

# 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)?

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Tjachie Naudé

BA LLB LLD

Professor, University of Cape Town

## Dedication

I have had the pleasure of knowing Gerhard Lubbe, who is honoured by this issue of the *Stellenbosch Law Review*, since 1991, when I was a student in his Law of Contract class at Stellenbosch University. Like probably all his students, I immediately admired his brilliant insights and teaching style, including his constant critical and creative engagement with the policy issues. I still aspire to become a lecturer and researcher just like him one day. I also owe him an immense gratitude for his inspiration, example, guidance, patience and friendship during his supervision of my doctoral thesis and thereafter.

The link between this article and Gerhard's research is his chapter *A system in search of a lost cause: Reflections on the principle of reciprocity in South African Contract Law*. In this chapter, Gerhard also considered the role of the *exceptio non adimpleti contractus* and the principle of reciprocity in continuous contracts as well as more generally. I look forward to collaborating with him further, including on the Law of Lease.

## 1. Introduction

The central obligation of the lessor is to give the lessee the beneficial use and enjoyment of the object leased.<sup>1</sup> This duty is confirmed by more specific *naturalia* such as the lessor's duty to refrain from disturbing the lessee in his or her enjoyment, as well as to deliver and maintain the property in the agreed

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condition.<sup>2</sup> In case of breach of the lessor's obligation to maintain, it is trite that the lessee has the following remedies in terms of the common law:

- specific performance;<sup>3</sup>
- the right to effect the necessary repairs him- or herself, to deduct the reasonable costs thereof from the rental and claim any balance from the lessor, after the lessor had been given a reasonable opportunity to effect the necessary repairs;<sup>4</sup>
- cancellation of the agreement if the leased object is materially defective, provided that, if the defect(s) arose during the currency of the lease, the lessor was given reasonable notice to repair the defect;<sup>5</sup>
- damages, provided that the lessor knew or ought to have known of the defect;<sup>6</sup> and
- reduction in rent proportional to the lessee's reduced use and enjoyment of the object leased.<sup>7</sup>

The remedy of reduction in rent is also available to a lessee whose use and enjoyment have been impaired for other reasons, such as wrongful disturbance by the lessor or through *vis maior* or *casus fortuitus*.<sup>8</sup>

The line of cases beginning with *Arnold v Viljoen* ("*Arnold*"), which held that a tenant who remained in occupation of the premises, is obliged to pay the full rent even if he or she did not receive beneficial use, was held to be wrongly decided in *Ntshiqqa v Andreas Supermarket (Pty) Ltd* ("*Ntshiqqa*")<sup>10</sup> and *Mpange v Sithole*.<sup>11</sup> The Supreme Court of Appeal ("SCA") also correctly criticised the judgment in *Arnold* and cases relying thereon in *obiter dicta* in *Thompson v Scholtz* ("*Thompson*").<sup>12</sup>

The remedy of reduction in rent entails that if the lessee could derive no use and enjoyment from the leased object, the lessee is entitled to pay no rental for the relevant period. In other words, reduction to zero is possible. However, if the lessee derived a limited degree of beneficial use and enjoyment, older authorities take the view that the lessee is merely entitled, and therefore obliged, to pay a reduced rent proportional to his or her reduced use and

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enjoyment. <sup>13</sup> The implication is that a lessee, who withholds the full amount of rental when he or she was only entitled to pay a reduced amount, will be in breach of contract. This could have serious consequences, as the lessor may have an immediate right to cancel the lease for breach by the lessee under a cancellation clause (*lex commissoria*).

In *Ethekwini Metropolitan Unicity Municipality (North Operational Entity) v Pilco Investments CC* ("Ethekwini"), the SCA held that:

"If the amount to be remitted was capable of prompt ascertainment, the plaintiff [lessee] could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted." <sup>15</sup>

Conceivably, though, the more recent judgment in *Botha v Rich NO* ("*Botha*") <sup>16</sup> could imply that if the lessee did pay a reduced rent, but erred somewhat on the proper extent of the justified reduction, it may be contrary to good faith for the lessor to exercise his or her right to cancel under a cancellation clause given a *bona fide* dispute on the exact extent of the reduction, which requires an imprecise estimation based on fairness. <sup>17</sup> This would be so particularly where the rent was reduced in accordance with legal advice. Where the parties agree that rent should be reduced but differ on the extent thereof, the lessor should rather approach a court for a decision than cancel against the lessee's wishes. <sup>18</sup>

Does the lessee who received partial use have a further alternative (and apparently conflicting) remedy, namely the right to withhold the full amount of the rent? Could he or she raise the *exceptio non adimpleti contractus* (hereafter "the *exceptio*")? <sup>19</sup> Availability of the *exceptio*, as currently understood in South African law, would logically imply that the lessee who received partial use and enjoyment is not in breach for refusing to pay any rental, and therefore a cancellation clause cannot be used against the lessee. If the *exceptio* applies in this context, logic would dictate that the rules on relaxation thereof

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recognised in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* ("*BK Tooling*") <sup>20</sup> should also apply. It would therefore be up to the lessor to convince a court to exercise an equitable discretion to award a reduced rental to the lessor who was in breach of his or her obligation to maintain the premises or not to disturb the lessee's use and enjoyment.

Conflicting and unclear *dicta* in case law and by academic writers on the availability and exact operation of the *exceptio* in this context, shrouds the lessee's exact remedies in some uncertainty. <sup>21</sup>

As will become apparent below, there is also no uniformity on this issue amongst civilian legal systems, which recognise the right to withhold performance under the general principles of contract law, as well as the right to reduce rent.

## 2. The old authorities and the case law

The Roman and Roman-Dutch writers and older South African cases only mention the remedy of a proportionate reduction of rent in the case of partial use and enjoyment, and not the right to withhold the rest of the rent as a further remedy in such a case. <sup>22</sup> The *exceptio* is simply not mentioned.

However, in the first judgment in *Ntshiqqa*, Madlanga AJ stated that:

"[a]s the respondent [lessee] is not only entitled to remission of rental but can in fact even raise the *exceptio non adimpleti contractus* which 'applies to all contracts where the

obligations of the parties are reciprocal' (*Scholtz v Thompson* 1996 (2) SA 409 (C) at 416B), the applicant was not entitled to invoke the provisions of clause 16 of the lease agreement [the cancellation clause] and cancel the contract." <sup>24</sup>

The lessee in this case claimed that it was entitled to withhold the rent for December 1995, as the lessor had failed to provide toilet facilities on the premises as promised, and also as the lessee experienced frequent power cuts due to the diversion of electricity to adjoining premises, which caused damage to the lessee's perishable goods and seriously affected the lessee's turnover. Accordingly, the court held that the lessee was not in breach of the agreement by withholding one month's rental. It should be noted that the rental was payable monthly in arrears. <sup>25</sup>

It is unclear whether the court thought that the lessee was essentially wholly deprived of the beneficial use and enjoyment of the premises, given how essential toilet facilities are, and given the frequent electricity cuts. Nevertheless, as the premises were still used by the lessee to operate a supermarket, the judgment is open to the interpretation that even a lessee who is only partially deprived of the beneficial use and enjoyment of the premises, may raise the *exceptio*.

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On appeal, the Full Bench of the Transkei Supreme Court stated more clearly that the *exceptio* is available to a lessee whose use and enjoyment of the premises were impaired, as a means of enforcing the lessor's counter-performance, and referred in this regard to *BK Tooling*. Accordingly, the court agreed that the lessee's refusal to pay the rent for December did not constitute a breach that allowed the lessor to invoke the cancellation clause. Miller J stated that "I arrive at such conclusion after exercising my discretionary power as described by Innes JA in *Hauman v Nortje*" and also referred to *BK Tooling*. The court added that a remedy available to a lessor who claimed that a portion of the rent was owing, was "to claim a reduced rental, in which event he will have to prove (1) that the respondent [lessee] is utilising the incomplete performance, (2) that circumstances exist that make it equitable for the court to exercise its discretion in his favour, and (3) what the reduced rental should be", again with reference to *BK Tooling*.

The judgment in *Ntshiqqa* has not been followed consistently. A number of other courts have held that a lessee who received partial use and enjoyment must pay a reduced rental and is not entitled to withhold the full rent. However, there is also some support for *Ntshiqqa*.

In *Seiti v Berlein*, the court, in referring to the lessee's reliance on the *exceptio* where electrical gates to the premises were not repaired, included the following *obiter dictum* in a footnote:

"This is a permissible defence to a claim for rent where the obligations are reciprocal as between the parties, cf *Ntshiqqa v Andreas Supermarket (Pty) Ltd ...*" <sup>30</sup>

Other recent decisions have specifically held, however, that the lessee who received reduced use and enjoyment must pay a proportionately reduced rent and is not entitled to withhold the full rent. In *Ethekwini*, (without reference to *Ntshiqqa*) the SCA rejected a lessee's argument that it did not have to pay rent at all because a third party occupied a part of the property in breach of the lessor's undertaking to give undisturbed use and enjoyment. The court held that the lessee was obliged to pay the rent, but that:

"Of course, because the plaintiff [lessee] was, until early June 1997, deprived of the use of that portion of the property which was being used by the person making pre-cast fencing, the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property." <sup>32</sup>

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Similarly, in *Loch Logan Waterfront (Pty) Ltd v Carwash 4U (Pty) Ltd* the Free State High Court rejected a lessee's argument that it was entitled to withhold the entire rent as the electrical equipment in the premises were affected by leaks when it rained (which leaks the lessor failed to repair despite repeated demands). The lessor was therefore entitled to rely on the cancellation clause and validly cancelled the contract due to the lessee's non-payment of the rent. The court held that at common law the legal position is, and has always been, that

an aggrieved lessee is entitled to rent remission, where the lessee is partially deprived of use and enjoyment. <sup>34</sup> The court stated that, on the presumption that the premises were defective as claimed, "the complete withholding of rent was not a recognised remedy in law." <sup>35</sup> Rather the "apposite action would have been to reduce the rent", <sup>36</sup> and in this regard the court referred to the Full Bench decision in *Ntshiqqa* as well as to *Ethekwini*. The court furthermore stated that "the relative remedy of rental remission applies to cases of minor deprivation whereas the absolute remedy of rental withholding applies to cases of major deprivations". <sup>39</sup> However, "[i]n the absence of proven complete deprivation of enjoyment of the merx the absolute remedy of withholding cannot be sanctioned". In addition, the court held that: "The salient principle of law is that, where the lessee's enjoyment of the merx is merely reduced, but not completely impaired, the appropriate remedy that corresponds with the degree of reduced enjoyment is rental remission. The underlying rationale of this relative remedy is to restore the balance between the opposite bargains as was originally agreed upon." <sup>40</sup>

As the lessee in this case did not make any averments as to the extent of the wrongful deprivation, <sup>41</sup> and as rain is seasonal and the lessee still traded from the premises, <sup>42</sup> the lessee had some substantially undisturbed use and enjoyment and therefore the withholding of rent was unjustifiable as it was "not commensurate to the magnitude of the lessor's alleged breach". <sup>43</sup>

The suggestion by the Full Bench in *Ntshiqqa* that *BK Tooling* is applicable in its entirety to the lessor's obligation to give beneficial use and enjoyment, and the reciprocal obligation to pay the rent, was also not followed by the SCA in *Thompson* (although the implications of the latter decision for a possible remedy of withholding of rent are not clear). The SCA reduced the decision in *BK Tooling* to two propositions. The first proposition is that the *exceptio* provides a party with the remedy of withholding its own performance if the

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other party who had to perform the counter-obligation first or simultaneously, did not properly perform or tender proper performance. This proposition was held to apply to all reciprocal contracts, and by implication, to leases as well. The obligations in issue were the seller's obligation to give early occupation of the *merx* and the buyer's reciprocal obligation to pay occupational interest between date of occupation and date of transfer, which are akin to the lessor and lessee's principal obligations. The second proposition in *BK Tooling* was said to be that, where a party utilised the other party's defective performance, the breaching party may approach a court to persuade it to exercise its discretion to grant a reduced contract price, thereby relaxing the *exceptio*. The breaching party also bears the onus of proving the quantum of such reduced price. This second proposition was held to presuppose that the shortfall in the plaintiff's performance can be restored and the cost of doing so be quantifiable. As such it was held to be inapplicable to continuous obligations like the seller's obligation to give early occupation against payment of occupational interest given that the impairment in occupation in the past cannot be rectified and a mathematical calculation of the cost of restoring the defective performance is impossible. <sup>45</sup> However, the court was prepared to grant a remedy to the seller in the form of a reduced claim for occupational interest, based on the analogous remedy of remission of rent. In this regard the court stated that: "Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx*. This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract, eg because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial... The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the *exceptio*, more particularly of the first proposition in *BK Tooling* (cf *Fourie NO en 'n Ander v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A))." <sup>46</sup>

Thus, the court recognised the remedy of a proportionate reduction of rent and did not

suggest that the lessee may also withhold the full rent in the case of partial deprivation of use and enjoyment. Instead, the *exceptio* was only mentioned in relation to a total deprivation of use, in that the absolution of the lessee from the obligation to pay rental in that scenario was "a manifestation of the *exceptio*".

Nienaber JA went on to state that "[t]he second proposition in *BK Tooling* does not fit so readily into the scheme of things where the interference with the tenant's use of the leased property is only partial or temporary." <sup>47</sup> The reasons given were, firstly, that the breach is a continuing one which cannot be restored in relation to the past period, and secondly, the "near impossibility of a mathematical calculation of the 'cost of restoration'", which Nienaber JA

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thought was required for application of the second proposition in *BK Tooling*. The court held that:

"In the case of a lease proper the matter is never approached along the lines of the second proposition in *BK Tooling*. Where the interference with the lessee's enjoyment was only partial or temporary it is not the law that the landlord is enjoined to prove the cost to correct or supplement any defects or deficiencies in the *merx*, which is then deducted from the agreed rental. One approach, if *Arnold v Viljoen (supra)* is to be followed, is to confine the tenant to a counterclaim for damages when the *merx* is defective. The other, perhaps better approach, with its own support in the authorities, is to reduce the rental in such a case in proportion to the lessee's diminished enjoyment of the leased property." <sup>48</sup>

The court emphasised that remission of rent cannot be equated to the second proposition in *BK Tooling*, but is merely analogous thereto, as both are founded on fairness. <sup>49</sup> Remission of rental was stated to differ from the second proposition in *BK Tooling* in two respects. Firstly, remission of rental "involves an estimation, in the innocent party's hand", of the extent to which the remuneration should be reduced in relation to his or her reduced enjoyment. Secondly, that exercise is "primarily subjective" as it may include elements peculiar to the lessee. By contrast, the second proposition in *BK Tooling* involves a calculation "in the guilty party's hand", of the exact cost of perfecting his or her own defective performance, a "primarily objective" exercise. <sup>50</sup> The implication is that in lease, the lessee bears the onus of establishing that it is entitled to a remission of rent, whereas, in terms of *BK Tooling*, the malperforming plaintiff bears the onus of convincing the court to grant a reduced contract price and to quantify such reduction. <sup>51</sup>

Nevertheless, the court held that the analogy of remission of rent is "close enough to the facts of the current case (periodic payment by the one party for the temporary use of another's property) to justify its adoption as a means of achieving an equitable result where the second proposition in *BK Tooling* is manifestly inappropriate." <sup>52</sup>

The court referred briefly to the Full Bench decision in *Ntshiqqa* but did not comment on the correctness of that decision. It simply mentioned that *Ntshiqqa* followed a similar line of reasoning to that of the court *a quo* in *Scholtz v Thompson*, with the result that the court *a quo* concluded that the seller did not prove a contractual claim at all, even though the buyer enjoyed the use of the farm for several months. <sup>54</sup> This reference to *Ntshiqqa* coupled with rejection of the court *a quo*'s view that the buyer was entitled to withhold the full amount, implies that the SCA did not agree with the court in *Ntshiqqa* on the operation of the *exceptio* in lease agreements. It is a pity that the SCA did not clearly comment on the correctness of that case.

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It is not clear from *Thompson* itself whether the "first proposition in *BK Tooling*", namely the availability of the *exceptio* itself, can be applied to partial deprivation of use and enjoyment. The court only stated that the second proposition does not apply. In the course of his *obiter* criticism against *Arnold*, Nienaber JA did say that:

"To award the landlord the full rental when he failed to give his tenant full occupation is to offend against the first proposition in *BK Tooling*; and to deny the tenant a reduction of rental *pro rata* to his diminished enjoyment of the *merx* is to offend against all authority sanctioning a *remissio mercedis* when the landlord is in breach of the lease."

This may perhaps mean that the first proposition in *BK Tooling* is applicable only in the event of a total failure to give occupation, and not a partial one. It appears that the only logical inference to be drawn from *Thompson* is that the *exceptio* plays no role in the case of partial deprivation as it is up to the lessee to estimate a reduced rental.

This was also effectively how *Thompson* was subsequently interpreted in *Dormell Properties 282 BK v Edulyn (Edms) Bpk*. The Western Cape High Court held that the lessor was entitled to cancel the lease where the lessee withheld the full amount of the rental and did not pay for its electricity and water usage on the basis that its use and enjoyment was impaired by building works. The court stated that it is clear that the lessee "cannot be entirely absolved from the obligation to pay rental and utilities for the months of November and December because he received usage of the business premises, albeit partial."<sup>56</sup> Although the court assumed that the *exceptio* was available to the lessee, it apparently limited its availability to cases where the lessee received no use and enjoyment whatsoever. The court quoted the first passage from *Thompson* (quoted above),<sup>57</sup> which refers to the *exceptio* in relation to a total deprivation of use and enjoyment.

Accordingly, there are conflicting High Court decisions on whether a lessee has a right to withhold the full rental in the case of partial deprivation of use and enjoyment, and on the exact role and operation of the *exceptio* in lease agreements. The SCA also did not clarify the issue sufficiently in *Thompson* and *Ethekwini*. As will be shown next, there is a divergence of opinion amongst academic writers, whereas others do not clearly consider the issue.

### 3. The views of academic writers

Only a few modern writers specifically consider whether a lessee who had partial use and enjoyment may rely on the *exceptio* to withhold the full rent, as opposed to merely reducing the rent in proportion to the reduced use and enjoyment.

Piek and Kleyn, writing before *Ntshiqqa*, specifically state that the lessee may not rely on the *exceptio* to withhold the full rent in such a scenario.<sup>58</sup>

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In this regard they point out that the old authorities and South African case law do not mention such a remedy. From the fact that the lessor was entitled to claim a *pro rata* rental, they deduce that the lessee may not rely on the *exceptio*. Knoetze, commenting on the first judgment in *Ntshiqqa*, interpreted the court's reference to the *exceptio* to mean that the lessee in this instance was "in fact not only entitled to a remission of rent, but that he could even raise the *exceptio non adimpleti contractus* which is said to apply to all contracts where the obligations of the parties are reciprocal".<sup>60</sup> As she is of the opinion that "in the modern era, one cannot have the convenient use of premises operating as a supermarket without the provision of toilet facilities",<sup>61</sup> she stated that, "based on the facts of the *Ntshiqqa* case, the *exceptio* could in fact have been applicable, although not raised".<sup>62</sup> However, she specifically agrees with Piek and Kleyn that:

"where the lessor has granted a portion of the agreed use and enjoyment to the lessee, he is entitled to receive a pro rata proportion of the rental. In such a case the lessee may not, by making use of the *exceptio*, refuse to pay such a pro rata portion."?<sup>63</sup>

Cooper confirms the lessee's right to pay a reduced rent proportional to its use and enjoyment. He mentions the view of Piek and Kleyn that "to such a reduced claim a lessee cannot plead the *exceptio*".<sup>64</sup> Sharrock, on the other hand, takes the opposite view in relation to the lessor's duty "to afford beneficial use and enjoyment" and not to interfere with the lessee's use and enjoyment.<sup>65</sup> He states that where the lessor unlawfully interferes with the lessee's use and enjoyment, the lessee has the normal contractual remedies as well as a claim for proportionate remission of rental, or "the lessee may, alternatively, simply refuse to pay rent and, if sued by the lessor for payment, raise the *exceptio*".<sup>66</sup> Sharrock then discusses the court a quo's decision in *Ntshiqqa* to illustrate this statement.<sup>67</sup> However, under the heading "Duty to put and keep property in proper condition" Sharrock merely lists a proportionate reduction of rent as one of the lessee's five possible remedies for breach, and does not mention the right to withhold the rental.

Lubbe also implicitly supports the view that the right to withhold the rent is available to the lessee. <sup>68</sup> He states that "[t]his is not to deny the possibility that performance may be withheld by the lessee to exact full compliance with his obligations from the lessor in the future. See *Ntshiqqa*". <sup>69</sup> Lubbe does not limit this statement to cases of total deprivation of use and enjoyment. However, his

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ultimate comment on *Thompson*, namely that the court's approach precluded "the insight that the situation which the court was faced with was perhaps not one to be dealt with within the confines of the *BK Tooling* propositions", <sup>70</sup> could perhaps imply that partial deprivation of use and enjoyment by a lessee should not be dealt with by reference to the *exceptio*.

Currie, in his discussion of the two judgments in *Ntshiqqa*, states that the rejection of *Arnold* is correct, as "there is no basis in law or principle for treating lease any differently from other reciprocal contracts." <sup>71</sup> He proceeds to summarise the implications of the *Ntshiqqa* decisions, without criticising or expressly affirming these. In this regard, the *Ntshiqqa* decisions are interpreted to allow any lessee without full use and enjoyment of the premises to withhold the rent, and this does not amount to breach of contract. The lessor's remedy in the face of withholding of rent, is to claim payment of a reduced rental on the grounds for relaxation of the *exceptio* set out in *BK Tooling*, namely utilisation of the premises by the lessee. <sup>72</sup>

Apparently, no other writer has specifically considered whether the full rental may be withheld in the face of a partial deprivation. However, a number of writers accept that the *exceptio* may be relevant in the context of lease, without specifically considering its operation in the case of a mere reduction in beneficial use. Statements by these authors veer closer to or further away from the notion that the rent may be withheld even in the case of partial reduction in use and enjoyment.

Although Christie and Bradfield do not specifically consider the issue in question, they come closest to the position taken by Piek, Kleyn and Knoetze by stating that *Thompson* "recognised that *BK Tooling* was designed to cater for defective performance in a contract such as a building contract, presupposing a breach that can be fully restored. It cannot be applied to a continuing contract such as a lease where there has been a continuing breach by the landlord, who cannot objectively prove the cost of remedying the defect in order to support his claim for rent at a reduced rate. The tenant must claim a remission of rent on criteria that are primarily subjective ...". <sup>73</sup>

They add that "[t]his does not mean that *BK Tooling* can never be applied to a contract of sale". If the requirements set out by Jansen JA can be met, "*BK Tooling* can be applied to any type of contract". <sup>74</sup> However, all these statements together seem to suggest that the lessee is limited to a remission of rent and may not withhold the full rental.

Bradfield and Lehmann, in *Principles of the Law of Sale and Lease*, also do not specifically consider whether *Ntshiqqa* or *Thompson* allow lessees to raise the *exceptio* in the case of partial deprivation of use and enjoyment.

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However, they apparently do not recognise this remedy in that context, as they mention reduction of rent as one of the lessee's four remedies in the case of a failure to maintain the property, and do not refer to the *exceptio* in this regard. <sup>76</sup> All they say about *Ntshiqqa* is that it refused to follow *Arnold*. They furthermore criticise *Arnold* on the basis that it is "certainly in conflict with the incidents of the reciprocity of obligations that arise from a reciprocal contract and the principles applicable to the *exceptio*" (with a reference to *BK Tooling*), without expressly explaining how the *exceptio* operates in this context. <sup>78</sup>

Lehmann in *Wille's Principles* simply states that the lessee is entitled to a proportionate reduction in rental, so that "[t]he amount of remission depends on the extent to which the lessee's enjoyment of the property has been reduced" (with reference to *Thompson*). She adds that "total remission is a manifestation of the *exceptio non adimpleti contractus*" and refers in this regard to *Thompson* and to Piek and Kleyn's article. <sup>80</sup> That probably means that the *exceptio* is not relevant to a partial reduction in enjoyment.

A similar interpretation may be ascribed to Glover's quotation from *Thompson* according to which the lessee's absolution from the obligation to repay rental if he did not receive any use whatsoever, "would simply be a manifestation of the *exceptio*".<sup>81</sup> Glover as well as Kerr (in the previous edition of *The Law of Sale and Lease*) mention *Ntshiqqa* under the rubric of the lessor's duty "to refrain from disturbing the lessee in his use and enjoyment of the property".<sup>82</sup> They state in this regard that:

"If undisturbed use is interfered with, although not totally denied (for example, the lessor causes the electricity supply to become erratic), the lessee is entitled, if he so wishes, to a remission of rent. If the lessor in such circumstances claims that the whole of the rent is due, the *exceptio non adimpleti contractus* is available as a defence to the lessor's claim" (referring to *Ntshiqqa*).<sup>83</sup>

On the other hand, Van Huyssteen, Van der Merwe and Maxwell<sup>84</sup> seem to support the view that the lessee who received reduced use may raise the *exceptio*, although this is not stated clearly. They state that:

"A lessee who has been in occupation of the premises but who has not been afforded the full use and enjoyment of the premises may withhold the payment of rent" (with a reference to *Ntshiqqa* and *Thompson*).<sup>85</sup>

They add that "this right derives from the *exceptio non adimpleti contractus*" and that "the lessor may thus claim a reduced rental".<sup>86</sup> This could be interpreted to mean that the lessee who received partial use would

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be entitled to withhold the full rent and that it is up to the lessor to claim a reduced rental as *BK Tooling* allows.

Other authors discuss a proportionate remission of rent, but also mention the *exceptio* as a remedy available in lease agreements generally, without specifically stating whether this entails that the lessee who received partial use may withhold the entire rental until the lessor has persuaded a court to reduce the rent. Such authors include De Wet and Van Wyk,<sup>87</sup> Van der Merwe et al,<sup>88</sup> Stoop<sup>89</sup> and Joubert.<sup>90</sup>

Thus, academic writers either do not specifically consider or are not *ad idem* on the exact remedies of the lessee who derived partial use and enjoyment of the premises. Many of them make loose statements that the *exceptio* is available in this context, without clearly considering the implications thereof.

The next part considers the possible approaches to the problem in more depth.

#### 4. At least two possible approaches

There are at least two different conceivable approaches evident from the current case law and literature on the remedies of reduction of rent and withholding of rent. Firstly, there is the view that the lessee who received partial use and enjoyment may only reduce the rent proportionally and is not entitled also to withhold the rent. If the lessee obtained no beneficial use and enjoyment, a proportionate reduction would entitle the lessee to reduce the rent to zero. This approach would recognise that the principle of reciprocity as well as fairness more generally, which underlie the *exceptio* as well as its qualification under *BK Tooling*,<sup>91</sup> also underlie the remedy of reduction in rent. Under this approach, any reference in case law or academic writing to the availability of the *exceptio* in this context should rather be taken to affirm that the principles of reciprocity and fairness underlie both sets of rules, but that they are nevertheless merely analogous. The outcome of the rules on reduction in rent and the *exceptio* appears to overlap in the case of total deprivation of use and enjoyment, as no rental is payable in that situation. However, in cases of partial deprivation of use and enjoyment, the lessee may not withhold the full amount of rent with reference to the *exceptio*. Whether there is in fact dissonance between this approach and the rules on the *exceptio*, and how they could be reconciled, will be discussed in more depth in part 4 3 below.

The second possible approach is that the *exceptio* applies as an alternative remedy to reduction in rent, even where the lessee has obtained partial use and enjoyment. Thus, it would not be breach for the lessee who received partial use to withhold the full rent until the

lessor restores full use and enjoyment.

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Consistent application of the *exceptio* would also entail that the lessor may persuade a court to exercise its equitable discretion to grant a reduced contract price (a reduced rent) in terms of the principles recognised in *BK Tooling*, as the lessee has utilised the performance.<sup>92</sup> The right to withhold the rent should only apply until the lessor has repaired the defect, in which case the lessee may no longer rely on the *exceptio*, but must pay a reduced rent in proportion to the use and enjoyment which he or she enjoyed before repairs.

As noted above, this approach conflicts with several cases including *Thompson* insofar as the court stated that "the second proposition" in *BK Tooling* (the court's equitable discretion to grant a reduced contract price) could not be applicable to continuous obligations as the defective performance that occurred in the past cannot be remedied. In addition, Nienaber JA in *Thompson* stated *obiter* that, in lease agreements, "the matter is never approached along the lines of the second proposition in *BK Tooling*",<sup>93</sup> where an analogous, but different, remedy of reduction in rent applies.<sup>94</sup> However, proponents of the applicability of *BK Tooling* in the case of lease agreements could show that *Thompson* misinterpreted *BK Tooling*. Firstly, *Thompson* incorrectly interpreted *BK Tooling* to mean that "the second proposition" can only be applied where the cost of repairing the defective performance is quantifiable. In fact, *BK Tooling* recognised that the repair costs would merely usually ("*in die normale geval*") be the amount by which the contract price is reduced, but that in some cases a different measure should be used.<sup>95</sup> In addition, it is arguable that *Thompson* wrongly stated that the second proposition in *BK Tooling* cannot be applied when the defect can no longer be repaired. *BK Tooling* rather stated that the application of the *exceptio* normally ("*gewoonlik*") presupposes the possibility that full and proper performance is still possible.<sup>96</sup> As such, the defence only normally operates as an enforcement mechanism.<sup>97</sup> Lubbe has argued that *BK Tooling* therefore implicitly recognised the extinctive or resolutive effect of the *exceptio* in some instances, and that this aspect of the principle of reciprocity was also explicitly recognised in some of the sources referred to.<sup>98</sup> Van der Merwe et al refer to *Motor Racing Enterprises (Pty) Ltd (in Liquidation) v NPS (Electronics) Ltd ("Motor Racing Enterprises")*<sup>99</sup> as an example of the potential resolutive effect of the *exceptio*. It could thus be argued that *Thompson* should not preclude the availability of the *exceptio* and relaxation thereof in terms of

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*BK Tooling* in the context of the lessor's obligation to give undisturbed and beneficial use and enjoyment.

Part 4 1 below will very briefly consider comparative authority for the two approaches mentioned above from two other civilian jurisdictions (Austria and Germany) and some supra-national rules which also recognise the *exceptio* (as well as the lessee's right to reduce the rent).<sup>100</sup> Part 4 2 will then consider the policy arguments in favour of these two approaches, whereas part 4 3 will attempt a theoretical explanation for the first approach, before a conclusion is set out in part 5.

#### 4.1 A brief comparative perspective

The first approach, namely the sole availability of reduction in rent, is followed in Austrian Law. The Austrian Supreme Court specifically stated that the lessee's right to a proportionate reduction in rent under § 1096 of the Austrian Civil Code ("Civil Code")<sup>101</sup> displaces the general right to withhold performance in § 1052 of the Civil Code, so that the lessee is only entitled to a proportionate reduction in rent.<sup>102</sup>

By contrast, German law recognises that the lessee's right to pay a reduced rental in proportion to his or her use or enjoyment under § 536 of the German Civil Code<sup>103</sup> is available in addition to the general right to withhold performance under § 320 of the German Civil Code ("the defence of failure to perform the contract" as the *exceptio* is known in German law).<sup>104</sup> Emmerich explains this on the basis that the right to enforce the contract is not affected by the right to reduce the rent, with the implication that the right to withhold the contract price is regarded as an enforcement mechanism.<sup>105</sup> The fact that the lessee has to

perform first does not militate against this remedy, as the right to withhold can apply at least to the first rent due after the defect appears. <sup>106</sup> Accordingly, German law differs from Austrian law in this respect.

However, it should be noted that § 320(2) of the German Civil Code qualifies the *exceptio* by providing that:

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"If one party has partially performed, counter-performance may not be refused if, under the circumstances, in particular on account of the relative insignificance of the part not performed, the refusal would be [contrary to good faith]." <sup>107</sup>

The German courts have interpreted this to mean that the lessee who received partial use may not withhold an unreasonably high portion of the rent in addition to reducing the rent proportionately to the reduced use under § 536. Case law has in the past generally restricted the amount that the lessee may withhold to three to five times the amount of reduction to which the lessee is entitled under § 536, or three to five times the cost of repairs. <sup>108</sup> However, since 2009, courts have mostly restricted the right to withhold a portion of the rent to double the amount by which the rent may be reduced under § 536. <sup>109</sup> As such, German law does not completely support the notion that the *exceptio* entitles the lessee to withhold the full amount in addition to the right to reduce the rent.

The majority view in German law is that the lessee may withhold the rent until the lessor repairs the defect, as the claim of the lessee to beneficial use and enjoyment does not arise periodically from month to month, but is a unitary right that continues to exist until fulfilment. <sup>110</sup>

Article 4:101 of the Principles of European Law: Lease of Goods, drafted by the Study Group on a European Civil Code, gives the lessee, faced with breach by the lessor, both the right to reduce the rent and to withhold performance of the reciprocal obligation. <sup>111</sup> The Official Comment cross-references the general right to withhold performance under Article III-3:401 of the DCFR, which applies whether the aggrieved party has to perform first or last. <sup>112</sup> According to this article, the performance which may be withheld is "the whole or the part of the performance as may be reasonable in the circumstances". The Official Comment to Article 4:101 explains that a party having a right to claim damages for breach should not be obliged to pay the full amount of its performance and thereby take the risk that the breaching party will be unable to pay the damages. It adds that this may provide guidance for the aforesaid test of reasonableness: "the party should normally be allowed to withhold so much as is needed to secure the party's remedies for non-performance". The

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Notes to this article indicate that there is no uniformity on the issue whether the lessee has a right to withhold in addition to a right to reduce the rent in European legal systems. <sup>113</sup>

## 4.2 Policy arguments in favour of each approach

The first approach (sole availability of reduction of rent) is possibly the neatest, simplest solution. If the *exceptio* was available to a lessee who enjoyed partial use and enjoyment, the lessee would be entitled to withhold the full amount (under the current understanding of the *exceptio*) and it would be up to the lessor to persuade a court to exercise its discretion to relax the *exceptio* and grant it a reduced rent under *BK Tooling*. Given the prohibitive costs of litigation in South Africa and that a relatively small sum may be involved, this would burden the lessor unduly and be unfair. There is much to be said for rather obliging the lessee to pay a reduced rent in order to restore the reciprocity between the performances, a remedy which in principle functions extra-judicially.

Proponents of the second approach may argue that the *exceptio* provides a lessee who only enjoys partial use, but who is unable to put an end to the impairment of his or her use and enjoyment or to afford litigation to claim specific performance, with a strong extra-judicial remedy to force the lessor to restore full use and enjoyment. This is particularly apposite when the impediment to use and enjoyment is not one which the lessee could easily remove him- or herself, for example by repairs, such as when the lessor has, in breach of his

obligation to provide full use and enjoyment, allowed a third party to use part of the land. <sup>114</sup> Once the lessor restores full use and enjoyment, for example by repairing a defect, the lessee should pay back the amount withheld that exceeds the lessee's entitlement to reduce the rent proportional to his or her use and enjoyment. As the lessee is obliged to pay a proportionally reduced rent once the lessor makes the repairs or ceases the disturbance in enjoyment, the right to withhold rent does not unduly burden the lessor, as the lessor could simply comply with its duties to grant the lessee full use and enjoyment, for example by repairing a defect in the leased premises. In addition, it could also be argued that it is desirable that the rules on specific contracts should not conflict with the general principles applicable to contracts and that it has been widely accepted that the *exceptio* applies to all reciprocal contracts. Consistency would require that the rules on relaxation of the *exceptio* should therefore also apply to all reciprocal contracts.

Under the next rubric, this assumption that the rules on the specific contracts like lease should be in line with the general principles of contract law, will be investigated. It will also be considered whether there is in fact dissonance between the first approach and the rules on the *exceptio*, and how they could be reconciled.

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### 4.3 Can the first approach be reconciled with the general principles of contract law?

As noted above, the first approach is to accept that the *exceptio* or any other right to withhold performance is never an appropriate response to the lessor's failure to give beneficial use (particularly where there is only partial deprivation of use and enjoyment). This could be explained on the basis that there are special rules in the law of lease on reduction in rent which exclude the application of the *exceptio* as a general principle of contract law. On this view, the principle of reciprocity, as well as fairness more generally, which underlie the *exceptio* as well as its qualification under *BK Tooling*, also underlie the remedy of reduction in rent, but the rules themselves operate differently and are merely analogous. In cases of partial deprivation of use and enjoyment, there are special rules in lease which prevent the lessee from withholding the full amount of rent with reference to the *exceptio*. This would not be the only instance where specific contracts have special rules on remedies which arguably deviate from the general principles of contract law. <sup>116</sup> In the words of Gerhard Lubbe, it would amount to an unnecessary "tyranny of the general principles" to demand that all rules on the specific contracts be in line with the general principles. <sup>117</sup> Rather, there may be policy considerations surrounding a specific contract which require a special rule. <sup>118</sup>

However, it is also possible to explain the inapplicability of the *exceptio* in the case of partial impairment in use and enjoyment with reference to the general principles of contract law, although this requires some tweaking of the rules on the *exceptio*.

Under the next rubric (part 4 3 1), the position when rent is payable in arrears will be considered. It will be argued that the *exceptio* should only function as an enforcement mechanism so that it cannot be raised at the end of the payment period, as the defect can no longer be remedied then, given that the lessor's obligation to give use and enjoyment in relation to each payment period is divisible. Instead, the general principles of contract law should recognise an additional remedy, namely reduction in price, which will be available to the lessee in such a situation.

Thereafter part 4 3 2 will consider the situation when rent is payable in advance. It will be argued that the lessee who has to perform first cannot raise the *exceptio*. However, the lessee may have a different remedy, namely suspension of performance in the face of an anticipatory breach by the lessor. The exact operation of this remedy will be considered in depth.

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#### 4.3.1 The position when rent is payable in arrears

It could be argued that when rent is payable in arrears, the *exceptio* should not grant a right to withhold performance in the face of partial impairment of use and enjoyment. It should first be noted that a lease agreement creates divisible obligations. Thus, the obligation to pay rent

for each payment period (which will be presumed here to be a month) and the reciprocal obligation to give use and enjoyment for that payment period (or month) should be regarded as separate obligations, divisible from the rest of the contract. There is clearly support for this notion in that the obligation to pay rent for a particular month survives a later cancellation of the agreement.<sup>119</sup> The implication logically is that the lessor's reciprocal obligation to maintain and give use and enjoyment is also divisible (despite the contrary majority view in German law).<sup>120</sup> Giving the lessee a right to withhold the whole rent until the lessor repairs the defect, even if a few months elapse before the lessor effects the repair, would militate against the view that the obligation to pay rent for each month is a divisible obligation.

In this regard, there is a minority view in German law that the right to withhold rent based on § 320 (the equivalent of the *exceptio*) ends at the end of each payment period (that is normally at the end of each month).<sup>121</sup> The implication is that at the end of each payment period, the lessee has to pay the rent withheld in excess of the amount by which the rent may be reduced in proportion to the lessee's reduced use. In other words, the lessee who must pay in advance may withhold the rent at the beginning of the month, but must pay a reduced amount in proportion to his or her use and enjoyment at the end of the month. The primary reason for this view is the impossibility of correcting performance in the past in relation to the period to which payment of the rent relates. The implication hereof is also that when rent is payable in arrears, the lessee may not withhold the full rent, but must pay reduced rent in proportion to the lessee's use and enjoyment.

The view that the *exceptio* is not available when rent is payable in arrears is premised on a proposed rule that the *exceptio* should be regarded as an enforcement mechanism in cases where the aggrieved party has elected to uphold the contract and to utilise the other party's performance. In such cases, the *exceptio* may only be used as a means of enforcing the other party's obligation where proper performance is still possible. This implies that, when proper performance by a breaching party is no longer possible, the aggrieved party who utilises the breaching party's performance may not

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raise the *exceptio* or right to withhold performance, but must pay a reduced contract price, given that the *exceptio* can no longer fulfil its enforcement function in that scenario. This approach therefore also pleads for recognition of a generalised remedy for breach of contract of reduction in price, *inter alia* to reflect the importance of this remedy in some important specific contracts, namely lease (the lessee's entitlement to pay a reduced rent) and sale (the purchaser's right to reduce the contract price by reliance on the *actio quanti minoris* or *exceptio quanti minoris*). It is therefore apposite that the Principles of European Contract Law ("PECL") and the European DCFR also recognise a generalised remedy for breach of a reduction in price.<sup>122</sup>

The cost orders made by South African courts against aggrieved parties who raised the *exceptio* after utilising the other party's performance and who were ultimately ordered to pay a reduced price in situations where proper performance by the breaching party was no longer possible, show that effectively the courts were of the opinion that the aggrieved party should have paid a reduced price all along.<sup>123</sup> It was correctly accepted in *BK Tooling*, however, that where the aggrieved party relies on the *exceptio* to enforce performance by the breaching party where this is still possible, a cost order will not be made against the aggrieved party who refused to pay a reduced contract price.<sup>124</sup>

The proposed limitation of the *exceptio* means that it is not always up to the breaching party to convince a court to exercise a judicial discretion to award a reduced contract price before this becomes payable at all, as required by *BK Tooling*. Termination of the right to withhold performance by a party utilising the other's performance takes place immediately once performance by the breaching party becomes impossible, and not only once a court exercises a discretion to relax the *exceptio*. This is particularly sensible, as access to courts is limited and mostly prohibitively expensive in South Africa. Obviously, in a situation where the *exceptio* may not be exercised because performance by the breaching party is no longer possible, a dispute may arise on the correct quantum of the reduced contract price and this may require intervention by a court. The assertion that the aggrieved party who upholds the contract has to pay a reduced contract price where the aggrieved party utilises the breaching

party's performance, but where it is impossible for the breaching party to correct the performance, is therefore merely explicitly subjected to a judicial discretion.

On the facts of *BK Tooling*, the aggrieved party made it impossible for the breaching party to correct its defective performance by giving the moulds to a third party to repair. Thus, the *exceptio* could no longer serve as an enforcement mechanism and the aggrieved party who elected to uphold the contract must pay a reduced price proportional to the value of the defective performance, and sue for any further damages.

Applied to lease, this means that when a particular month or other payment period has passed, it becomes impossible to correct the performance for that month, so that the *exceptio* may not be raised and only the entitlement to reduce the rent remains. This remedy of reduction in rent is already recognised as a *naturale* of the contract of lease, but as argued above should also be seen as a manifestation of a more generalised remedy of reduction in price, which should be available in respect of all contracts, and which allows the aggrieved party to reduce the price in proportion to the value of the defective performance.<sup>125</sup>

As rent was mostly payable in arrears in Roman and Roman-Dutch times (as is still the default position under the South African common law), the fact that the *exceptio* is only an enforcement mechanism provides an explanation why the old authorities only granted the lessee who received partial performance a proportional reduction in rent and not the additional right to withhold or suspend the performance. As the parties themselves divided the obligation to pay rent and the counter-obligation to give beneficial use into monthly segments, the lessee cannot argue that the monthly obligation to pay rent is also reciprocal to future performances by the lessor.<sup>126</sup>

It could certainly be argued that an even more far-reaching limitation on the exercise of the *exceptio* than the limitation argued for above should be recognised. This rule would be that the *exceptio* may only be raised to the extent allowed by good faith (as is the case in civilian systems like German law and some supra-national model rules).<sup>127</sup> Differently stated, a performance may only be withheld by reliance on the *exceptio* to the extent that this may be reasonable in the circumstances. The *exceptio* and the principle of reciprocity have their roots in the concepts of good faith and fairness and it seems apposite that these principles should also govern its exercise. The Constitutional Court in *Botha* recently affirmed the link between the principle of reciprocity,

which underlies the *exceptio*, and good faith as well as the link between these principles and the fundamental rights to dignity and freedom.<sup>128</sup> The general principle that the *exceptio* may only be raised to the extent allowed by good faith explains the more specific rule argued for above, as it would be contrary to good faith for the aggrieved party to utilise the breaching party's partially defective performance and to uphold the contract, but at the same time to withhold the entire reciprocal obligation, where proper performance by the breaching party is no longer possible.

Article 9:201 of the PECL and Article III-3:401(4) of the (European) DCFR also add a reasonableness requirement to "the right to withhold performance of reciprocal obligation".<sup>129</sup> These instruments provide that the performance, which may be withheld, is the whole or part of the performance as may be reasonable in the circumstances. The same two illustrations are given by both these instruments to explain this rule. In the first illustration, "A agrees to buy a new car from B, a dealer. When A comes to collect the car there is a scratch on the bodywork. A may refuse to accept the car or pay any part of the price until the car is repaired".<sup>130</sup>

The second illustration is "the same except that the car is to be shipped to A's home in another country, where B has no facilities. Since it would be unrealistic to expect B to repair the scratch, it would be unreasonable and contrary to good faith for A to withhold more than the cost of having the car repaired locally".<sup>131</sup>

The Official Comment to the DCFR notes that "[t]he restriction in paragraph (4) is not found in the laws of all Member States, at least in such a clear form, but it seems only

consistent with the general duty of good faith and fair dealing". <sup>132</sup>

The illustrations are consistent with the principle that the *exceptio* should only be used as an enforcement mechanism where the aggrieved party seeks to uphold the contract and proper performance remains possible. Where it is not possible for the breaching party to repair the defective performance, or not reasonable to expect this of the breaching party due to the tremendous costs involved as in the second illustration, the aggrieved party may only reduce the

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contract price and not raise the *exceptio* as to do so would be contrary to good faith or unreasonable.

The argument advanced here requires reconsideration of the South African authority that the *exceptio* does not only operate as an enforcement mechanism where the breaching party's performance has been utilised by the other party, but may also have a resolutive function. <sup>133</sup> Perhaps the only clear authority against regarding the *exceptio* as solely an enforcement mechanism in the case of utilisation of the performance is *Motor Racing Enterprises*. The SCA rejected an argument that the *exceptio* is only a temporary defence raised in order to compel the other contracting party to perform. It thus qualified *dicta* in *Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd* and *BK Tooling* to the effect "that the *exceptio* is essentially a temporary defence raised in order to compel the other contracting party to perform his unfulfilled obligations". <sup>137</sup> The court pointed out that *BK Tooling* only stated that "usually" the *exceptio* is an enforcement mechanism, and that it does not follow that the defence cannot succeed when a defective performance can no longer be remedied. <sup>138</sup> The court illustrated "the untenability of a suggestion that the *exceptio* is only a temporary defence" with the following example: A contracts to build a house for B but his performance is defective in some respects. The defects can be cured. Prior to the execution of remedial work, the house burns down as a result of a short circuit caused by lightning. The court concluded that "surely the *exceptio* does not vanish into thin air merely because remedial work is no longer possible". <sup>139</sup>

The court's reasoning can be criticised. Firstly, it should be noted that the aggrieved party in *Motor Racing Enterprises* did not seek to withhold the full contract price still outstanding at the time of breach. Instead it insisted on paying a reduced contract price. The respondent (aggrieved party) agreed to sponsor a Grand Prix race organised by the appellant (breaching party), and agreed to payment of the sponsorship fee in instalments in return for certain rights, for example the exclusive right to be designated the official sponsor of the event. It was already clear on the day of the race that the appellant breached the agreement in several ways, including the failure to mention the respondent's sponsorship in media communications and by allowing another company to advertise its sponsorship of the event. Nevertheless, the aggrieved party was willing to pay the whole of two instalments that were payable after the race and only withheld a portion of an additional further two instalments. Thus the aggrieved party was essentially relying on the right to pay a reduced

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price, and not on the right to withhold the entire performance, as the *exceptio* would allow. The outcome of the case is therefore not inconsistent with a rule that it would be contrary to good faith to withhold the entire outstanding price on the basis of the *exceptio* where proper performance by the breaching party is no longer possible but where the aggrieved party utilised the defective performance, instead of paying a reduced contract price. It was therefore not necessary for the court to reject the notion that the *exceptio* is in such cases essentially a temporary defence aimed at compelling the other contracting party to perform its unfulfilled obligations.

In addition, the example used by the court in support of this rejection is not persuasive. When partially completed work is destroyed, the question is rather who bears the risk of such destruction. Before such destruction, it is clear that the building work could be cured, so that the *exceptio* could be raised. However, destruction brings new rules, namely those on risk, into play and it is not helpful to make conclusions on whether the *exceptio* is available when really the relevant rules are those pertaining to risk. Nienaber in his discussion of Construction Contracts in *LAWSA* states that "the contractor bears the risk when work in progress is lost or

damaged by force of circumstances beyond the contractor's control, such as earthquake, flood or fire". <sup>140</sup> As a result, the contractor will remain liable to "absorb the physical loss and repair the damage unless the catastrophe resulted from instructions issued, or defects in the materials supplied by, or the conduct of, the employer or its agent." <sup>141</sup> Risk only passes to the employer upon approval or acceptance of the contractor's work. <sup>142</sup> Accordingly, the reason why the *exceptio* could still be raised after destruction of the work is that the contractor remains liable to repair the work as it carries the risk of such destruction.

Thus, for all the above reasons, the principles that should apply to the *exceptio* and the remedy of reduction in price explain why the *exceptio* is not available to a lessee who obtained partial use when rent is payable in arrears.

#### 4.3.2 The position when rent is payable in advance

Do the general principles of contract law entail that when rent is payable in advance, the lessee may withhold the full rent when it appears from the state of the leased object that the lessor will not provide full beneficial use and enjoyment? Is there, at the very least, a right to withhold the full rent until the end of the payment period in such a case?

If the lessee who must pay in advance but who has reason to believe that his or her enjoyment would be partially impaired should have a right to withhold the rent at the beginning of each payment period until the end of the payment period, this is probably not an application of the *exceptio*. The *exceptio* is only available to a party who has to perform simultaneously with the other party or after the other party. It cannot be argued convincingly that the lessee

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who must pay in advance, performs simultaneously with the lessor. Rather the lessee must perform first and then the lessor must tender full use and enjoyment. Any right to withhold the rent, therefore, could probably not be based on the *exceptio*.

However, a contracting party also has a right to suspend performance when the other party commits an anticipatory breach (provided the aggrieved party is willing and able to perform the moment the repudiation is retracted). <sup>143</sup> This remedy is available regardless of whether the aggrieved party has to perform first and is also based on the principle of reciprocity. <sup>144</sup> It might be good policy to make this remedy of suspension available to the lessee who has to pay in advance when it is clear that the lessor will not perform properly in relation to the payment period, for example due to the defective state of the leased object. This is consistent with the broad definition of repudiation or anticipatory breach in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* ("*Datacolor*"), namely an intimation "by word or conduct and without lawful excuse, that all or some of the obligations under the contract will not be performed according to their true tenor", in other words when it is clear that a malperformance will occur.

This right to suspend performance should definitely be available to a party who must perform first (including a lessee), when it is clear that the other party will commit a material breach which is therefore serious enough to allow cancellation of the contract, *inter alia* to give the aggrieved party time to decide whether to cancel the contract, but also as a means to enforce proper performance. <sup>146</sup> Withholding the full performance would therefore be allowed when the impending malperformance is a material breach and it is not reasonable to expect the aggrieved party to continue with the contract and be satisfied with damages. <sup>147</sup> In the case of lease, where the lessee, despite such a serious, likely impairment of his or her use and enjoyment, nevertheless decides to utilise the property, this would mean that the lessee who must pay in advance may withhold the full rental at the beginning of the payment period, but must pay a reduced rent at the end of the payment period if he or she still had some use and enjoyment from the premises.

But should the remedy of suspension in the face of anticipatory breach be limited to such serious breaches? The South African cases recognising the

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remedy of suspension all involved such serious breaches. <sup>148</sup> It has also been argued that the

concept of anticipatory breach itself should be restricted to conduct predicting a material breach, in other words conduct which predicts that the aggrieved party will be substantially deprived of what it was entitled to expect under the contract. <sup>149</sup> On this approach, the lessee may only withhold the full rent in advance when it is clear that there will be a substantial impairment to his or her use and enjoyment, to such an extent that it cannot reasonably be expected of him or her to continue with the contract and be satisfied with damages.

However, the broad definition of repudiation in *Datacolor* also covers conduct which predicts any malperformance, including a partial malperformance that would not be serious enough to justify cancellation. Accepting this broad definition of repudiation would make suspension of performance potentially available to a lessee who has to pay in advance but who has reason to believe that the lessor will not afford him or her full use and enjoyment of the leased object. As repudiation of the entire contract was involved in *Datacolor*, it was not necessary for the court to accept such a wide definition, however. Thus, the South African position is currently not clear.

Do other legal systems make the remedy of suspension of performance available in respect of all forms of anticipatory breach, even where the anticipated breach is only partial or temporary and does not justify cancellation? The UNIDROIT Principles of International Commercial Contracts (the "PICC") requires a reasonable belief that there will be a fundamental non-performance before a party may withhold its own performance, thus a breach which is serious enough to justify cancellation. <sup>150</sup> In his commentary on this article, Huber states that when the future non-performance by the other party is only partial, the issue becomes whether the aggrieved party is entitled to withhold its entire performance or whether a proportionality requirement should be introduced. <sup>151</sup> He concludes that, as a general rule, the aggrieved party should be entitled to withhold the whole of its performance. Apart from the fact that the wording does not require proportionality, the right to withhold requires a fundamental breach so that it is "justifiable not to require the aggrieved party to conduct a difficult examination to determine the extent of the other party's future breach". <sup>152</sup> He argues however, that in exceptional cases, the good faith principle in Article 1.7(1) of the PICC "may restrict the right to withhold performance (eg when it is clear that the seller's non-delivery is restricted to a precisely determined part of its performance, it may be justified to restrict the

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buyer's right to withhold payment only to the extent that corresponds to the part which will not be delivered)". <sup>153</sup>

By contrast, in some other legal systems and supra-national rules, the right to withhold performance applies to any anticipated breach, and not just where a fundamental breach is anticipated. However, these systems accept that the performance that may be withheld is the whole or part of the performance as may be reasonable in the circumstances. <sup>154</sup> In other words, as with the *exceptio*, this right of the party to suspend performance is subject to a requirement of reasonableness – it may only be exercised to the extent that it is reasonable or consistent with good faith.

This suggests that the aggrieved party should not be allowed to withhold the full performance in the face of an anticipated non-material breach. As noted above, the Official Comment to Article 4:101 of the Principles of European Law: Lease of Goods would limit the amount that may be withheld in advance to so much as is needed to secure the party's other remedies for non-performance. This implies that the lessee may withhold an amount that covers the proportional reduction in rent which he or she may be likely to claim as well as any additional damages.

It is not easy to choose between the rule that the right to suspend only exists where there is reason to believe that a material breach will occur and the alternative rule that performance may be withheld if it is clear that any breach will occur, but only to the extent that is reasonable in the circumstances. A consideration of the purpose of the remedy of suspension may be instructive in this regard.

The Official Comment to Article 4:101 of the Principles of European Law: Lease of Goods argues that the right to withhold performance "has two main purposes, namely to protect the

withholding party against granting credit and to give the other party an incentive to perform".<sup>155</sup> In the context of lease, the first of these purposes guards against the risk of the lessee who must pay in advance ending up with an unsecured claim in the lessor's insolvent estate,

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and also against the lessee taking the risk that the lessor will not be able to pay damages payable on the basis of the impairment of the lessee's use and enjoyment.

Allowing suspension if the anticipated breach is only partial and does not amount to material or fundamental breach requires greater guidance in case law on the extent to which the performance may be withheld. As noted above, some German authors argue that the lessee who has to pay monthly in advance may merely withhold a portion of the rent (usually double the amount by which the rental may be reduced) until the end of the month, at which point a proportionately reduced rent is payable.<sup>156</sup> However, merely allowing the aggrieved party to withhold an amount proportional to the value of the anticipated reduced performance plus covering any additional damages that are payable, as well as the costs of repairs (which the lessee is able to effect him- or herself after notice to the lessor) would bring more clarity in this regard. This would be consistent with an understanding of the remedy of suspension as a means of securing the aggrieved party's remedies for breach.

To require that only a court may reduce the rent may bring more certainty, but is probably not suitable for South Africa, where litigation is out of reach of the majority of lessees and lessors and where the rental housing tribunals may be swamped with cases in some provinces.<sup>157</sup>

Because it may be difficult to predict how much damages the lessee may suffer, it may, however, be simplest to affirm that the lessee who must pay in advance and who has reason to believe that his or her use and enjoyment will be impaired (in cases where the lessor's breach is not material) may at best pay a reduced rent proportional to his or her likely deprivation of use and enjoyment, if he or she is able to estimate such reduced use and enjoyment at that stage given the state of the leased object.<sup>158</sup> If the lessee is not able to estimate it, his or her remedy would be to pay the rent and claim back the portion that was overpaid at the end of the payment period.

On the other hand, however, it could be argued that the lessee is typically the weaker, less-resourced party and needs a strong enforcement remedy in the form of a right to withhold the entire rent until the end of the payment period or repair of the defect, whichever occurs first.

It is not easy to choose between these rules for cases where the anticipated breach is non-material.

## 5. Conclusion

The weight of Roman, Roman-Dutch and South African authority is in favour of only recognising proportional reduction in rent as a remedy for a lessee who received partial use and enjoyment of the leased object, so that a right to withhold the full rent with reference to the *exceptio* is not available as

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a further defence in such a case. Nevertheless, the judgment of the Full Bench in *Ntshiqqa*, which applied the *exceptio* and the rules on the relaxation thereof in *BK Tooling* in this context, has not been specifically overruled, and has often been cited with approval by academic writers. This creates uncertainty about the lessee's exact obligations and remedies.

Recognising only proportional reduction in rent as a remedy, and not also the right to withhold the rest of the rent, whether rent is payable in advance or in arrears, is also the simplest solution. It may give the impression, however, that the law of lease is not consistent with the general principles of contract law on remedies for breach, which recognise that the *exceptio* applies to all reciprocal contracts. This is not in itself an argument for rejecting such an approach. There may be good policy reasons for differentiating between different types of specific contracts, which may have their own deviating rules.

In any event, the exclusive applicability of reduction in rent could be reconciled with the general principles of contract law. It should be recognised that the lessor's obligation to give use and enjoyment for a particular payment period (for example a month) and the reciprocal duty to pay the rent is a divisible set of reciprocal obligations which are separate from the rest of the contract. In addition, a somewhat novel rule should be recognised that the *exceptio* may only be used as an enforcement mechanism in cases where the aggrieved party elected to uphold the contract and to utilise the breaching party's performance. It would be contrary to good faith to raise the *exceptio* where proper performance by the breaching party is no longer possible (as was the case on the facts of *BK Tooling*). The costs orders granted by courts who relaxed the *exceptio* by awarding a reduced contract price support this view. In addition, South African law should recognise as one of the remedies for breach, the right to reduce the contract price proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time. At the end of the payment period (for example a month), performance by the lessor is no longer possible in relation to the lapsed month, and so the *exceptio* cannot be raised, which means that the lessee must pay a reduced price. This principle does not require exercise of a judicial discretion, but if the parties dispute the extent by which the price may be reduced, a court's guidance may of course be sought.

It is also arguable that a more far-reaching qualification on the exercise of the *exceptio* should be recognised, namely that it may only be raised if to do so is consistent with good faith or reasonableness (which is already the implication of *BK Tooling* in cases where the defective performance was utilised, except that that case requires judicial intervention to relax the *exceptio*).

The view that the obligations are divisible, also entails that where rent is payable in advance, the *exceptio* can probably not be raised as it is only available to a party who has to perform simultaneously with, or after the other party.

However, the general principles of South African contract law also recognise the right of a party who has to perform first to suspend his or her performance if the other party commits an anticipatory breach. It might be good policy

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to make the remedy of suspension available to the lessee who has to pay in advance for a particular month when it is clear that the lessor will not perform properly in relation to that payment period due to, for example, the defective state of the leased object. The lessee is typically the weaker party and would benefit from such a strong extra-judicial enforcement mechanism, whereas the lessor could simply repair the defect in order to obtain the rent payable. This solution would be consistent with the broad definition of anticipatory breach in *Datacolor* as an intimation by word or conduct that some or all of the obligations will not be performed according to their true tenor. However, the contrary view is that the remedy of suspension of performance is only available to a party who must perform first when it is clear that the other party will commit a material breach. The lessee who must pay in advance should certainly be allowed to withhold the full rent where a material breach is predicted.

The remedy of suspension should otherwise only be available to the extent allowed by good faith or reasonableness. It is not easy to choose a rule on how much the lessee should be able to withhold in the case of anticipation of a non-material breach. In other words, it is not easy to decide what would be allowed by good faith and reasonableness. There is room for abuse and excessive prejudice to lessors if lessees could withhold the full amount in response to a minor defect, particularly in respect of a longer payment period. On the other hand, the lessor who is aggrieved by non-payment of the rent could simply repair the defect immediately. The latter argument supports a rule that the lessee who must pay in advance may withhold the full rent until the end of the payment period or repair of the defect, whichever comes earlier, even if the defect is not a material one.

On balance, however, the remedy of suspension should also be available when a non-material malperformance is predicted, but in such a case the lessee should at most be allowed to retain an amount sufficient to secure his or her other remedies, namely proportionate reduction in rent, effecting the repairs him- or herself (after notice to the lessor) and

damages. It should remain open to the lessor to approach a court to argue that the right to suspend performance is not being exercised in a manner which is consistent with good faith. This may be particularly apposite if rent is payable in advance at longer intervals, such as annually, whereas the partial defect in the premises is not very significant. If there is a *bona fide* dispute between the parties on how much of the rent the lessee is entitled to withhold, it would be contrary to good faith for the lessor to rely on a cancellation clause.<sup>159</sup> The lessor should then rather approach a court for a decision on how much rent is payable.

## Summary

*The weight of South African authority is in favour of only recognising proportional reduction in rent as a remedy for a lessee who received partial use and enjoyment of the leased object, so that a right to withhold the full rent with reference to the exceptio is not available as a further defence. Nevertheless, Ntshiq v Andreas Supermarket, which applied the exceptio and the rules on the relaxation thereof in*

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*BK Tooling in this context, has not been specifically overruled, and has often been cited with approval by academic writers. This creates uncertainty about the lessee's exact obligations and remedies. If it is accepted that proportional reduction in rent is the appropriate remedy, rather than the exceptio, it may give the impression that the law of lease is not consistent with the general principles of contract law on remedies for breach, which recognise that the exceptio applies to all reciprocal contracts. However, there may be good policy reasons why different types of specific contracts should have their own deviating rules. This contribution shows that in this instance the rules on lease could be reconciled with the general principles. It argues for some modification of the currently accepted principles on the exceptio as well as recognition of proportionate reduction in price as a generalised remedy for breach. There is already implicit support for this modification in the cost orders made by courts who relaxed the exceptio. When rent is payable in advance, the right to suspend performance in the face of an anticipatory breach becomes relevant, and proposals are also made in this regard. The rules argued for in this contribution are consistent with a more general principle that the exceptio as well as the remedy of suspension may only be raised to the extent consistent with good faith or reasonableness.*

\* G Lubbe "A system in search of a lost cause: Reflections on the principle of reciprocity in South African Contract Law" in E Dirix, S Stijns, W Pintens & P Senaeve (eds) *Liber Amicorum Jacques Herbots* (2002) 205.

1 See the authorities cited by JN Piek & DG Klein "'n Huurder se aanspraak op vermindering van huurgeld terwyl hy in besit van die huursaak is" (1983) 46 *THRHR* 367 368-369. Kleyn's surname was misspelt and the correct spelling will be used henceforth. See also G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 374-414; WE Cooper *Landlord and Tenant* 2 ed (1994) 83-131; G Bradfield & K Lehmann *Principles of the Law of Sale and Lease* 3 ed (2013) 143-155 and the authorities cited there.

2 See the authorities cited by Piek & Kleyn (1983) *THRHR* 367 368-369. See also Glover *Kerr's Law of Sale and Lease* 374-414; Cooper *Landlord and Tenant* 83-131; Bradfield & Lehmann *Principles of the Law of Sale and Lease* 143-155 and the authorities cited there.

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

4 *Hunter v Cumnor Investments* 1952 (1) SA 735 (C).

5 *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 (A).

6 *Nannucci v Wilson* (1894) 11 SC 240. In *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 (4) SA 391 (D) and *Hunter v Cumnor Investments* 1952 (1) SA 735 (C), the courts held that the lessor must have either known of the defect or should have known thereof by reason of his trade or profession.

7 See generally *Hunter v Cumnor Investments* 1952 (1) SA 735 (C).

8 For details, see eg Glover *Kerr's Sale and Lease* 417-424 and the authorities cited there.

9 1954 (3) SA 322 (C) 330A-C.

10 1997 (3) SA 60 (TKS).

11 2007 (6) SA 578 (W). The court granted a proportional reduction in rent.

12 1999 (1) SA 232 (SCA).

13 For extensive references to the common-law authorities, see Piek & Kleyn (1983) *THRHR* 376-381. See eg *D 19 22 25 2*; *D 19 2 33*; H de Groot *Inleidinge tot de Hollandsche rechts-geleerdheid III* (1620) 19 and 12; Voet 19 2 23 and *cf* Voet 19 2 26 and 19 2 24; J van der Linden *Regtsgeleerd, Practicaal en Koopmans Handboek I* (1806) 15 and 12; Lauterbach *Colleqium Theoretico-practicum ad Pandectas* 19 2 LVI; RJ Pothier *Traité du contrat de louage: selon les regles tant du for de la conscience, que du for extérieur* (1778) 139-143.

See also eg *Rubidge v Hadley* (1884) 2 M 174; *Shapiro v Yutar* 1930 CPD 92 and 97-98; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C) 740C (*obiter*); *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 (4) SA 391 (D) 393C (*obiter*); *Mount Hargo Investments (Pty) Ltd v Peersons Extension* 1976 (3) SA 343 (D) (*obiter*); *Steynberg v Kruger* 1981 (3) SA 473 (O) 478C.

14 (320/06) [2007] ZASCA 62 (29-05-2007) *SAFLII* <<http://www.saflii.org/za/cases/ZASCA/2007/62.html>> (accessed 08-10-2015).

15 Para 22. The rent was payable in advance.

16 2014 (4) SA 124 (CC).

17 *Botha v Rich NO* 2014 (4) SA 124 (CC) recognised that a right to cancel in terms of a cancellation clause should be exercised fairly and by implication consistently with good faith. On this judgment see eg R Sharrock "Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich* and *Combined Developers v Arun Holdings* (2015) 27 *SA Merc LJ* 174; D Bhana & A Meerkotter "The impact of the Constitution on the Common Law of Contract: *Botha v Rich NO* (CC)" (2015) 132 *SALJ* 494.

18 Amendments to the Dutch Civil Code, which took effect in 2003, oblige the lessee to ask a court to reduce the rent, *inter alia* to avoid disputes (art 7:207). However, this is not likely to be a good solution in South Africa, given that access to courts is more limited and relatively expensive here.

19 For a general discussion of the principle of reciprocity and the *exceptio non adimpleti contractus* see eg A Hutchison "Reciprocity in Contract Law" (2013) 24 *Stell LR* 3.

20 1979 (1) SA 391 (A).

21 See the authorities discussed in parts 2 and 3 below.

22 For extensive references to the common-law authorities, see Piek & Kleyn (1983) *THRHR* 376-381. See further the authorities cited in n 13 above.

23 1997 (1) SA 184 (Tk).

24 195D-E.

25 As also under the common-law residual rules on lease.

26 1997 (3) SA 60 (Tks) 67H-I.

27 1979 (1) SA 391 (A) with reference to *Hauman v Nortje* 1914 AD 293.

28 *Ntshiq v Andreas Supermarket* 1997 (3) SA 60 (Tks) 68D.

29 (AR 151/2009) [2009] ZAKZPHC 24 (05-06-2009) *SAFLII* <<http://www.saflii.org/za/cases/ZAKZPHC/2009/24.html>> (accessed 08-10-2015).

30 Para 19 with reference to the decision by the Full Bench in *Ntshiq v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (Tks).

31 (320/06) [2007] ZASCA 62 (29-05-2007) *SAFLII* <<http://www.saflii.org/za/cases/ZASCA/2007/62.html>> (accessed 08-10-2015).

32 Para 22 with reference to Cooper *Landlord and Tenant* 200; AJ Kerr *The Law of Sale and Lease* 3 ed (2004) 350 and Piek & Kleyn (1983) *THRHR* 381-381, where the latter two authors specifically say that the tenant who received some use and enjoyment cannot rely on the *exceptio*.

33 (3618/2011) [2012] ZAFSHC 32 (01-03-2012) *SAFLII* <<http://www.saflii.org/za/cases/ZAFSHC/2012/32.html>> (accessed 08-10-2015).

34 Para 18.

35 Para 18.

36 Para 19.

37 1997 (3) SA 60 (Tks) 65H-66A.

38 (320/06) [2007] ZASCA 62 (29-05-2007) *SAFLII* <<http://www.saflii.org/za/cases/ZASCA/2007/62.html>> (accessed 08-10-2015).

39 Para 22.

40 Para 26.

41 Para 24.

42 Paras 25 and 26.

43 Paras 28 and 45.

44 1999 (1) SA 232 (SCA).

45 244G and 247D.

46 2476A-C. In the case of *Fourie NO v Potgietersrusse Stadsraad* 1987 (2) SA 921 (A), the leased premises was held to be of no use for the purpose for which it was leased. No reference was made to the *exceptio*.

47 1999 (1) SA 232 (SCA) 247D.

48 247H-I.

49 248G.

50 248G-H.

51 This is also Lubbe's interpretation of *Thompson v Scholtz* 1999 (1) SA 232 (SCA) in G Lubbe "A system in search of a lost cause: Reflections on the principle of reciprocity in South African Contract Law" in P Senaeve, W Pintens, S Stijns & E Dirix (eds) *Liber Amicorum Jacques Herbots* (2002) 219.

52 1999 (1) SA 232 (SCA) 248H-I.

53 1996 (2) SA 409 (C).

54 247G-H.

55 (A150/2012) [2012] ZAWCHC 244 (27-11-2012) *SAFLII* <<http://www.saflii.org/za/cases/ZAWCHC/>

2012/244.html> (accessed 08-10-2015). The rent was payable on the first day of each month.

56 Para 17.

57 See the text to n 46 above.

58 Piek & Kleyn (1983) *THRHR* 382.

59 381. This conclusion is reached despite an earlier reference to the rule that a party may only claim performance if he had already performed or tenders performance, failing which the defendant may rely on the *exceptio*, which rule was stated to also apply to lease agreements, being reciprocal agreements. See also Cooper *Landlord and Tenant* 105 who cites Piek and Kleyn's article.

60 E Knoetze "The lessee's right to use and enjoy the leased premises" (1997) 18 *Obiter* 109 110.

61 111.

62 116.

63 116.

64 Cooper *Landlord and Tenant* 105.

65 R Sharrock *Business Transactions Law* 8 ed (2011) 325-326.

66 325.

67 325-326.

68 Lubbe "A system in search of a lost cause" in *Liber Amicorum Jacques Herbots* 205 and 221.

69 221. See also n 100.

70 Lubbe "A system in search of a lost cause" in *Liber Amicorum Jacques Herbots* 223.

71 I Currie "Law of Lease" (1997) *Annual Survey* 224 228.

72 C Lewis "General Principles of Contract" (1997) *Annual Survey* 167 193 also merely restates what was held in *Ntshiqqa*, namely that the lessee who did not receive full beneficial use of the premises was entitled to withhold full payment of the rental.

73 Christie & Bradfield *Contract* 442-443.

74 442-443.

75 Bradfield & Lehmann *Principles of the Law of Sale and Lease*.

76 145-149.

77 149.

78 149.

79 K Lehman "Letting and Hiring of Property" in F du Bois (ed) *Wille's Principles of South African Law* 9 ed (2007) 906 916.

80 916 (with reference to Piek & Kleyn (1983) *THRHR*).

81 Glover *Kerr's Sale and Lease* 418.

82 380; Kerr *Sale and Lease* 299.

83 Glover *Kerr's Sale and Lease* 380; Kerr *Sale and Lease* 299.

84 JF van Huyssteen, SWJ van der Merwe & CJ Maxwell *Contract Law in South Africa* (2010).

85 240.

86 240.

87 The authors mention the *exceptio* in the context of lease, without specifically discussing the issue at hand at 198, but in the chapter on lease simply discuss *remissio mercedis* (JC de Wet & AH van Wyk *Kontraktereg en Handelsreg* 1 5 ed (1995) 359).

88 SWJ van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract – General Principles* 4 ed (2012) 335.

89 P Stoop "Law of Lease" (2012) *Annual Survey* 691 693.

90 DJ Joubert *General Principles of the Law of Contract* (1987) 231.

91 *Thompson v Scholtz* 1999 (1) SA 232 (SCA) 248G.

92 The Full Bench in *Ntshiqqa* recognised the applicability of these principles in this context.

93 1999 (1) SA 232 (SCA) 247G.

94 248G.

95 423A-B and 423D-H. For example, the court quoted from English authority according to which, if the cost of remedying the defect is disproportionate to the end to be attained, the measure could be the value of the building had it been built as required by the contract less the value as it stands. However, the court refrained from expressing a firm opinion on whether similar considerations apply to our measure for the reduction of the contract price. See also Van der Merwe et al *Contract* 340.

96 1999 (1) SA 232 (SCA) 435C-D.

97 See also Lubbe "A system in search of a lost cause" in *Liber Amicorum Jacques Herbots* 222.

98 222 with reference to *inter alia* BK Tooling's reference to Williston at 418H who stated that the *exceptio* "virtually resulted in discharging a party permanently if the performance of the other party actually becomes impossible".

99 1996 (4) SA 950 (A).

100 These civilian jurisdictions are chosen as Roman law influence in these systems also leads to recognition of the *exceptio*, although they differ on the exact operation of this defence in the context of lease.

101 The *Allgemeine Bürgerliches Gesetzbuch* or *ABGB*.

102 SZ 2004/47 = 5 Ob 6 0 /0 4 s (decision of the Austrian Supreme Court (*OGH*) of 29-03-2004).

103 *Bürgerliches Gesetzbuch* or *BGB*.

104 Translation by G Thomas & G Dannemann "Civil Code/BGB – modernized" (21-03-2014) *German Law Archive* <<http://germanlawarchive.iuscomp.org/?p=632>> (accessed 15-09-2015). The first sentence of § 320(1) provides that:

"Unless the contract requires him to perform first, a person bound by a synallagmatic [or reciprocal] contract may refuse to perform his part until the other party effects counter-performance."

105 V Emmerich "§ 536" in V Emmerich, C Rolfs & B Weitemeyer (eds) *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen - Buch 2 Recht der Schuldverhältnisse §§ 535-562*; D Reuter *HeizkostenV; BetrKV (Mietrecht 1)* (2011) § 536 para 59, 198; Emmerich "§ 536" in *Miete Handkommentar §§ 535 bis 580a des Bürgerlichen Gesetzbuches: Allgemeines Gleichbehandlungsgesetz* 10 ed (2011) § 536 para 34, 91.

106 BGHZ 84, 42, 45; BGHZ 127, 245, 253; Emmerich in *Staudinger* § 536 para 59, 198.

107 Translation by Thomas & Dannemann "Civil Code/BGB – modernized" (21-03-2014) *German Law Archive* except for last phrase, which has been substituted by the author for their phrase "would constitute bad faith". The original German reads "*gegen Treu und Glauben verstoßen würde*".

108 Emmerich "§ 536" in *Staudinger* § 536 para 61, 199.

109 Para 61, 199.

110 M Häublein "Vorbemerkung zum §536" in W Krüger & HP Westermann (eds) *Münchener Kommentar zum Bürgerlichen Gesetzbuch – Schuldrecht: Besonderer Teil I §§ 433-610 Finanzierungsleasing, Heizkosten V, Betriebskosten V, CISG* 7 ed (2015) Vor § 536 para 15, 1283.

111 These principles were drafted as a possible model for further development of European contract law. See K Lilleholt, A Victorin, A Fötschl, BER Konow, A Meidell & AB Torum (eds) *Principles of European Law: Lease of Goods* (2008). The subsequent rules on Lease of Goods in the Draft Common Frame of Reference ("DCFR") do not specifically refer to the lessee's right to withhold the rent, but the Official Comment confirms that the lessee has all the usual remedies for non-performance except to the extent varied by arts IV.B-4:101 to 4:104 (C von Bar & E Clive *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (2009) 1515). The DCFR comprises principles, definitions, and model rules of European Private Law generally. It only constitutes model rules based on comparative research.

112 188.

113 These notes have also been taken up in the Official Comment to the Draft Common Frame of Reference 1518-1520.

114 *Cf Ethekwini Metropolitan Unicity Municipality* (320/06) [2007] ZASCA 62 (29-05-2007) *SAFLII* <<http://www.saflii.org/za/cases/ZASCA/2007/62.html>> (accessed 08-10-2015).

115 *Thompson v Scholtz*1999 (1) SA 232 (SCA) 248G.

116 De Wet & Van Wyk *Kontraktereg* 359-360 criticise the rule that damages could only be claimed if the lessor knew or should have known of the defect by reason of his trade or profession, on the basis that it deviates from the general principles of contract law. The special remedies of the law of sale for latent defects are currently not regarded as remedies for breach of contract.

117 The phrase "tyranny of the general principles" is that of Gerhard Lubbe, used informally in discussions with the author.

118 *Cf* part 4 2 above.

119 See eg Van der Merwe et al *Contract* 352 who state that in the case of lease:

"[T]here are clearly at least divisible performances, if the contract itself is not divisible. In the circumstances the lessor's performance can be divided with reference to the rent periods, as can the performance of the lessee. Consequently, there are several obligations; some of which may possibly survive cancellation. The obligations in respect of the rent for the expired periods are immune to the cancellation because there is no relation of reciprocity between the rent for the expired period and the lessor's duties after cancellation." *Cf* also *Thompson v Scholtz*1999 (1) SA 232 (SCA).

*Cf* also *Thompson v Scholtz*1999 (1) SA 232 (SCA).

120 See eg Van der Merwe et al *Contract* 352.

121 Häublein "Vorbemerkung zum §536" in *Münchener Kommentar* Vor § 536 para 15, 1283.

122 Art 9:401 of the PECL reads:

"(1) A party who accepts a tender of performance not conforming to the contract may reduce the price. This reduction shall be proportionate to the decrease in the value of the performance at the time this was tendered compared to the value which a conforming tender would have had at that time...

(3) A party who reduces the price cannot also recover damages for reduction in the value of the performance but remains entitled to damages for any further loss it has suffered so far as these are recoverable under Section 5 of this chapter".

See also art III-3:601 of the (European) DCFR and Voet 19 2 40. (The PECL was prepared by the Commission on European Contract Law and is based on comparative research into European legal systems. The proposed rules have not been promulgated as a code and so the Principles are only model rules. See O Lando & H Beale (eds) *Principles of European Contract Law Parts I and II* (2000). On the DCFR, which built further on PECL, see n 111 above).

123 See the cost order in *Thompson v Scholtz*1999 (1) SA 232 (SCA), where proper performance by the seller was no longer possible, as well as the cost order in *BK Tooling* which allowed the court *a quo's* cost order against BK Tooling to stand in relation to the costs in that court. See further *BK Tooling (Edms) Bpk v Scope*

*Precision Engineering (Edms) Bpk*1979 (1) SA 391 (A) 435H; *Hauman v Nortje* 1914 AD 304.

124 1979 (1) SA 391 (A) 435H.

125 See n 122 above for the suggested formulation of this right.

126 The German writer Häublein also takes this (minority) view. See Häublein "Vorbemerkung zum §536" in *Münchener Kommentar Vor § 536* para 15, 1283).

127 GH Treitel *Remedies for Breach of Contract – A comparative account* (1998) states that civil law systems generally restrict the operation of the *exceptio* by insisting that a party cannot rely on the defence when to do so would be contrary to good faith. See also § 320(2) of the German Civil Code quoted at n 107 above; art 9:201 of the PECL; art III-3:401(4) of the (European) DCFR. The Official Comment to art 7.1.3 of the UNIDROIT PICC states that:

"The text [of art 7.1.3 which corresponds with the *exceptio*] does not explicitly address the question which arises where one party performs in part but does not perform completely. In such a case the party entitled to receive performance may be entitled to withhold performance but only where in normal circumstances this is consonant with good faith and fair dealing". Cf also H Schelhaas "Chapter 7 Non-Performance Section 1: Non-performance in general" in S Vogenauer (ed) *Commentary on the Unidroit Principles of International Commercial Contracts* 2 ed (2015) 839. (The PICC were drafted by an international team of scholars to be an "elaboration of an international restatement of general principles of contract law" (Governing Council of UNIDROIT *Introduction to the 1994 Edition* in UNIDROIT *Unidroit Principles of international Commercial Contracts 2010* (2010) xxii). Parties may incorporate these into their contracts, but courts and arbitral tribunals also sometimes refer to the PICC as evidence of generally accepted principles of international trade. See S Vogenauer "Introduction" in S Vogenauer (ed) *Commentary on the Unidroit Principles of International Commercial Contracts* 2 ed (2015) 1-30).

Cf also H Schelhaas "Chapter 7 Non-Performance Section 1: Non-performance in general" in S Vogenauer (ed) *Commentary on the Unidroit Principles of International Commercial Contracts* 2 ed (2015) 839. (The PICC were drafted by an international team of scholars to be an "elaboration of an international restatement of general principles of contract law" (Governing Council of UNIDROIT *Introduction to the 1994 Edition* in UNIDROIT *Unidroit Principles of international Commercial Contracts 2010* (2010) xxii). Parties may incorporate these into their contracts, but courts and arbitral tribunals also sometimes refer to the PICC as evidence of generally accepted principles of international trade. See S Vogenauer "Introduction" in S Vogenauer (ed) *Commentary on the Unidroit Principles of International Commercial Contracts* 2 ed (2015) 1-30).

128 Especially *Botha v Rich NO*2014 (4) SA 124 (CC) paras 45-46. The need for an "abuse of rights" doctrine, based on good faith, is clear from the case of *Combined Developers v Arun Holdings*2015 (3) SA 215 (WCC).

129 See the text to n 112 above.

130 Illustration 3.

131 Illustration 4. Schelhaas "Chapter 7" in *Commentary on the Unidroit Principles of International Commercial Contracts* 839 states in her commentary on art 7.1.3 PICC that the same result is conceivable under the PICC.

132 844.

133 It is not denied that the principle of reciprocity, which underlies the *exceptio*, sometimes fulfils a resolutive function. So, for example, if an obligation is extinguished through supervening impossibility of performance, the general rule is that its reciprocal obligation is also extinguished. In addition, if proper performance by the breaching party is no longer possible and the defective performance is virtually worthless, the aggrieved party may reduce the price to nil, which is the value of the defective performance.

134 1996 (4) SA 950 (A).

135 1979 (2) SA 56 (A) 60B.

136 419A ("*Wesentlik is die weerhoudingsreg (die teenhanger van die exceptio) dus 'n middel om die teenprestasie af te dwing*").

137 962A-D.

138 962C-D.

139 962E-F.

140 PM Nienaber "Construction Contracts" in WA Joubert and JA Faris (eds) *The Law of South Africa IX* para 51.

141 Para 51.

142 Para 51.

143 See eg *Erasmus v Pienaar*1984 (4) SA 9 (T); *Dawnford Investments CC v Schuurman*1994 (2) SA 412 (N); *Moodley v Moodley*1990 (1) SA 427 (D); *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (182/13) [2014] ZASCA 22 (28-03-2014) SAFLII <<http://www.saflii.org/za/cases/ZASCA/2014/22.html>> para 11 (accessed 08-10-2015).

144 See eg *Erasmus v Pienaar*1984 (4) SA 9 (T); *Dawnford Investments CC v Schuurman*1994 (2) SA 412 (N); *Moodley v Moodley*1990 (1) SA 427 (D); *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (182/13) [2014] ZASCA 22 (28-03-2014) SAFLII <<http://www.saflii.org/za/cases/ZASCA/2014/22.html>> para 11 (accessed 08-10-2015).

145 2001 (2) SA 284 (SCA) para 17.

146 *Moodley v Moodley* 1990 (1) SA 427 (D) 431.

147 According to *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 17, whether the aggrieved party may cancel depends on the nature and degree of the impending non- or malperformance. This should be read in conjunction with *Singh v McCarthy Retail Ltd (t/a McIntosh Motors)* 2000 (4) SA 795 (SCA).

148 See the cases cited in n 143 above.

149 M Fischer *Remedies for Anticipatory Breach of Contract* LLM thesis University of Cape Town (2015) 39, 56-57, 78 and 80.

150 Art 7.3.4:

"A party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract."

151 "Section 3: Termination" in S Vogenauer (ed) *Commentary on the Unidroit Principles of International Commercial Contracts* 2 ed (2015) 916 953.

152 953.

153 953.

154 Art 9:201(2) of the PECL provides that:

"A party may similarly withhold performance for as long as it is clear that there will be a non-performance by the other party when the other party's performance becomes due".

The qualification in art 9:201(1) that the party "may withhold the whole of its performance or a part of it as may be reasonable in the circumstances" also applies to this right to withhold. See also art III-3:401(2), (3) and (4) of the DCFR:

"(2) A creditor who is to perform a reciprocal obligation before the debtor performs and who reasonably believes that there will be non-performance by the debtor when the debtor's performance becomes due may withhold performance of the reciprocal obligation for as long as the reasonable belief continues. However, the right to withhold performance is lost if the debtor gives an adequate assurance of performance. (3) A creditor who withholds performance in the situation mentioned in paragraph (2) has a duty to give notice of that fact to the debtor as soon as is reasonably practicable and is liable for any loss caused to the debtor by a breach of that duty. (4) The performance which may be withheld under this Article is the whole or part of the performance as may be reasonable in the circumstances".

Art 5:623 of the Dutch Civil Code provides that a party who has to perform first is nevertheless entitled to suspend performance of her obligation, if circumstances coming to her attention after conclusion of the contract give her good grounds to fear that the other party will not perform the reciprocal obligation. The second sentence of that article provides that if there are good grounds to fear that the other party will only perform partially or improperly, the suspension or withholding of performance is only allowed insofar as the defect in the performance justifies it.

155 189.

156 See the text to n 117 above.

157 As is evident from *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

158 *Ethekwini Metropolitan Unicity Municipality* (320/06) [2007] ZASCA 62 (29-05-2007) SAFLII <<http://www.saflii.org/za/cases/ZASCA/2007/62.html>> (accessed 08-10-2015) para 22, where the rent was also payable in advance.

159 *Cf Botha v Rich NO* 2014 (4) SA 124 (CC).