

SOUTH AFRICA / JUDGMENT

Perryvale Investments (Pty) Ltd v Patel NO and Another (13096/2005) [2008] ZAWCHC 224 (25 July 2008) [2008] ZAWCHC 224

COURT

Western Cape High Court, Cape Town

BEFORE

Davis

CASE / FILE NUMBER

13096/2005

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IN

THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL
DIVISION)

CASE

NO: 13096/2005

DATE: 25

JULY 2008

In

the matter between:

PERRYVALE
INVESTMENTS (PTY) LTD APPLICANT
And
S
PATEL N.O. 1st
RESPONDENT
MICHAEL
KATZ 2nd
RESPONDENT

JUDGMENT

DAVIS, J: [1] On 15 April 2008 this Court granted an order which read as follows: "1. The decision by the first respondent dated 5 August 2005 referring the applicant for prosecution in terms of section 16 of the Rental Housing Act No. 50 of 1999 is set aside. 2. The applicant shall, within 60 days of the date of this order provide the first respondent with a report, detailing the maintenance and repairs done to the roof of Shelbourne, Beach Road, Sea Point, subsequent to the first respondent's decision dated 5 August 2005. 3. The second respondent shall be entitled to 50% remission of rent from the applicant for the period September 2002 until August 2004, less the amount of R850, less the amount of R1 512,50 rental for July 2004, less the amount of R1 512 rental for August 2000. 4. The applicant and the second respondent shall each be liable for 50% of the costs of the following: 4.1. Cost of the building consultant's report, R3 000; 4.2. air quality and monitoring report R1 500; 4.3. Swift microbiology report R1 500. 5. The ruling by first respondent that applicant shall pay a remission of 100% of the rental for the period September 2004 to July 2005 is set aside. 6. The parties shall pay their own costs of suit". [2] This order was made by the Court after a considerable opportunity had been afforded to the parties to settle the dispute. It was my view that, after hearing argument, this was a matter that should have been settled rather than litigated. Every opportunity was granted to both parties to agree to an order which would put an end to this litigation. Sadly and regrettably, it appeared that a complete settlement of the dispute could not be obtained. Accordingly the order was formulated together with the parties but without any agreement that this would be the end of the matter. After the order was granted, second respondent requested reasons for the order. It is therefore incumbent upon this Court to provide the reasons for the order so granted, which are set out herein. [3] The applicant sought to review and have set aside the decision of first respondent of 23 June 2005 in terms of which it upheld second respondent's two complaints pursuant to Regulations promulgated under the Rental Housing Act, 50 of 1999 ("the Act"). The applicant also sought an order dismissing the second respondent's complaints which had been lodged in terms of section 13(1) of the Act. [4] Briefly, applicant carries on business as a proprietor of rented immovable property, being a beachfront block of apartments,

Shelbourne, which consists of 52 flats and a ground floor restaurant in Sea Point. Second respondent occupied flat 801 in Shelbourne.

First respondent is cited in these proceedings in his capacity as the chairperson of the Western Cape Housing Tribunal {"the

Tribunal") constituted in terms of the provisions of Chapter 4 of the Act. First respondent did not enter an appearance in these

proceedings but deposed to an affidavit entitled "explanatory affidavit" in which the following was stated: "The Tribunal initially filed a notice of intention to oppose. However, on further consideration of the founding affidavit and supplementary affidavit filed in these proceedings it decided to file a notice of intention to abide instead. Accordingly, a notice of withdrawal of

opposition and a notice of intention to abide had been duly filed. In the circumstances the purpose of this affidavit is merely to appraise the above Honourable Court with an explanation in respect of certain issues raised in the founding papers, as well as to raise certain legal issues which are of significant relevance to the future work of the Tribunal". [5] The applicant bases its application for review on section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

and accordingly seeks to have this section apply to the Tribunal's decision of 23 June 2005. In its view, the decision taken by the first respondent, purportedly pursuant to powers contained in and granted by the Act and Provincial Regulations published in the Western Cape Provincial Gazette 5822 of 1 February 2002 as Provincial Notices 21 and 22. The decision of 23 June 2005 was preceded by a hearing before the Tribunal, which itself was preceded by the institution of an action for the ejection of second respondent from apartment 801 in Shelbourne. [6] In essence, Mr Lourens who appeared on behalf of the applicant, correctly characterised the decision of the Tribunal as the ultimate consequence of a complaint which had initially been brought by second respondent against the applicant alleging various defects in the rented property and which constituted an unfair practice by the applicant entitling the second respondent to a remission of rental. [7] The applicant appears to launch its attack against the decisions of first respondent on the following basis: 1. The character of the decision itself as contemplated by section 6(2)(e) of PAJA and the basis for the decision as contemplated in section 6(2)(f) of PAJA. 2. Procedural unfairness as contemplated by section 5(2)(c) of PAJA. Applicant instituted proceedings against second respondent on 9 September 2004 for the second respondent's eviction from Shelbourne. In a letter of 8 September 2004 addressed to the Tribunal, second respondent set out a complaint against the applicant concerning the subject of unfair practices. In this particular regard, two pieces of correspondence are relevant to illustrate the nature of the complaint which was brought by second respondent after the action taken by applicant. In a report generated by C Wellman on behalf of Western Cape Rental Housing Tribunal, the following is stated with regard to the complaint: "1. The complainant claims that the leaking roof of his flat has never been properly repaired, although the respondent has been informed and requested to do so on numerous occasions. The leak resulted in water dripping through the ceiling and down the walls which caused mildew. This caused damage to his possessions (clothing, furniture etc) and was detrimental to his health. 2. Furthermore, the complainant is of the opinion that it would not be fair of the respondent to expect him to pay the full rental as he is claiming that he never had the full use and enjoyment of the flat and that the dampness influenced his health and wellbeing. The report continues: The complainant is claiming compensation in the following amounts: Damages to his possessions caused by the leaking roof - R13 000.

Remission/rebate of rent for the rental period R61 775.

Compensation for other expenditure due to disrepair of roof - R5 225.

That the Tribunal makes an order for the roof to be repaired properly". [8] On 8 September 2004 second respondent generated the complaint to which reference has already been made, under cover of a letter

headed "re unfair practices". It is a voluminous document and I shall merely cite key passages thereof to indicate the nature of the complaint: "The landlord's lawyer...seems to think that the so-called inadequate roof repairs effected on 8 July 2004 exonerates his client's transgressions. Adequate roof repairs should have been effected over two years ago!". Second respondent continues: "I only recently began to suspect that there could be moulds in my flat as I was not previously aware that water leaking in can cause indoor mould growth (sic). The landlord should have been aware of this but did not advise me of the risk. As a result of the landlord refusing to effect adequate roof repairs and attend to the water feaking in problem for over two years, there was excessive moisture/dampness content in my flat which was highlighted by my building consultant on 15 July 2004. My flat was and still is contaminated by moulds and I have expert evidence to back this up. The excessive mould spores did cause/exacerbated my health problems (sic) and definitely affected my wellbeing (the area in my flat was and is biologically contaminated)...". Second respondent concludes: "The landlord has flagrantly disregarded my rights as a tenant for over two years and was not concerned about denying me commodus usus of my flat for over two years and that his wrongful and negligent actions were exposing me to health and safety risks. He believes he owes no duty of care to the tenant. He has now run to a large legal firm to help him get out of a minefield he foolishly and negligently entered having ignored all the warning signs along the way. The sooner unscrupulous landlords are punished to the full extent of the law, the sooner they will learn not to abuse the law". [9] The Cape Town Magistrate's Court, on 1 December 2004, referred the eviction proceedings which had been instituted by applicant before it to the Tribunal for determination. Second respondent's letter of complaint then resulted in two undated reports by a building consultant, Mr Jonathan Mitchell based on inspections carried at the apartment on 15 July 2004 and 3 November 2004. Testimony was heard from a range of persons, including a building inspector Mr Goodall, an air monitoring specialist, Mr L J van Rensburg, Mr Deon Bell, the general handyman responsible for repairs of a general nature and testimony from Mr David Kawitzky and Perry Kawitzky, director of the applicant. [10] After hearing this evidence, first respondent ruled that "the applicant must submit a detailed repair plan for the whole building and not simply for apartment 801 by 31 July 2005". In this connection, the ruling detailed the nature of the report that was required: "1. A reputable waterproofing contractor ought to be appointed to satisfactorily remedy the concrete roof over flat 801 to prevent any storm water ingress. 2. The spalling concrete on the interior of flat 801 ought to be attended to and inspected by a structural engineer who ought to issue a detail specification of how to treat the steel for purposes of inhibiting any further rust ana" then to specify an appropriate epoxy repair mortar. Thereafter, the ceiling to be reskhnmed and repainted. 3. Where the walls are cracked these cracks ought to be raked open and sealed with a suitable flexible acrylic sealant and then painted over. 4. Wherever there is loose and flaking paint as a result of storm water ingress and dampness, the loose paint ought to be scraped off and the area thoroughly prepared and feft to dry out prior to repainting with three coats of good quality paint.

5. The loose piaster externally which is visible through the kitchen window ought to be carefully hacked off and be satisfactorily

remedied. Precautions have to be taken against falling debris to the restaurant patrons below. 6. The remedial work be undertaken by suitably skilled artisans and all under competent supervision, 7. The remedial work be undertaken in consultation with the tenant so as to cause as little inconvenience and disruption as possible". First respondent also ruled that second respondent was entitled to a remission of rent. It calculated such remission as follows: "The tenant is entitled to a remission of rent and costs incurred calculated as follows: 50% remission of R2 500 for 24 months totalling R30 000 (September 2002 - August 2004) and 100% remission of R3 025 for 10 months totalling R30 250 (September 2004 - June 2005); repairs to ceiling R850; cost of building consultant's report R3 000; air quality monitoring report R1 500; Swift microbiology report R1 500". First respondent also found thus: "The evidence led would indicate that repairs more of an emergency nature were done rather than any specific plan to do maintenance. In the absence of any other evidence of maintenance, the Tribunal cannot but agree that there was a serious lack of maintenance foreseen or envisaged in the Rental Housing Act and the unfair practices regulations". [11] Mr Lourens submitted that this particular holding, together with the decisions which had been made: 1. Ignored the testimony of the local authority official, Mr Goodafl, that the building was in a safe and good state of repair. 2. Ignored the evidence that the second respondent refused the applicant access to the premises for the purposes of effecting repairs. 3. Ignored the documentation to the contrary of Messrs M Waggie, W Voigt and Stormroofing which indicated the extent of the repairs

undertaken. 4. Ignored the evidence of Mr David Kawitzky and Mr Perry Kawitzky as to the extent of the repair work applicant had carried out. 5. Afforded insufficient regard to the evidence before the Tribunal that the applicant had reasonably attempted to resolve the problem of leakage or damp complained of by second respondent in respect only of flat 801 Shelbourne". Mr Lourens also submitted that the very finding was premised on the principle that, unless a specific maintenance plan was En place, there would automatically be a serious lack of maintenance, notwithstanding the extent of the repairs which were undertaken, as well as the existence of five full time employees at Shelbourne. [12] Mr Lourens contended further that there was no indication in the reasons provided first respondent of the grounds upon which the remissions

of rental had been decided. Neither the reports nor the evidence indicated in each of these two periods that flat 801 was either only half inhabitable or totally uninhabitable as the case may be, nor did first respondent find to that effect in its reasons. This raised the inference of the arbitrary nature to this component of its decision. He also contended that there was no indication as to what had motivated the Tribunal to adopt a differentiated treatment for rental remission purposes in respect of the two periods, namely 50% for the period September 2002 to August 2004 and 100% for the period September 2004 to June 2005. He therefore submitted that the Tribunal had not taken account of the fact that the applicant had offered the second respondent alternative accommodation but that the latter had refused this. Moreover, the Act did not afford

the Tribunal the power to order repayment of rent which already had been paid. [13] In this connection he referred to section 13(4)(c) of the Act which provides: "Where a tribunal, at the conclusion of the hearing in terms of paragraph

- (d) of subsection (2), is of the view that an unfair practice exists, it may (c) make any other ruling that is just and fair to terminate any unfair practice, including without detracting from the generality of the foregoing, a ruling to discontinue (i) over-crowding; (ii) unacceptable living conditions; (iii) exploitative rentals; (iv) lack of maintenance". Mr Lourens further submitted that the use of the word "discontinued" in this provision clearly referred to a regulation of future

conduct or behaviour; that is a discouragement or prescription of an existing unfair labour practice from continuing into the future. He also noted that the second respondent had vacated flat 801 during August 2004. In the circumstances, the Tribunal was not empowered to direct a remission of rental and by necessary implication, uphold and effect the claim for damages for any period before that. [14] Mr Lourens noted that the applicant had been directed to bear the costs occasioned by the professional reports. These reports had been commissioned by the second respondent and related to possible fungus spores in the air. Applicant contended that the alleged presence of fungus spores was irrelevant to the complaint being a leaking roof. In directing the applicant to bear the costs of these irrelevant reports, Mr Lourens submitted that the decision taken had been for an ulterior purpose or motive, being a punitive measure and, further, that irrelevant

considerations have been taken into account, namely that the presence of fungus spores was relevant to the complaint. [15] Second respondent appeared in person. He submitted that the first respondent was required to establish whether there had been a lack of maintenance by applicant which resulted in storm water ingress and caused mould and damp in second respondent's dwelling. He further submitted that the first respondent was required to establish whether second respondent had been partially deprived by such lack of maintenance so that the full beneficial use and enjoyment of the apartment and, if so, the extent to which such deprivation would constitute a fair remission of rental in the circumstances. [16] In this connection, second respondent referred to Regulation 4(1)(d) which requires that the landlord must effect repairs for which he is responsible and not merely attempt to effect repairs. He submitted that for the purposes of remission mercedis it was irrelevant whether the applicant had acted reasonably, for example by conducting patchwork of the suspected problem area as a first attempt to remedy the water ingress, or use its best endeavours in its attempt to effect repairs. It was sufficient, in his view, for second respondent to demonstrate that the attempted repairs were unsuccessful and that accordingly second respondent had been deprived of the full use and enjoyment of the apartment. [17] Turning to the maintenance plan, second respondent contended that first respondent's ruling required applicant to submit a maintenance plan which was not premised on the principle that unless such a plan was in place there would automatically be a serious lack of maintenance. The conclusion of a serious lack of maintenance was drawn by first respondent in his ruling and was based on the absence of any maintenance other than that which he described

as being of an emergency nature. Furthermore, the complaint form states "roof not adequately repaired". In his view, this description did not limit the inadequate repairs to a part of the building's roof. Mr Mitchells report also referred top and which was attached to the complaint form under "list of complaints and disputes", this report on the lack of

maintenance of both second respondent's dwelling and moreover, the building as a whole. In this particular connection, Mr Katz referred to the evidence of Mr Julian Mitchell, the building consultant, who testified that "the building is In a state of decay, it is degenerating, it needs remedial work". Mr Mitchell had testified, after his second inspection of 3 November 2004, that "the purpose of remedial work was to resolve the problem, but it failed dismally in being able to resolve the problem" [18] Insofar as the rental remission was concerned, Mr Katz contended that during the first period, that is between September 2002 to August 2004, there was storm water ingress into the flat with the resultant damp and mould growth. The mould smelled and the storm water ingress caused damage to furniture and fittings in the flat. A progressive worsening in the living conditions of the flat took place during this period because no repairs had been effected since May 2002. [19] At the end of August 2004, that is prior to the commencement of the second period, second respondent vacated his fiat as repairs had not yet been carried out. In a letter generated by applicant's attorney of 3 September 2004, there was the implication that applicant was unable to effect any repairs unless second respondent vacated the premises, albeit temporarily. Thereafter repairs to the flat were unsuccessfully attempted and second respondent accordingly could not return to the flat as he awaited applicant to effect the necessary repairs. In his view, therefore, in terms of Regulation 5(2)(a) he was entitled to 100% remission of rental. [20] He contended that the living conditions had progressively worsened during the first period and it followed that by the second period living conditions were significantly worse than had been experienced by him during the first period. He submitted therefore that first respondent's omission to expressly mention these facts at the ruling did not mean that they had not been considered and their relevance was clear in the determination of a fair rental remission. [21] Turning to the question of the cost of professional reports, Mr Katz referred to section 13{12}{a) of the Act which empowers first respondent to make a ruling as to costs which may be just and equitable. The professional reports in respect of which the costs were to be granted to second respondent was relevant to the hearing. The relevance of the reports of Mr Mitchell are self-evident. The remaining two reports being the air quality monitoring and the Swift microbiology report were relevant to establish the presence and extent of mould and fungal spores in the dwelling, both of which had clearly affected the ability to enjoy full occupation of the apartment in the manner envisaged by the law and both therefore were relevant to the determination of the remission of rental. Evaluation [22] As I indicated at the commencement of this judgment, first respondent abides the decision of the Court. That is certainly

relevant with regard to the question of any prosecution which may be brought in terms of section 16 of the Act. In my view, there was no purpose in doing anything more than setting aside any possible prosecution, particularly when the authority in question abided the decision of the Court and showed no real intention that it was to prosecute the matter. Furthermore, the question which arose for complaint were not best resolved through the issue of a prosecution, but

rather through the implementation of a maintenance plan which ultimately became the central dispute between the parties. In my view, an examination of the findings of the first respondent certainly do no more than necessitate an examination of the possible success to be achieved by the maintenance report and the further work which may have to be done by applicant, pursuant to such a plan. [23] I therefore turn to the question of the report. In his affidavit, first respondent refers to the report produced by applicant in response to the Tribunal's ruling, itself an indication that applicant had hardly treated the matter in the kind of cavalier

fashion which would have justified a prosecution and the use of criminal law in circumstances where, quite clearly, alternative

dispute mechanisms are further indicated. [24] In that affidavit the following is stated by Mr Patel: "in this regard I point out that the applicant's attorneys of record addressed correspondence to the Tribunal on 2 August 2005 in terms whereof the following is stated: "In accordance with the requirement that our client should investigate through an engineer whether urgent remedial work is necessary, it has secured a report from Rozowsky & Associates, a highly reputable firm of consulting civil and structural engineers and we attach a copy of their fax report of 28 July 2005..." On 5 August 2005 the Tribunal responded thus: "The Tribunal does not make a ruling that your client should investigate through an engineer whether urgent remedial work is necessary. For ease of reference the relevant section on the ruling dealing with the repair plan is quoted hereunder. Clearly your client has not complied with the ruling in terms of substance nor in terms of the date of 31 July 2005. The matter will now unfortunately be referred for prosecution as non-compliance is an offence in terms of section 6(d)(7) of the Rental Housing Act. The Tribunal thus questioned the whole issue around the report and this is also in the process of being followed up. The Tribunal therefore cannot commit itself and is satisfied that there is no immediate hazard to occupancy of the building or to members of the public frequenting the restaurant below. Your own report only evaluated the impact on occupancy of the apartment or building..." Significantly on 12 August 2005 applicant's attorneys of record addressed correspondence to the Tribunal in terms whereof the following is stated; "With the best will in the world the applicant has been unable at the date you offer to provide the maintenance program required in your decision. The said correspondence also requested an extension to finalise reports and plans... On 26 August 2005 the Tribunal addressed correspondence to the applicant's attorneys of record advising the Tribunal (after considering the relevant correspondence as well as the proceedings) had decided that an extension would not be provided". I should add that no satisfactory explanation is proffered in any of the correspondence as to why the extension was not granted. [25] On the basis of Mr Patel's evidence, there had been non-compliance in a material aspect with the Tribunal's ruling. Further action was clearly necessary. In my view, there is evidence which indicates that the Tribunal was justified in persisting with its finding that a comprehensive plan should be developed. Mr Mitchell's evidence, for example, was of sufficient coherence and plausibility, given the persistent problems which had been encountered by second respondent and documented by him, to justify the Tribunal's ruling that a comprehensive report was required. [26] In this respect, Mr Mitchell's evidence is particularly persuasive. I do not intend to set out comprehensively the evidence

which he provided before the Tribunal, the following passage must therefore suffice for the purposes of this judgment. He informed the Tribunal as follows in his testimony:

JUDGMENT

DAVIS, J:

[1] On 15 April 2008 this Court granted an order which read as follows:

"1. The decision by the first respondent dated 5 August 2005 referring the applicant for prosecution in terms of section 16 of the Rental Housing Act No. 50 of 1999 is set aside.

2. The applicant shall, within 60 days of the date of this order provide the first respondent with a report, detailing the maintenance and repairs done to the roof of Shelbourne, Beach Road, Sea Point, subsequent to the first respondent's decision dated 5 August 2005.

3. The second respondent shall be entitled to 50% remission of rent from the applicant for the period September 2002 until August 2004, less the amount of R850, less the amount of R1 512,50 rental for July 2004, less the amount of R1 512 rental for August 2000.

4. The applicant and the second respondent shall each be liable for 50% of the costs of the following:

4.1. Cost of the building consultant's report, R3 000;

4.2. air quality and monitoring report R1 500;

4.3. Swift microbiology report R1 500.

5. The ruling by first respondent that applicant shall pay a remission of 100% of the rental for the period September 2004 to July 2005 is set aside.

6. The parties shall pay their own costs of suit".

[2] This order was made by the Court after a considerable opportunity had been afforded to the parties to settle the dispute. It was my view that, after hearing argument, this was a matter that should have been settled rather than litigated. Every opportunity was granted to both parties to agree to an order which would put an end to this litigation. Sadly and regrettably, it appeared that a complete settlement of the dispute could not be obtained. Accordingly the order was formulated together with the parties but without any agreement that this would be the end of the matter. After the order was granted, second respondent requested reasons for the order. It is therefore incumbent upon this Court to provide the reasons for the order so granted, which are set out herein.

[3] The applicant sought to review and have set aside the decision of first respondent of 23 June 2005 in terms of which it upheld second respondent's two complaints pursuant to Regulations promulgated under the Rental Housing Act, 50 of 1999 ("the Act"). The applicant also sought an order dismissing the second respondent's complaints which had been lodged in terms of section 13(1) of the Act.

[4] Briefly, applicant carries on business as a proprietor of rented immovable property, being a beachfront block of apartments,

Shelbourne, which consists of 52 flats and a ground floor restaurant in Sea Point. Second respondent occupied flat 801 in Shelbourne.

First respondent is cited in these proceedings in his capacity as the chairperson of the Western Cape Housing Tribunal {"the

Tribunal") constituted in terms of the provisions of Chapter 4 of the Act. First respondent did not enter an appearance in these

proceedings but deposed to an affidavit entitled "explanatory affidavit" in which the following was stated:

"The Tribunal initially filed a notice of intention to oppose. However, on further consideration of the founding affidavit and supplementary affidavit filed in these proceedings it decided to file a notice of intention to abide instead. Accordingly, a notice of withdrawal of opposition and a notice of intention to abide had been duly filed. In the circumstances the purpose of this affidavit is merely to appraise the above Honourable Court with an explanation in respect of certain issues raised in the founding papers, as well as to raise certain legal issues which are of significant relevance to the future work of the Tribunal".

[5] The applicant bases its application for review on section 6 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

and accordingly seeks to have this section apply to the Tribunal's decision of 23 June 2005. In its view, the decision taken by the first respondent, purportedly pursuant to powers contained in and granted by the Act and Provincial Regulations published in the Western Cape Provincial Gazette 5822 of 1 February 2002 as Provincial Notices 21 and 22. The decision of 23 June 2005 was preceded by a hearing before the Tribunal, which itself was preceded by the institution of an action for the ejectment of second respondent from apartment 801 in Shelbourne.

[6] In essence, Mr Lourens who appeared on behalf of the applicant, correctly characterised the decision of the Tribunal as the ultimate consequence of a complaint which had initially been brought by second respondent against the applicant alleging various defects in the rented property and which constituted an unfair practice by the applicant entitling the second respondent to a remission of rental.

[7] The applicant appears to launch its attack against the decisions of first respondent on the following basis:

1. The character of the decision itself as contemplated by section 6(2)(e) of PAJA and the basis for the decision as contemplated in section 6(2)(f) of PAJA.
2. Procedural unfairness as contemplated by section 5(2)(c) of PAJA.

Applicant instituted proceedings against second respondent on 9 September 2004 for the second respondent's eviction from Shelbourne. In a letter of 8 September 2004 addressed to the Tribunal, second respondent set out a complaint against the applicant concerning the subject of unfair practices. In this particular regard, two pieces of correspondence are relevant to illustrate the nature of the complaint which was brought by second respondent after the action taken by applicant. In a report generated by C Wellman on behalf of Western Cape Rental Housing Tribunal, the following is stated with regard to the complaint:

- "1. The complainant claims that the leaking roof of his flat has never been properly repaired, although the respondent has been informed and requested to do so on numerous occasions. The leak resulted in water dripping through the ceiling and down the walls which caused mildew. This caused damage to his possessions (clothing, furniture etc) and was detrimental to his health.
2. Furthermore, the complainant is of the opinion that it would not be fair of the respondent to expect him to pay the full rental as he is claiming that he never had the full use and enjoyment of the flat and that the dampness influenced his health and wellbeing.

The report continues:

The complainant is claiming compensation in the following amounts:

Damages to his possessions caused by the leaking roof - R13 000.

Remission/rebate of rent for the rental period R61 775.

Compensation for other expenditure due to disrepair of roof - R5 225.

That the Tribunal makes an order for the roof to be repaired properly".

[8] On 8 September 2004 second respondent generated the complaint to which reference has already been made, under cover of a letter

headed "re unfair practices". It is a voluminous document and I shall merely cite key passages thereof to indicate the nature of the complaint: "The landlord's lawyer...seems to think that the so-called inadequate roof repairs effected on 8 July

2004 exonerates his client's transgressions. Adequate roof repairs should have been effected over two years ago!".

Second respondent continues:

"I only recently began to suspect that there could be moulds in my flat as I was not previously aware that water leaking in can cause indoor mould growth (sic). The landlord should have been aware of this but did not advise me of the risk. As a result of the landlord refusing to effect adequate roof repairs and attend to the water feaking in problem for over two years, there was excessive moisture/dampness content in my flat which was highlighted by my building consultant on 15 July 2004. My flat was and still is contaminated by moulds and I have expert evidence to back this up. The excessive mould spores did cause/exacerbated my health problems (sic) and definitely affected my wellbeing (the area in my flat was and is biologically contaminated)...".

Second respondent concludes:

"The landlord has flagrantly disregarded my rights as a tenant for over two years and was not concerned about denying me commodus usus of my flat for over two years and that his wrongful and negligent actions were exposing me to health and safety risks. He believes he owes no duty of care to the tenant. He has now run to a large legal firm to help him get out of a minefield he foolishly and negligently entered having ignored all the warning signs along the way. The sooner unscrupulous landlords are punished to the full extent of the law, the sooner they will learn not to abuse the law".

[9] The Cape Town Magistrate's Court, on 1 December 2004, referred the eviction proceedings which had been instituted by applicant before it to the Tribunal for determination. Second respondent's letter of complaint then resulted in two undated reports by a building consultant, Mr Jonathan Mitchell based on inspections carried at the apartment on 15 July 2004 and 3 November 2004. Testimony was heard from a range of persons, including a building inspector Mr Goodall, an air monitoring specialist, Mr L J van Rensburg, Mr Deon Bell, the general handyman responsible for repairs of a general nature and testimony from Mr David Kawitzky and Perry Kawitzky, director of the applicant.

[10] After hearing this evidence, first respondent ruled that "the applicant must submit a detailed repair plan for the whole building and not simply for apartment 801 by 31 July 2005". In this connection, the ruling detailed the nature of the report that was required:

"1. A reputable waterproofing contractor ought to be appointed to satisfactorily remedy the concrete roof over flat 801 to prevent any storm water ingress.

2. The spalling concrete on the interior of flat 801 ought to be attended to and inspected by a structural engineer who ought to issue a detail specification of how to treat the steel for purposes of inhibiting any further rust ana" then to specify an appropriate epoxy repair mortar. Thereafter, the ceiling to be reskhnmed and repainted.

3. Where the walls are cracked these cracks ought to be raked open and sealed with a suitable flexible acrylic sealant and then painted over.

4. Wherever there is loose and flaking paint as a result of storm water ingress and dampness, the loose paint ought to be scraped off and the area thoroughly prepared and left to dry out prior to repainting with three coats of good quality paint.
5. The loose piaster externally which is visible through the kitchen window ought to be carefully hacked off and be satisfactorily remedied. Precautions have to be taken against falling debris to the restaurant patrons below.
6. The remedial work be undertaken by suitably skilled artisans and all under competent supervision,
7. The remedial work be undertaken in consultation with the tenant so as to cause as little inconvenience and disruption as possible".

First respondent also ruled that second respondent was entitled to a remission of rent. It calculated such remission as follows:

"The tenant is entitled to a remission of rent and costs incurred calculated as follows:

50% remission of R2 500 for 24 months totalling R30 000 (September 2002 - August 2004) and 100% remission of R3 025 for 10 months totalling R30 250 (September 2004 - June 2005); repairs to ceiling R850; cost of building consultant's report R3 000; air quality monitoring report R1 500; Swift microbiology report R1 500".

First respondent also found thus:

"The evidence led would indicate that repairs more of an emergency nature were done rather than any specific plan to do maintenance. In the absence of any other evidence of maintenance, the Tribunal cannot but agree that there was a serious lack of maintenance foreseen or envisaged in the Rental Housing Act and the unfair practices regulations".

[11] Mr Lourens submitted that this particular holding, together with the decisions which had been made:

1. Ignored the testimony of the local authority official, Mr Goodafl, that the building was in a safe and good state of repair.
2. Ignored the evidence that the second respondent refused the applicant access to the premises for the purposes of effecting repairs.
3. Ignored the documentation to the contrary of Messrs M Waggie, W Voigt and Stormroofing which indicated the extent of the repairs undertaken.
4. Ignored the evidence of Mr David Kawitzky and Mr Perry Kawitzky as to the extent of the repair work applicant had carried out.
5. Afforded insufficient regard to the evidence before the Tribunal that the applicant had reasonably attempted to resolve the problem of leakage or damp complained of by second respondent in respect only of flat 801 Shelbourne".

Mr Lourens also submitted that the very finding was premised on the principle that, unless a specific maintenance plan was En place, there would automatically be a serious lack of maintenance, notwithstanding the extent of the repairs which were undertaken, as well as the existence of five full time employees at Shelbourne.

[12] Mr Lourens contended further that there was no indication in the reasons provided first respondent of the grounds upon which the remissions

of rental had been decided. Neither the reports nor the evidence indicated in each of these two periods that flat 801 was either only half inhabitable or totally uninhabitable as the case may be, nor did first respondent find to that effect in its reasons. This raised the inference of the arbitrary nature to this component of its decision. He also contended that there was no indication as to what had motivated the Tribunal to adopt a differentiated treatment for rental remission purposes in respect of the two periods, namely 50% for the period September 2002 to August 2004 and 100% for the period September 2004 to June 2005. He therefore submitted that the Tribunal had not taken account of the fact that the applicant had offered the second respondent alternative accommodation but that the latter had refused this. Moreover, the Act did not afford the Tribunal the power to order repayment of rent which already had been paid.

[13] In this connection he referred to section 13(4)(c) of the Act which provides:

"Where a tribunal, at the conclusion of the hearing in terms of paragraph

- (d) of subsection (2), is of the view that an unfair practice exists, it may (c) make any other ruling that is just and fair to terminate any unfair practice, including without detracting from the generality of the foregoing, a ruling to discontinue (i) over-crowding; (ii) unacceptable living conditions; (iii) exploitative rentals; (iv) lack of maintenance".

Mr Lourens further submitted that the use of the word "discontinued" in this provision clearly referred to a regulation of future

conduct or behaviour; that is a discouragement or prescription of an existing unfair labour practice from continuing into the future. He also noted that the second respondent had vacated flat 801 during August 2004. In the circumstances, the Tribunal was not empowered to direct a remission of rental and by necessary implication, uphold and effect the claim for damages for any period before that.

[14] Mr Lourens noted that the applicant had been directed to bear the costs occasioned by the professional reports. These reports had been commissioned by the second respondent and related to possible fungus spores in the air. Applicant contended that the alleged presence of fungus spores was irrelevant to the complaint being a leaking roof. In directing the applicant to bear the costs of these irrelevant reports, Mr Lourens submitted that the decision taken had been for an ulterior purpose or motive, being a punitive measure and, further, that irrelevant

considerations have been taken into account, namely that the presence of fungus spores was relevant to the complaint.

[15] Second respondent appeared in person. He submitted that the first respondent was required to establish whether there had been a lack of maintenance by applicant which resulted in storm water ingress and caused mould and damp in second respondent's dwelling. He further submitted that the first respondent was required to establish whether second respondent had been partially deprived by such lack of maintenance so that the full beneficial use and enjoyment of the apartment and, if so, the extent to which such deprivation would constitute a fair remission of rental in the circumstances.

[16] In this connection, second respondent referred to Regulation 4(1)(d) which requires that the landlord must effect repairs for which he is responsible and not merely attempt to effect repairs. He submitted that for the purposes of remissio mercedis it was irrelevant whether the applicant had acted reasonably, for example by conducting patchwork of the suspected problem area as a first attempt to remedy the water ingress, or use its best endeavours in its attempt to effect repairs. It was sufficient, in his view, for second respondent to demonstrate that the attempted repairs were unsuccessful and that accordingly second respondent had been deprived of the full use and enjoyment of the apartment.

[17] Turning to the maintenance plan, second respondent contended that first respondent's ruling required applicant to submit a maintenance plan which was not premised on the principle that unless such a plan was in place there would automatically be a serious lack of maintenance. The conclusion of a serious lack of maintenance was drawn by first respondent in his ruling and was based on the absence of any maintenance other than that which he described as being of an emergency nature. Furthermore, the complaint form states "roof not adequately repaired". In his view, this description did not limit the inadequate repairs to a part of the building's roof. Mr Mitchells report also referred top and

which was attached to the complaint form under "list of complaints and disputes", this report on the lack of

maintenance of both second respondent's dwelling and moreover, the building as a whole. In this particular connection, Mr Katz referred to the evidence of Mr Julian Mitchell, the building consultant, who testified that "the building is In a state of decay, it is degenerating, it needs remedial work". Mr Mitchell had testified, after his second inspection of 3 November 2004, that "the purpose of remedial work was to resolve the problem, but it failed dismally in being able to resolve the problem"

- [18] Insofar as the rental remission was concerned, Mr Katz contended that during the first period, that is between September 2002 to August 2004, there was storm water ingress into the flat with the resultant damp and mould growth. The mould smelled and the storm water ingress caused damage to furniture and fittings in the flat. A progressive worsening in the living conditions of the flat took place during this period because no repairs had been effected since May 2002.
- [19] At the end of August 2004, that is prior to the commencement of the second period, second respondent vacated his fiat as repairs had not yet been carried out. In a letter generated by applicant's attorney of 3 September 2004, there was the implication that applicant was unable to effect any repairs unless second respondent vacated the premises, albeit temporarily. Thereafter repairs to the flat were unsuccessfully attempted and second respondent accordingly could not return to the flat as he awaited applicant to effect the necessary repairs. In his view, therefore, in terms of Regulation 5(2)(a) he was entitled to 100% remission of rental.
- [20] He contended that the living conditions had progressively worsened during the first period and it followed that by the second period living conditions were significantly worse than had been experienced by him during the first period. He submitted therefore that first respondent's omission to expressly mention these facts at the ruling did not mean that they had not been considered and their relevance was clear in the determination of a fair rental remission.
- [21] Turning to the question of the cost of professional reports, Mr Katz referred to section 13{12} {a) of the Act which empowers first respondent to make a ruling as to costs which may be just and equitable. The professional reports in respect of which the costs were to be granted to second respondent was relevant to the hearing. The relevance of the reports of Mr Mitchell are self-evident. The remaining two reports being the air quality monitoring and the Swift microbiology report were relevant to establish the presence and extent of mould and fungal spores in the dwelling, both of which had clearly affected the ability to enjoy full occupation of the apartment in the manner envisaged by the law and both therefore were relevant to the determination of the remission of rental.

Evaluation

[22] As I indicated at the commencement of this judgment, first respondent abides the decision of the Court. That is certainly

relevant with regard to the question of any prosecution which may be brought in terms of section 16 of the Act. In my view, there was no purpose in doing anything more than setting aside any possible prosecution, particularly when the authority in question abided the decision of the Court and showed no real intention that it was to prosecute the matter. Furthermore, the question which arose for complaint were not best resolved through the issue of a prosecution, but rather through the implementation of a maintenance plan which ultimately became the central dispute between the parties. In my view, an examination of the findings of the first respondent certainly do no more than necessitate an examination of the possible success to be achieved by the maintenance report and the further work which may have to be done by applicant, pursuant to such a plan.

[23] I therefore turn to the question of the report. In his affidavit, first respondent refers to the report produced by applicant in response to the Tribunal's ruling, itself an indication that applicant had hardly treated the matter in the kind of cavalier

fashion which would have justified a prosecution and the use of criminal law in circumstances where, quite clearly, alternative

dispute mechanisms are further indicated.

[24] In that affidavit the following is stated by Mr Patel:

"in this regard I point out that the applicant's attorneys of record addressed correspondence to the Tribunal on 2 August 2005 in terms whereof the following is stated:

"In accordance with the requirement that our client should investigate through an engineer whether urgent remedial work is necessary, it has secured a report from Rozowsky & Associates, a highly reputable firm of consulting civil and structural engineers and we attach a copy of their fax report of 28 July 2005..."

On 5 August 2005 the Tribunal responded thus:

"The Tribunal does not make a ruling that your client should investigate through an engineer whether urgent remedial work is necessary. For ease of reference the relevant section on the ruling dealing with the repair plan is quoted hereunder. Clearly your client has not complied with the ruling in terms of substance nor in terms of the date of 31 July 2005. The matter will now unfortunately be referred for prosecution as non-compliance is an offence in terms of section 6(d) (7) of the Rental Housing Act.

"With the best will in the world the applicant has been unable at the date you offer to provide the maintenance program required in your decision. The said correspondence also requested an extension to finalise reports and plans... On 26 August 2005 the Tribunal addressed correspondence to the applicant's attorneys of record advising the Tribunal (after considering the relevant correspondence as well as the proceedings) had decided that an extension would not be

provided". I should add that no satisfactory explanation is proffered in any of the correspondence as to why the extension was not granted.

[25] On the basis of Mr Patel's evidence, there had been non-compliance in a material aspect with the Tribunal's ruling. Further action was clearly necessary. In my view, there is evidence which indicates that the Tribunal was justified in persisting with its finding that a comprehensive plan should be developed. Mr Mitchell's evidence, for example, was of sufficient coherence and plausibility, given the persistent problems which had been encountered by second respondent and documented by him, to justify the Tribunal's ruling that a comprehensive report was required.

[26] In this respect, Mr Mitchell's evidence is particularly persuasive. I do not intend to set out comprehensively the evidence which he provided before the Tribunal, the following passage must therefore suffice for the purposes of this judgment. He informed the Tribunal as follows in his testimony:

"On the second visit the conclusion I came to after inspecting the interior of the apartment, again being denied access to the roof, was that in my opinion only cosmetic remedial work had been executed and this had not addressed the source of the problem and was more a case of concealing the visual effects of the problem but did not address the root cause and the source of the storm water ingress and i believe that whatever remedial work had been done will prove to be grossly defective the minute it starts raining again". This was in essence the basis of Mr Mitchell's evidence before the Tribunal. It is supported, to a considerable extent, by further

evidence, namely that the problem continued to persist, notwithstanding efforts to the contrary. For this reason, I made an order that a comprehensive report as indicated by the ruling of the Tribunal had to be produced within 60 days of the order of this Court. This would afford the Tribunal a concrete basis for deciding whether any further action should be taken against the applicant, including the possibility of prosecution, were the proposed plan be proved to be inadequate or applicant treated the problem in a fashion which undermined the very purposes of the Tribunals objectives. If, by contrast, the Tribunal does not act against applicant after the provision of the report, it must have a rational basis for taking that decision. In short, the order provided a further opportunity for the Tribunal which, on its present attitude, did not appear to be pursuing the matter [27] I turn, therefore, to deal with the second essential component of the order and the reasons given therefor, namely the remission of rental. [28] It appears from the first respondent's decision that it took into account the fact that alternative accommodation was offered to the respondent. The first respondent therefore concludes "in substance, no alternative accommodation was offered". In coming to this conclusion it is clear to me that the first respondent failed to take into account the following relevant considerations

that the second respondent's own witness, Mr Mitchell, did not contend that the offer of alternative accommodation, meaning in flat 701, was indeed unreasonable. To the extent that it is relevant, his evidence reads thus: "That would obviously be inconvenient but if this aspect had taken care of and it is the flat directly below that one, other than the fact that you are going to

lose a little bit of view because you are now - I suppose it would be a reasonable offer". The incoherence of the record does not detract from the fact that Mr Mitchell did not testify that the offer which had been made was indeed unreasonable. [29] The offer of alternative accommodation was not only made in the applicant's attorney's letter of 10 September 2004, but had also been made on 10 August 2004 and again on 3 September 2004. Significantly, second respondent did not contradict this evidence.

In his evidence before the Tribunal he stated the following: "I have been saying every time he offered me a flat on 2004, I am not denying that he made me the offer. No one has ever...the flat but he is saying that he offered it on two other occasions. On 10 August he asked me to move, no, no, no and I did not...well then that is clearly documented before September. Yes sure I said there were two occasions, 10 August and 3 September I am not denying that". It appears that second respondent's refusal to accept the alternative accommodation was based on the fear that it is cockroach-infested

and it would be a three years lease and that water would run into it from flat 801 above. In this connection applicant testified: "So you know I didn't unreasonably refuse that flat. No. I what would you do if the previous tenant said the flat is cockroach-infested?

She wouldn't lie to me. No. 2...a lease for three years when you are told that the landlord's partners aren't supposed to know about it and then...the previous experience I must take that flat and then go through the whole thing again. Why can't they fix up the one flat, get it right and then carry on". [30] There was no evidence led as to the presence of cockroaches; nor is there any suggestion of any supporting evidence from the other tenant. There was no evidential basis by which the Tribunal could have taken this kind of vague allegation, unsupported by evidence, into account. When Mr Kawitzky testified that 'in over 30 years of administering property for my family we have never, ever offered anybody a three year lease agreement, we never sign more than a one year lease with people', there was no evidence which contradicted this statement nor justified the speculative attempt at a reason by second respondent to refuse the alternative accommodation. [31] On the record before the Tribunal and after a careful reading of all the relevant passages thereof which apply to this issue, there does not appear to be evidence to justify the contentions of second respondent as to why he had refused to accept the alternative

accommodation. In short, from September 2002 until August 2004, second respondent was entirely justified in its argument that a remission of rental should have been granted for the reasons that are evident from the faults in the roof. But from August 2004 alternative accommodation was offered and other than the unsubstantiated allegations by second respondent, all I suspect are obduracy, tenacity or perhaps frustration with the applicant and its treatment of second respondent more than any objective reason, there was no basis for his refusal of such an offer. For this reason I ordered a reduction of that period of the remission as is reflected in the order. [32] Turning finally to the reports for which applicant has been ordered to pay the costs, I could find no justification in law, nor was any offered, as to why the applicant should bear the entire costs of these professional reports. It was for this reason that the ruling was made to the effect that both parties should share the costs of the reports which had been

commissioned by second respondent. [33] Given the fact that neither side emerged victorious in this dispute, it was equitable to order that each side pay its own costs. For these reasons, therefore, the order of 15 April 2008 was so granted. DAVIS, J

"On the second visit the conclusion I came to after inspecting the interior of the apartment, again being denied access to the roof, was that in my opinion only cosmetic remedial work had been executed and this had not addressed the source of the problem and was more a case of concealing the visual effects of the problem but did not address the root cause and the source of the storm water ingress and I believe that whatever remedial work had been done will prove to be grossly defective the minute it starts raining again".

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DAVIS, J

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