

NOT REPORTABLE

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: I 1089/2003

In the matter between:

**WERNER KARL LEONHARD VON WATZDORF**

**PLAINTIFF**

and

**THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**DEFENDANT**

**Neutral citation:** *Von Watzdorf v Government of the Republic of Namibia* (I 1089-2003) [2013] NAHCMD 287 (16 October 2013)

**Coram:** VAN NIEKERK J

**Heard:** 6, 7 April 2005

**Delivered:** 16 October 2013

**Flynote:** **Landlord and tenant** – Tenant restoring premises at termination of lease but not in same good condition that it was received – Such not ‘holding over’.

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## ORDER

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1. The plaintiff’s claim is dismissed.
2. The defendant shall be entitled to its costs, which are limited to what it would have been if the matter had been disposed of on exception.

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## JUDGMENT

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VAN NIEKERK J:

[1] The plaintiff is a businessman of Mariental who entered into a written lease agreement with the defendant on 22 April 1991 in respect of certain premises at Erf 49, Mariental. The premises consist of four lockable garages with a toilet and a carport-cum-workshop containing a hoist. In terms of the lease agreement the lease commenced on 1 March 1991 for a period of one year with the option of renewal.

[2] The initial monthly rental was agreed at N\$2815-00. In terms of clause 14(a) of the agreement the defendant further undertook 'to maintain the Premises' safety, or cleanliness and the preservation of good order therein as well as the doors, walls, floors, gates, electrical installations and other equipment in a good state of repair, and to return the Premises on the expiry date to the Lessor in the same good order as it was received.'

[3] The lease was renewed on several occasions until 7 May 2001 when the defendant gave three months written notice of termination of the lease with effect from 31 August 2001. By that stage the monthly rental had escalated to N\$9 7492-14.

[4] The plaintiff instituted action for damages allegedly suffered as a result of the defendant allegedly holding over the premises for a period of 14 months after the date of termination of the lease. The relevant allegations in the particulars of claim are set out thus:

- '7. On or about 28 May 2011 Plaintiff acknowledged the aforesaid termination of the lease agreement and in writing reminded the

Defendant to comply with clause 14(a) of the lease agreement in that it had to return the premises on the termination of the lease in the same good order as it was received at the commencement of the lease.

8. Plaintiff has complied with all its obligations in terms of the lease agreement, but the Defendant is in breach of its obligations in that it failed to return the [premises when the lease came to an end in the same good state of repairs on 31<sup>st</sup> August 2001 but only did so on the 31<sup>st</sup> October 2002 thereby holding the premises over for a period of 14 months without paying any rental or any other amount.
9. As a result of Defendant's aforesaid breach Plaintiff has suffered damages in the amount of N\$137 089-96 being the market rental value of the premises calculated at N\$9 792-14 per month for a period of 14 months during which period Defendant was in unlawful occupation of the premises.'

[5] The defendant asked for further particulars in respect of paragraph 8 in the following terms:

'Is it alleged that the Defendant failed to return the premises to the Plaintiff at all or that it failed to return them in the same good state of repair at termination on 31 August 2001?'

[6] In response the following reply was given:

'No. It is Plaintiff's case that the Defendant failed to return the premises in the same good order and the same good state of repair at the termination of the lease agreement on 31 August 2001.'

[7] The defendant filed a plea in which it inter alia denied that it had failed to return the premises on 31 August 2001 and that it remained in occupation for a further 14 months. It alleged that it returned the premises in a good state of repair. It further

admitted that it did not pay any rental during this period and made certain allegations in respect of certain flood damage which the premises had undergone during the duration of the lease. It is not necessary to deal with these allegations further.

[8] At the trial the plaintiff testified, where after he closed his case. The defendant then presented the testimony by three witnesses. On the view I take of the matter it is not necessary to deal in any detail with the evidence presented. Suffice it to say that the evidence by both parties is in line with the further particulars set out above and the plea in that it is common cause that the defendant indeed was not in occupation of the premises after the date of termination of the lease. During argument at the close of the case counsel on behalf of the plaintiff at first submitted that although there was a vacation of the premises, there was still a holding over in the sense that the clause requiring restoration in a good condition was breached leading thereto that the premises could not be re-let. However, counsel later conceded that in such circumstances there was no holding over by the defendant. This concession was properly made.

[9] A holding over occurs when the lessee fails to redeliver the premises upon termination of the lease (*Sussman v Mare* 1944 GELD 64; *Van der Merwe v Erasmus* 1945 TPD 97; *Phil Morkel v Lawson & Kirk* 1955 (3) SA 249 (C); *Sandown Park (Pty) Ltd V Hunter Your Wine & Spirit Merchant (Pty) Ltd And Another* 1985 (1) SA 248 (W)).

[10] In *Nedcor Bank Ltd V Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C) the following passages appear (at p249B-E):

[37] 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. On this obligation see Grotius *Inleidinge* 3.19.11 - 12; Voet *Commentarius ad Pandectas* 19.2.32; Van der Keessel *Praelectiones* 3.9.11; Van der Linden

*Koopmans Handboek* 1.15.12; *Pothier Traité du Contrat de Louage* 197; *Bartman v Leonard and Others* 1952 (2) SA 582 (C) at 596G; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W); *W E Cooper Landlord and Tenant* 2nd ed (1994) at 217 - 18; *LAWSA* 14 para 189.

[38] Should a lessee be in breach of this obligation, he is regarded as unlawfully 'holding over'. The lessor may then have him ejected by legal process, or claim damages for breach of contract. See *Matz v Simmonds' Assignees* 1915 CPD 34; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd and Another* 1985 (1) SA 248 (W).'

[11] The general statement in the first sentence in paragraph [38] of this quotation must, I would respectfully suggest, be qualified by an indication that the lessee must still be in occupation of the premises. I think the learned judge who wrote the judgment also intended it that way, as the lessee in that case was still in occupation. Moreover, none of the cases referred to in this paragraph is authority for the proposition that a failure to restore the premises in the same condition as they were received, fair wear and tear excepted, would constitute a 'holding over' in circumstances where the premises are restored, but not in the required condition. I have also not come across any authority which supports the general statement in the first sentence under discussion.

[12] The plaintiff clearly has not made out a case that there was a holding over. As such he cannot succeed with his claim. Counsel did not move any amendment on his behalf to bring the particulars of claim in line with the law. In fact, the particulars of claim are excipiable. This brings me to the issue of costs. Normally the defendant would have been entitled to its costs, but as the exception was not taken, its costs

should be limited to what it would have been if the matter had been disposed of on exception.

(signed on original)\_\_\_\_\_

K van Niekerk

Judge

APPEARANCE:

For the plaintiff:

Mrs L Briers  
of Dr Weder. Kruger & Hartmann

For the defendant:

Mr P Swanepoel  
of the Government-Attorney