tenant to withhold rent due to the landlord's failure to comply with his repair obligations has led to unsatisfactory results.⁷⁹ A tenant must therefore rather aim to assert his rights by making use of legitimate channels such as a claim for damages.⁸⁰ Consequently a

⁷² Viljoen (note 1 above) 222.

⁷³ Artikel 206 Burgerlijk Wetboek Boek 7.

⁷⁴ Viljoen (note 1 above) 222.

⁷⁵ Viljoen (note 1 above) 222.

⁷⁶ Viljoen (note 1 above) 222.

⁷⁷ Viljoen (note 1 above) 222-223.

⁷⁸ Viljoen (note 1 above) 233.

⁷⁹ Viljoen (note 1 above) 233.

⁸⁰ Viljoen (note 1 above) 233.

tenant may sue a landlord for damages due to breach of either an express or implied covenant to accept the obligation of performing repairs.⁸¹ If the tenant remains in occupation of the property, damages are usually then limited to the tenant's loss of comfort and inconvenience due to the disrepair.⁸² A tenant usually may not withhold rent if the landlord fails to fulfil his repairing obligations although there are two remedies which exist on the basis of self-help, namely the common law right of recoupment and an equitable right of set-off.⁸³ This is similar to the South African position where the tenant is also generally not allowed to withhold rent and that the tenant should rather claim back the amount spent on repairing the defect of the property or he can set off the amount from his rental payments.

Even though a claim for specific performance was initially not considered appropriate in order to enforce a tenant's repairing obligation, such an order has been awarded by numerous courts to hold a landlord liable for his repair obligation.⁸⁴ This is similar to South Africa as the courts have also initially been reluctant to grant orders of specific performance which forces the lessor to perform his repairing obligations due to being unable to enforce and oversee such an order, but have recently become more willing to grant such orders especially when considering the constitutional violations that would occur if such an order is not granted.

4.4.2 US law

According to US law, several remedies are available to a lessee if the landlord fails to comply with the implied guarantee of habitability.⁸⁵ The lessee is allowed to stop paying rent, vacate the property and effectively terminate the lease.⁸⁶ If the tenant has suffered harm as a result of the violation, he can also sue the landlord for damages, which may even exceed the rent.⁸⁷ This is similar to the position in South African law where numerous remedies are also available if a landlord fails to comply with his duty and that damages can be claimed separately.

⁸¹ Viljoen (note 1 above) 233.

⁸² Viljoen (note 1 above) 233.

⁸³ Viljoen (note 1 above) 241.

⁸⁴ Viljoen (note 1 above) 245.

⁸⁵ Viljoen (note 1 above) 235.

⁸⁶ Viljoen (note 1 above) 235.

⁸⁷ Viljoen (note 1 above) 236.

The general rule is that a tenant can withhold rental payments until the landlord repairs the defect, but some statutes require the tenant to deposit the rental payments into an account that is managed either by a court or an official designee in order for the tenant to be able to rely on this remedy.⁸⁸ Nevertheless, if the landlord claims an eviction order and the payment of rent, the court can then adjust the rent for the period that the violation occurred.⁸⁹

Tenants are usually allowed to claim injunctive relief which requires that the landlord remedy the disrepair of the property.⁹⁰ The tenant is also permitted to undertake the necessary repairs and then deduct the costs thereof from future rent payments to the landlord.⁹¹ The housing codes also make provision for tenants to request that a local authority inspector examine the property and compel the landlord to perform the necessary repairs and the inspector can obtain a court order in order to compel the landlord to fix the problem and/or pay civil or criminal fines for the violation.⁹² This is in contrast to South African law as criminal fines cannot be imposed with regards to the lessor's duty of maintenance and there is no authority inspector to inspect the property, which usually results in the property remaining defective due to lack of enforceability and supervision.

4.4.3 Dutch law

According to Dutch law, a tenant can perform the repairs himself and recover the costs from the landlord, provided that the costs are reasonable, and the tenant can also subtract the costs from the rent due if the landlord fails to cure the necessary defect.⁹³ The tenant is also allowed to stop rent payments and claim damages in addition to any of the remedies available.⁹⁴ If the tenant's enjoyment is diminished as a result of a defect of the property, he may claim that the rent should be reduced proportionate to the impairment.⁹⁵ However, if the defect is extensive and completely obstructs the tenant from enjoying and using the property as agreed in the contract, either party is allowed to cancel the lease, as long as that defect falls outside the landlord's

⁸⁸ Viljoen (note 1 above) 243.

⁸⁹ Viljoen (note 1 above) 243.

⁹⁰ S 4.101(b) of the Uniform Residential Landlord and Tenant Act.

⁹¹ *Pugh v Holmes* 486 Pa 272 (1979).

⁹² Viljoen (note 1 above) 245-246.

⁹³ Viljoen (note 1 above) 236.

⁹⁴ Viljoen (note 1 above) 236.

⁹⁵ Viljoen (note 1 above) 236.

maintenance duties.⁹⁶ This is similar to the position in South Africa where the tenant can recover the costs from the landlord for curing the defect if the landlord fails to remedy such defect. However, the stopping of rent payments as an additional remedy, also known as the *exceptio*, is still fairly uncertain and this position in Dutch law can serve as guidance in order to clarify this problematic area of law and serve as a reason as to why it may be more desirable to recognise the *exceptio* as an additional remedy.

4.4.4 German law

In terms of German law, if a defect is present at the beginning of the lease or arises during the course of the lease and is of such a nature that the property is no longer suitable for its contracted use, then the tenant is released from paying rent for the period that the property is unsuitable.⁹⁷ If the defect only affects the suitability of the property, then the tenant must pay a reasonably reduced rent.⁹⁸ If the landlord failed to fix the defect or the nature of the defect necessitates immediate attention to restore the property then the tenant can perform the repairs himself and demand the associated costs from the landlord.⁹⁹ The tenant is also allowed to set off his claim against the landlord's rental claim.¹⁰⁰ The tenant is further liable for damage that exceeds fair wear and tear.¹⁰¹ This is similar to South African law where the tenant must pay reduced rent where the property is defective but the tenant still receives some use of the property. It is also similar where the tenant is allowed to repair the defect and then claim the associated costs from the landlord or alternatively deduct the amount spent fixing the defects from the rent due to the landlord. It is also similar to South African law as the tenant is also liable for damage that exceeds fair wear and tear. By contrast to this position, German law also recognises that the lessee's right to pay a reduced rental in proportion to his use or enjoyment under s 536 of the German Civil Code is available in addition to the right to withhold performance.¹⁰² The majority view in German law is that the lessee may withhold paying rent until the lessor repairs

⁹⁶ Viljoen (note 1 above) 237.

⁹⁷ Viljoen (note 1 above) 237.

⁹⁸ S 536 Bürgerliches Gesetzbuch (hereafter 'BGB').

⁹⁹ S 536a BGB.

¹⁰⁰ Viljoen (note 1 above) 238.

¹⁰¹ Viljoen (note 1 above) 238.

¹⁰² T Naudé 'The principle of reciprocity in continuous contracts like lease: what is and should be the role of the *exceptio non adimpleti contractus* (defence of the unfulfilled contract)?' (2016) 27 *Stell LR* 337.

the defect as the claim of the lessee to use and enjoyment of the property does not arise from month to month but is rather a right that continues to subsist until fulfilment.¹⁰³ This is in contrast to South African law as the *exceptio* has not yet been fully utilised in our law and this example in German law can serve as a guide as to why the *exceptio* should be more easily applied.

4.4.5 Austrian law

Austrian law only recognises a reduction in rental for the lessee.¹⁰⁴ The Austrian Supreme Court has specifically held that the lessee's right to a proportionate reduction in rent under s1096 of the Austrian Civil Code dislodges the right to withhold performance in s1052 of the same Civil Code which results in the lessee being entitled to a proportionate reduction in rent only.¹⁰⁵ In terms of South African law, the sole availability of reduction of rent is probably the simplest solution.¹⁰⁶ However, the withholding of rent can serve as an enforcement mechanism so that the landlord performs his obligations. Due to the poverty and poor vulnerable tenants in South Africa, it may be necessary to follow the German approach and have the withholding of rent in addition to a reduction in rent so that these vulnerable tenants are not subjected to constitutional violations.

4.5 Concluding remark

In conclusion, these foreign legal systems provide guidance and offer solutions to the areas of law which are problematic and uncertain. A problem of enforceability was found to be present in English law. This also the case in South Africa which needs to be cured as the rental housing framework was introduced in order to improve the bargaining power of tenants, among other things, which does not occur if the law cannot properly be enforced. US law, Dutch law and German law provide arguments that are in favour of the *exceptio non adimpleti contractus* even where the tenant receives partial use of the property as well as giving more responsibility to the landlord with regards to protecting the tenant from criminal activity. The approach in Dutch law, where the burden of remedying defects cannot be shifted to the tenant, is a more

¹⁰³ Naudé (note 102 above) 338.

¹⁰⁴ Naudé (note 102 above) 337.

¹⁰⁵ Naudé (note 102 above) 337.

¹⁰⁶ Naudé (note 102 above) 339.

desirable approach than the current South African law position as it can be difficult to recover payment from the landlord. Therefore, these problematic aspects need to be dealt with and these foreign systems offer reasonable suggestions in order to cure these defects which can be enforced and cured through our legislation.

Chapter 5:

Conclusion

There are problematic aspects which need to be clarified with regard to the lessor's duty of maintenance. This area of law is shown to be challenging through the evaluation of case law and the impact of the Rental Housing Act, the Consumer Protection Act and the amendments to the Rental Housing Act. My main research problem is a general study in which case law is evaluated in order to determine how the current law has developed followed by an analysis of the impact that the Rental Housing Act (and regulations), the Consumer Protection Act, as well as the amendments to the Rental Housing Act, which are not in force yet, has had on the lessor's duty of maintenance. Foreign legal systems were also considered and compared to our legal system in order to provide solutions and guidance to the necessary problematic areas. All of these aspects illustrate the need for clarity and certainty in regard to this area of law.

In chapter 2, I analysed the development of case law and found contradictory judgements which were heavily criticised by academics. *Arnold v Viljoen* was the first case that was analysed and it was held that the occupation of the property is decisive in determining whether the tenant owes rent to the landlord. This conclusion was condemned and the court failed to deal with the application of the *exceptio non adimpleti contractus*. This judgment shows that the lessor's obligation to maintain the property is less important than the tenant's duty to pay rent which is not in line with the principle of fairness. However, numerous other cases have reverted to the method where the lessee can continue to occupy the property at a reduced rental as this approach is believed to be more equitable. Another problematic aspect is that the courts have been disinclined to grant specific performance where the lessor has breached his maintenance duty as it is deemed to be challenging to enforce the order. This reasoning is arguably unacceptable due to the fact that this remedy may be the only possible remedy available for vulnerable tenants. Bearing in mind the constitutional rights to privacy, dignity and access to adequate housing, the court is bound to develop the common law in a way that allows it to grant specific performance where the tenants are particularly vulnerable and cannot undertake the repairs themselves as they would continue to occupy a property that violated their

constitutional rights. This shows that the remedy of reducing rent can sometimes be inadequate and that a more robust approach by the courts is necessary in order to ensure fairness and equity especially in a country like South Africa where such situations are not uncommon. The inconsistent High Court decisions on whether a lessee has a right to refuse to pay the full amount of rental in the instance of partial deprivation of the property and on the exact role and operation of the *exceptio* in lease agreements has led to uncertainty. Therefore, there is a need for clarification on these issues as these conflicting decisions create confusion which results in vulnerable tenants receiving less protection. Academic writers are also unsure about the application of the *exceptio* as they either do not consider it or are not in agreement on the exact remedies available to the lessee who has received partial use of the property. This further illustrates the ambiguity surrounding this area of law. Through the analysis of the development of case law and the contradictory judgments, I have shown that there are problematic aspects which need to be dealt with in order to provide clarity and certainty regarding the lessor's duty of maintenance.

In chapter 3, I analysed the impact that the relevant legislative provisions has on the lessor's duty of maintenance, specifically the sections in the RHA, the CPA and the amendments to the RHA which are not yet in force. The residual common law position to place the property in a reasonably fit condition for the purpose for which it was let has been made compulsory for residential leases by the RHA, which shows that the RHA has legislatively enforced the common law position. Although the RHAA is not in force yet, section 4B(11) read with section 1 is primarily intended to approve the common law position for residential tenants. Although the inclusion of such a definition is necessary, the enforceability remains questionable especially when considering the issue that numerous poor tenants still reside in dilapidated buildings, which shows that these legislative provisions need to be enforced effectively in order to cure this challenge. Once the RHAA becomes law, the residual provisions will be confirmed but the express clauses which place maintenance duties on tenants might no longer be an option. The RHAA is envisioned to improve the RHA which means that the landlord's duty to provide a tenant with a habitable dwelling and maintain it in that condition would probably apply to all private and social sector tenants, which alters the current position and offers more protection. Sections 55 and 56 of the CPA currently do not apply to leases as a lease falls within the definition of a service, which is excluded by the definition contained in section 1. Since it is believed that the

common law and RHA are sufficient to cover the necessary issues, the definition in section 1 of the CPA has not been stretched to include leases. In theory, numerous remedies are available to the tenant where the landlord breaches his maintenance duty. However, a landlord's continuous refusal to maintain the leased property is currently not specifically addressed in the South African rental housing framework which is problematic. Therefore some statutory development is required to this area of law as a landlord's continuous refusal to maintain the leased property is not a rare occurrence. Through the analysis of these provisions, I have demonstrated the problematic aspects which need to be dealt with as well as aspects which have been dealt with insufficiently by the current legislative framework which shows the need for development to the lessor's duty of maintenance.

In chapter 4, I analysed and compared South African law to foreign legal systems and suggested alterations and improvements where necessary. The foreign legal systems were English law, US law, Dutch law and German law. In terms of English law, local authorities are placed under an obligation to ensure that housing conditions in their area are kept under review in order to detect the necessary actions that may be required. This has shown to be an effective method in ensuring that social landlords maintain their property and that such a method should be considered in South African law. There is no implied warranty of habitability in English law and this area of law has become stagnant in comparison to other jurisdictions such as US law. According to US law, a breach by one party relieves the other party from complying with his obligations, which is similar to the principle of the *exceptio* in South African law and which therefore shows that the *exceptio* should apply in lease agreements. US law also lists certain instances in which the lessor can have more obligations placed on him where criminal activity is committed against the lessee, which can serve as a guide for South African law in order to place some burdens on the lessor with regards to safeguarding the lessee from criminal activity. As a result, the obligation of safeguarding from criminal activity would be more equally distributed between the parties resulting in neither party being too heavily burdened by such an obligation and ensuring the safety of the lessee who might be unable to safeguard himself from criminal activities without the help of the lessor. This is necessary in a country like South Africa where criminal activity occurs regularly and vulnerable tenants are more easily targeted due to a lack of security measures. Dutch law stipulates that costs of repairs cannot be shifted to the tenant, which is a more desirable approach and should

be followed in South Africa in order to enforce that the landlord complies with his duty. In US law, there are housing codes which must be complied with and which enable a local authority inspector to inspect the property and compel the landlord to make the necessary repairs. This approach should also be considered by South African law as this supervision can result in better enforceability of the relevant legislative provisions and thus better regulation overall. German law recognises the lessee's right to pay a reduced rental in addition to the general right to withhold performance as the lessee's right is of a continuous nature. This approach is desirable and should be followed in South African law as the withholding of rent can serve as an effective enforcement mechanism so that vulnerable tenants are offered more protection. Consequently these foreign legal systems should be consulted and therefore serve as a guide in improving and altering our current law in order to provide clarity and certainty. Through the analysis of these foreign systems, I have demonstrated that there are problematic aspects regarding the lessor's duty of maintenance which needs to be dealt with as well as aspects which have been dealt with insufficiently by the South African legal system.

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