

CURECHEM OVERSEAS (PVT) LTD
v
VADAC PROPERTIES (PVT) LTD

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & MAKONI JA
HARARE, JUNE 22, 2018 & October 30, 2018

F. Mahere for the appellant

T. Zhuwarara for the respondent

Judgment No. SC 71/18
Civil Appeal No. SC 390/17

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MAKONI JA: This is an appeal against the whole judgment of the High Court sitting at Harare in which the court granted the respondent's claims for costs of repairs and for damages for loss of income following breach of a lease agreement between the parties.

The judgment of the court *a quo* gives an in-depth outline of the facts of this matter. However, for the purposes of this appeal, I will give a brief outline of the salient facts.

The appellant and the respondent entered into a lease agreement in terms of which the respondent leased certain industrial premises being Stand 143, Beverley East,

Msasa, Harare to the appellant from 1 July 2004. The agreement was renewed over a period of ten years substantially on the same terms with changes on the *quantum* of rentals.

In terms of the lease agreement, the appellant was to use the premises for the storage and distribution of chemicals and ‘allied products.’ During the period of the lease, the appellant was expected to, *inter alia*, maintain the premises in a clean and sanitary condition; repair all interior plumbing; re-decorate the internal walls when necessary; and replace, if destroyed, lost or damaged, all fittings and fixtures, window panes, door locks and the keys thereto. At the termination of the lease, the appellant would return the premises, together with, *inter alia*, all the keys and other property of the respondent in the ‘*same good order, repair and condition fair wear and tear only excepted.*’

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In November 2013, the lease agreement expired and the appellant returned the property to the respondent. On 10 June 2014, the respondent issued out summons against the appellant in the court *a quo*. In the declaration, the respondent alleged that the appellant returned the property in a damaged state and that therefore it was in breach of the said lease agreement. The respondent further averred that the appellant was obliged, upon termination of the lease, to restore the premises to the respondent in the same condition as at the commencement of the lease, fair wear and tear excepted.

The respondent stated that it demanded that the appellant effects the necessary repairs to the leased property but the appellant refused to do so. The respondent then took it upon itself to restore and repair the premises. The respondent also stated that as a result of the appellant leaving the premises in a deplorable state, the respondent was not able to let out the

premises to new tenants until the 1st of May 2014. The respondent wrote to the appellant demanding payment of costs associated with the repairs and also costs for loss of income. Having failed to comply with the demand, the respondent brought a claim for damages in the High Court on 10 June 2014.

The respondent's claim was as follows: -

1. Payment of the sum of US\$ 27 150.78 being repair costs incurred by the respondent in effecting repairs to the premises leased to the appellant, which premises were damaged during the period of tenancy, and
2. Payment of the sum of US\$ 25 000.00 being lost rental income due to the respondent as a result of its leased premises being rendered unfit for further occupation by the appellant upon termination of the appellant's period of tenancy.

The costs of repairs included the cost of repairing the main building floor, electrical, plumbing, glass and lock and keys. The loss of rentals amounted to US\$ 25 000.00 being the total sum of rentals which the respondent should have collected for 5 months at the rate of US\$ 5 000 per month.

The appellant defended the claim. It denied the respondent's claim *in toto*. It averred that the claim was malicious and one calculated to harass it for having moved out of the premises. The gravamen of the defence was that the alleged damage neatly fitted into the "fair wear and tear" exception. The appellant also stated that it had offered to attend to the repair of a certain portion of the property, being the 'pink' or 'red' room, which portions were the most affected by chemicals. The expert reports had indicated that these portions were in need of attention. This was said to be in the spirit of avoiding further quarrels with the

respondent and not out of any legal obligation on its part. In the end, it had not attended to that portion because the respondent had frustrated the gesture.

The parties argued the matter in the court *a quo*. The respondent indicated that certain fixtures and fittings had been destroyed and that the floors of the premises had been damaged. The major damage complained of was said to have been caused by the spillage of chemicals. The respondent produced evidence through a report styled the 'BCHOD report.' This was a report prepared by BCHOD Consulting Engineers after investigating the damage of the premises by the appellant. The report was focused on the structural integrity of the affected areas and it confined its comments to the surface degradation.

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The report basically looked at six rooms. Of those six, chemical penetration was found to be negligible in three. For the other three, one had a chemical penetration of close to 5mm with the other room having a 25-27mm and the last room having a 50-52mm chemical penetration. Consequently, the BCHOD concluded and recommended that some parts of the floors on the premises needed 'finished smooth' to be done or alternatively, installing of a separate bonded topping. Grinding of the floors was also recommended to avoid any further chemical penetration. For the most affected room, cutting out of affected walls and re-bricking was recommended. Lastly, the report recommended that there be an investigation by a chemical expert which would focus on the potential health risks caused by the chemicals which allegedly had caused the damage to the building and the strong odours.

Following the recommendation, the respondent approached the Ministry of Health for an investigation of the health risks caused by the chemicals and strong odours. A report was then prepared by the Radiation Protection Authority of Zimbabwe ('RPAZ'). The report was produced in court. It stated that the appellant had stored heavy mineral acids and industrial chemicals and that these might have caused the corrosion of the floors, the walls, the rusting of the steel structures, the strong odours and the sticky floors. The RPAZ report concluded that, at the time of its inspection in February 2014, the premises were not fit for use. It therefore recommended that the premises be cleaned up with some solvents and neutralizers.

Another witness called by the respondent who had compiled a report independent of the BCHOD report indicated that the chemical damage to the premises was severe and remedial work was called for in-order to restore the floors to their ordinary condition and to guarantee their safety. This witness had qualifications in structural and construction engineering and had been engaged by the respondent to carry out the necessary repairs.

On the other hand, the appellant's evidence through its witnesses was to the effect that after inspecting the premises to establish the nature and extent of the damages as well as the nature and extent of the remedial work required, the damage squarely fitted into the 'fair wear and tear' exception. Their conclusion was that the remedial work had been over-done by the respondent and some of the repairs were excessive and unnecessary in the circumstances. The appellant contended that the total cost of the repairs that were necessary was US\$ 3 000 only. As such, the appellant could not be called upon to pay for those costs in

excess of the sum of US\$ 3 000.00. It also stated that if it were not for the respondent's unnecessary repairs, the premises could have been unoccupied only for a couple of days and not five months.

DETERMINATION OF THE COURT A QUO

After considering the relevant reports by experts and testimonies by witnesses, the High Court found in favour of the respondent and granted the two claims. In its judgment, the court *a quo* stated that both counsel had done everything possible to motivate their client's cases. However, the appellant was said to have fallen short on the relevant documentary evidence. The court *a quo* accepted the major findings of the reports presented by the respondent in evidence.

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It further found that the damage to the respondent's premises had gone beyond fair wear and tear and as such, it found that the cost of cleaning up the premises was a necessary expense incurred by the respondent in restoring the premises back to their original lettable status. The disposition of the court *a quo* was also based on the appellant's subsequent acceptance of the BCHOD report, which report it had firstly rejected. The court *a quo* found the amount claimed for the repairs to be reasonable based on the receipts that were placed before it by the respondent.

On the claim for US\$ 25 000 being lost rental income, the court *a quo* held that the appellant could not escape liability as the loss flowed naturally from the breach,

although it was indirect. Moreso, the appellant had not shown that the premises could have been repaired much sooner than the five months it took for the respondent to complete the repairs.

Aggrieved by that decision, the appellant noted this present appeal based on the following grounds:

GROUND OF APPEAL.

1. The court *a quo* erred in finding the appellant liable for damages in circumstances where the respondent had failed to establish that the appellant had breached the lease agreement between the parties, that is to say, that the appellant had failed to leave the premises in the 'same good order, repair and condition, fair wear and tear expected'. (sic)
2. The court *a quo* grossly erred in awarding the respondent remote damages, without any mitigation, for the loss of rentals, notwithstanding that the evidence on record showed that there were tenants prepared to lease the property.
3. The court *a quo* erred in finding that the appellant had caused the respondent's loss notwithstanding that the respondent declined the appellant a chance to rectify any perceived harm thus causing its own loss.
4. The court *a quo* erred in failing to take into account 'age and user in its determination of whether or not the damages to the property fell within the ambit of 'fair wear and tear'.

SUBMISSIONS IN THIS COURT

Counsel for the appellant, *Miss Mahere*, submitted that the court *a quo* erred in finding the appellant liable for damages when the respondent had not placed any evidence to establish the state of the property at the time it was leased out. She argued that the court *a quo* further erred in allowing the claim as the respondent had made an offer to repair the premises, which offer was denied thus the respondent's loss was self-authored. Counsel

further submitted that the damage to the property amounted to fair wear and tear considering that the property leased was to be used for the purposes of storing chemicals.

On the damages arising out of loss of income, *Miss Mahere* argued that the court *a quo* erred in awarding damages arising from loss of income when there were tenants who were willing to rent the premises for the sum US\$ 4 500.00 a month after the lease agreement had terminated. She further submitted that there was no evidence to show that the appellant caused the delay in the respondent's re-leasing of the premises and was therefore liable for the loss.

On the other hand, counsel for the respondent, *Mr Zhuwarara*, maintained that the finding of the court *a quo* was correct based on the expert reports that were placed before it. He further argued that the premises were lettable and fit for use when the appellant took occupation. He also submitted that the spillage of chemicals, leading to the corrosion of the floors and walls in the premises, did not fall under the 'normal and reasonable' use of the premises, neither was such damage envisaged by the parties when the lease agreement was concluded. The respondent's position is that it was the appellant's negligence and its failure to take protective measures for the premises which resulted in the damage to the premises.

Mr Zhuwarara also submitted that the appellant's offer to pay US\$ 3 000 for fixing the premises was a clear concession of the fact that the premises had been returned in a state that was beyond fair wear and tear.

ISSUES FOR DETERMINATION

Although the appellant has raised four grounds of appeal, it is my view that the present appeal turns or falls on the following questions:

1. Whether or not the court *a quo* erred in finding that the appellant failed to leave the premises in the 'same good order, fair wear and tear excepted,' taking into account the use and age of the premises.
2. Whether the court *a quo* erred in awarding the claim for damages for loss of rental income.

THE LAW

I now proceed to outline the law in respect of the first issue for determination in this appeal.

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In the South African case of *Nedcor Bank Limited v Withinshaw Properties (PTY) Ltd (A591/01) [2002] ZAWCHC 29 (30 May 2002)* the court said the following;

“A lessee is obliged to restore the leased premises to the lessor in a good condition, or at least in substantially the same condition as they were in at the time he took occupation thereof, fair wear and tear excepted. Cooper Landlord and Tenant (2nd edition 1994) 217-218; LAWSA 14 par 189”.¹

The parameters or obligations of the parties to a lease agreement during tenancy were spelt out in the case of *Cash Wholesalers (Pvt) Ltd v Marcuse 1961 (2) SA 347 (SR) at 353D-H*, wherein the court said the following: -

“It will be noted that the obligation is to keep the inside of the premises in a fit and proper state of repair and to deliver up possession of the premises in the same good order and condition in which the lessee received them, reasonable wear and tear

¹ At paragraph 37 of the judgment.

excepted. Two observations are necessary here. Firstly, under a covenant to keep the premises in a proper state of repair a lessee

“will only be liable to make such repairs as are ordinarily required.... He will not be required, either by his contract or the common law, to make structural alterations...”

per WESSELS, J., in *Salmon v. Dedlow*, 1912 **T.P.D 971** at p. 979. But the repairs for which he is responsible may involve renewals of parts of the building: *Sarkin v. Koren*, 1948 (4) S.A 438 (C). Second, if during the currency of the lease the premises are found not to be in a proper state of repair, prima facie the responsibility for that and the liability to make it good rest with the lessee, unless he proves that the state of disrepair is the result of fair wear and tear, for which he is not responsible: *African Theatres Trust v. Estate McCubbin* 1919 **N.P.D 277**. The fair wear and tear exception means that the tenant is relieved from the obligation to repair dilapidation or depreciation which is due to normal use and ravages of time, exposure and natural elements: *Radloff v. Kaplan* 1914 **E.D.L 357**; Sarkin’s case, supra at p. 444” (my underlining).

In that case, the learned judge went on to define the term **fair wear and tear** as ‘dilapidation or depreciation which is due to normal use, the ravages of time, exposure and natural elements.’ The authors A. Blundell, V.C Wellings in *Woodfall on Landlord and Tenant*, (26th Ed Lionel; Sweet and Maxwell Limited, 1960) at page 714 define reasonable fair wear and tear in the following words,

“Reasonable wear and tear means the reasonable use of premises by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed.... he is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear, from producing others which wear and tear would not directly produce.”

APPLICATION OF THE LAW TO FACTS

The gravamen of the appellant’s argument in the present appeal is that the court a *quo* erred in finding that the appellant was liable to pay the respondent’s costs incurred in repairing the premises as a result of the appellant’s breach of the terms of the lease agreement. It maintains the argument that the damage to the property fell within the ambit of ‘fair and tear’ considering the use of the premises. In order to make an informed

assessment, it is necessary first to determine whether or not the damage to the property falls within the ambit of ‘fair wear and tear.’

The position set out in the above authorities is that where damages to a property under lease amount to ‘fair wear and tear’ considering the use and age of the premises, then the lessee is not obliged to meet the costs of such repairs. However, where the damages do not fall under the ambit of the term ‘fair wear and tear’, the lessee is under an obligation to pay for the repairs to those premises. In the present appeal, it is common cause that the state of the premises when the lease commenced and when it was terminated was different. The appellant, however, argues that the damage to the premises was due to ‘fair wear and tear’ whilst the respondent maintains that the damage was more than ‘fair wear and tear’.

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As earlier on stated, the court *a quo*, basing on the documentary evidence and witnesses evidence, came to the conclusion that the damage to the premises did not fall under the exception of ‘fair wear and tear.’ In arriving at such a determination, a court generally looks at the circumstances of the case before it and the evidence adduced. In short, what is ‘fair wear and tear’ differs from case to case. There is no single definition. Each case is dealt with on its own facts.

Such a finding is a finding of fact. This appeal is thus directed mainly against the factual finding of the court *a quo*. In the case of ***Metallon Gold Zimbabwe v Golden Million (Pvt) Ltd SC-12-15*** at page 7 of the cyclostyled judgment, the court said as follows: -

“It is settled that an appellate court will not interfere with factual findings made by a trial court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it”²

The position was also aptly underscored in *Chenga v Chakadaya SC 07/13* wherein OMERJEE AJA at page 5 of the cyclostyled judgment stated that:

“It is trite that an appellate court will not interfere with a decision of a trial court based on findings of fact, unless there is a clear misdirection or the decision reached is irrational. In the case of *Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S)* at 670C-E KORSAN JA stated the following: -

“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. Bitcon v Rosenberg 1936 AD 380 at 395-7; Secretary of State for Education & Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (CA) at 671E-H; CCSU v Min for the Civil Service supra at 951A-B; PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S) at 326E-G.” (my emphasis).

It is therefore necessary to consider the facts of this present case *vis-a-viz* the findings made by the trial court and assess whether or not those findings were so outrageous or grossly unreasonable that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion.

A reading of the judgment of the court *a quo* shows that after considering the evidence led by the parties and the documents filed, the court *a quo* found that the damage to

² See also *Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S)* at page 670 and *Chioza v Siziba SC 16/11*.

the respondent's premises had gone beyond fair wear and tear. As such, it found that the cost of repairing the premises was a necessary expense incurred by the respondent in restoring the premises back to their original lettable status. It was on the basis of these findings that the court *a quo* granted the respondent's claim in its entirety.

Miss Mahere, whilst advancing the appellant's argument on the first and second grounds of appeal, argued that there was no evidence placed before the court on the status of the premises at the time the property was leased out. As such the court should not have accepted evidence on the status of the premises after termination of the lease. However, a perusal of the lease agreement shows that this argument clearly ignored the import of Clause 6(b) of the lease agreement between the parties which provided that;

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'It is agreed between the parties that the premises are in good order and condition at the commencement of this Lease ...'

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The above clause, in the undisputed lease agreement, shows the state of the property at the time the property was leased out. Further, the appellant has a hurdle to overcome in its allegation that there was no evidence of the state of the premises at the commencement of the lease. *Mr Zhuwarara* submitted that clause 6 (c) called upon the appellant to notify the respondent of any defects and deficiencies in writing within seven days of the commencement of the lease. No such notification was ever made. In the absence of such a notification or any evidence contrary to clause 6 (b) of the lease agreement, in my view the reasonable conclusion is that the premises were in good order and condition unlike what they were at the termination of the lease.

If the respondent was of the view that the premises were in a dilapidated state when the lease commenced, then it should have adduced evidence to that effect. It is trite that he who alleges must prove. In the absence of any evidence contrary to the clauses in the lease agreement, this argument is devoid of any reasoning and merit.

Appellant in its evidence in chief, although insisting that the damages amounted to fair wear and tear, accepted that there was an area that needed to be repaired, particularly the 'pink' and 'red' rooms. Asked during cross-examination whether there was something in need of attention at the premises, Mr Chand, the appellant's Managing Director said 'yes'. Surely, having accepted that some portions were in need of attention, the appellant cannot then argue that the damage to the property fell within the ambit of 'fair wear and tear'.

That argument is flawed. I would take that as a concession that the appellant was aware that the damage to the premises was beyond fair wear and tear. If the damage was genuinely fair wear and tear, there was no reason why the appellant would have made an offer to repair part of the premises. The findings of the court *a quo* cannot be faulted in this regard.

The appellant further argued that it was prevented from effecting the necessary repairs. It should be noted that from the evidence on record, the appellant indicated that it was willing to repair damages in a localised area it considered damaged (the pink and red room) since it was of the view that the other damages fell within the 'fair wear and tear' exception. The offer to repair was not genuine. It was coupled with a condition that it would repair the selected portion only and any other damage in the premises would be deemed fair wear and tear.

Further, the appellant accepted the BCHOD report which made a finding that the damage was beyond fair wear and tear. The report stated that resurfacing of the premises was necessary. That again shows that the appellant was somehow aware of the fact that the damage was beyond fair wear and tear. To then allege that the court *a quo* erred in awarding the claim for payment of costs of repairs is contradictory. The court *a quo* relied on this acceptance of the BCHOD report in arriving at its conclusion. Thus it cannot be faulted in anyway.

With regards the issue of ‘age and user’ in determining whether the damage was fair wear and tear, the BCHOD report was quite cognisant of the use and age of the premises. The report did acknowledge that chemical penetration of the chemicals that were stored by the appellant was the cause of most of the damage before recommending a solution for the damaged parts. The court *a quo*, after analysing the evidence at page 4 of the judgment, made the following remarks: -

‘Mr Scott said there had been need for a thorough investigation on all aspects of the damage to the building and on the potential health risks due to the chemical exposure or from the odour. To this extent, he had approached the ministry of health for assistance. He had been referred to the Radiation Protection Authority of Zimbabwe [**“RPAZ”**].

RPAZ had compiled a report. It was also produced. Its major findings were that there had been no radioactive chemicals. It said the defendant had stored heavy mineral acids, alkalines and industrial chemicals. These might have caused the corrosion of the floors and of the walls; the rusting of the steel structures; the strong odours and the sticky floors.

RPAZ had concluded that at the time of its inspection, in February 2014, the premises had not been fit for use. It had recommended cleaning up with different solvents and neutralizers.’

Clearly the court was alive to the use of the premises. Its conclusion in the matter was arrived at after accepting, among other things the reports by experts, which again were cognisant of the use of the premises.

In any event, I do not think that fair wear and tear in the circumstances envisaged the spillage of chemicals to an extent of damaging and corroding the walls and floors of the premises. The respondent, in substantiating its argument on this point, relied on Simon Garner & Alexandra Frith's *A Practical Approach to Landlord and Tenant* (6th Edition) wherein the concept of fair wear and tear was explained in the following words at page 109:

“It excludes the tenant from liability to repair damage which occurs due to the natural process of ageing. Such damage could be caused by the action of elements, or by the tenant's normal and reasonable use of the premises for the purposes for which they were let. The scope of such a clause is limited and will not extend to the following situations:

- a) If the tenant uses the premises in a way not envisaged when they were let which puts greater strain on the building or accelerates wear and tear e.g by storing heavy items on a warehouse floor (Manchester Bonded Warehouse Co. v Carr [1880] 5 CPD 507).

In *Woodfall on Landlord and Tenant supra* it is noted that:

“Independently of covenants to repair, whenever a tenant wilfully or negligently destroys the property, he must restore it or compensate his landlord for its loss, unless destruction is contemplated... (my underlining).

I associate myself with the above sentiments. The appellant must have taken measures to ensure that the spillage of chemicals resulted in the least minimal corrosion, not the extent of spillage or damage which resulted in 5mm to 52mm (5 centimetres) penetration into the surface in some places.

In the circumstances, I find it hard, as did the court *a quo*, to accept that such damage amounts to fair wear and tear. Accordingly, the finding of the court *a quo* was proper in the circumstances taking into account the evidence that was placed before it. Applying the test set out in *Mettallon Gold Zimbabwe supra*, the appellant has not been able to show that the findings of the court *a quo* were grossly unreasonable and outrageous. This court finds that the decision was arrived at after a considered view of the use and age of the premises, as well as the concept of fair wear and tear. This disposes of the first and fourth grounds of appeal.

Whether the court *a quo* erred in awarding the claim for damages for loss of rental income.

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Having established that the appellant has not been able to show why this court should interfere with the factual findings of the court *a quo* that the damage was beyond fair wear and tear, I move on to make a determination on the claim for loss of rentals, which is a claim for damages. In *Rowland Electro Engineering (Pvt) Ltd v Zimbank 2007 (1) ZLR 1 (H)*, GOWORA J (as she then was) at page 13F stated as follows: -

“The rationale for awarding damages to an aggrieved party based on a breach of contract is to place that party in the position he would have occupied had a breach not occurred by the payment of money and without causing undue hardship to the defaulting party.”

The appellant argues that the respondent’s loss did not flow directly from the breach. This argument is difficult to follow. Once it is accepted that the appellant breached the lease agreement, then the respondent was entitled to damages that arise from the breach.

The South African case of *Monyetla Property Holdings v Imm Graduate School of Marketing (Pty) Ltd and Others (10083/2012) [2013] ZAGPJHC 210* aptly underscores that point. It provides the following, at paragraph 26 of the judgment:

“In a claim for damages arising out of the breach of contract, the plaintiff may claim damages for all the damage flowing from the cause of action. He or she must claim, in a single action, compensation for all the damage he or she has already suffered and the prospective loss which he reasonably expects to suffer in the future. In *Coetzee v SA Railways & Harbours 1933 CPD 565*, Gardner JP (with whom Watermeyer J concurred) examined the English cases and said:

“The cases, as far as I have ascertained, go only to this extent, that is a person who sues for accrued damages, must also claim prospective damages, or forfeit them” (my underlining)

Wessels the Law of Contract also states as follows;³

“...If however, it can be proved to the Court that the profits were reasonably to be expected, and would certainly have been realized, but for the breach of contract, they form as much a part of the damages as any other loss...”

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In *Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431*, NUGENT JA, at page 449 E – F, stated that:

“A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.”

The appellant also argues that the court *a quo* erred in awarding a claim for remote damages, without any mitigation, for the loss of rentals. In *Rowland Electro Engineering (Pvt) Ltd v Zimbank supra* GOWORA J (as she then was) stated that:

³ A. A. Roberts ‘Wessels’ Law of Contract paras 3223 and 3224

‘It is trite that a plaintiff seeking to claim damages based on breach of contract has a duty to mitigate his loss.’

The appellant’s contention is that the granting of the claim for loss of rentals was misplaced since it had made an offer to repair part of the premises and that there were tenants who were willing to rent the premises for US\$ 4 500 after the termination of the lease. What is clear from the record is that after the conditional offer to repair part of the premises, the respondent wrote to the appellant indicating that they intended to ensure that remedial action was taken before the property could be re-let as engineers had confirmed that the damage caused by the chemicals was not merely cosmetic or on the surface. The respondent also acknowledged the offer to rent the premises but it also indicated that it was not willing to let the premises until they were occupiable.

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The judgment of the court *a quo* shows that the RPAZ Report made a conclusion that the premises had strong odours and sticky floors. It also states that as at February 2014, the premises were not fit for use, before recommending a cleaning up of the place. In light of this, the fact that there was a tenant willing to rent out the place could not preclude the respondent from claiming for loss of rentals as a result of breach of contract. This is because the premises had been declared not fit for use especially in light of the effects of the chemicals to human health. This is one of the reasons why the respondent wanted to ensure that the premises were in a good condition before it could lease them.

Given the circumstances of the case, the court *a quo* was correct in allowing the respondent’s claims. The respondent’s ability to mitigate the loss was inhibited by the fact

that the premises were said to be unfit for use due to the structural and health effects of the chemicals.

In conclusion, I would find that the appellant has not been able to show how the findings of the court *a quo* were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at such a conclusion given the evidence that was before it.

In the result, I make the following order:

The appeal be and is hereby dismissed with costs.

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GARWE JA

GUVAVA JA

Tavenhave & Machungauta, appellant's legal practitioners
Mawere Sibanda, respondent's legal practitioners