

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGEMENT

Case No: HC-MD-CIV-ACT-CON-2019/05306

In the matter between:

CHRISTIAAN ANDRIES ALBERTUS SNYMAN

PLAINTIFF

and

DR DANIEL MARTHINUS PIENAAR

DEFENDANT

Neutral citation: *Snyman v Pienaar* (HC-MD-CIV-ACT-CON-2019/05306) [2021]
NAHCMD 228 (12 May 2021)

Coram: Oosthuizen J

Heard: 30 - 31 March 2019

Delivered: 12 May 2021

Flynote: Law of Contract — Fixed term rental agreement — Unilateral early termination on ground that premises leased not suitable for medical practice — Claim by lessor for one month's unpaid rent during currency of contract — Claim by lessor for 5 months unpaid rental during 2019 — Claim by lessor for remaining 24 months rental minus reduced rental earned for remaining 24 months — Defendant raised but did not properly plea further defence that plaintiff has failed reasonably to mitigate his losses.

Summary: Written lease agreement between the parties for 5 years period commencing 1 January 2017. Rental agreed upon N\$25 000 per month escalating with 7.5% annually from 1 January 2018. Clause providing that notice of termination may not be given prior to 31 December 2021. Defendant inspected premises and acknowledge that is was suitable for consulting purposes. Defendant is a medical practitioner. The Ministry of Health and Social Services has issued licence certificates to defendant for the leased premises as consulting Room-Medical Practice for the duration of his occupancy of the leased premises. During May 2019 the defendant gave notice that he shall terminate the lease agreement effective 31 July 2019, *inter alia* for the reason that the premises does not comply with building regulations as far as disabled people are concerned.

Held, that the notice of early termination and defendant's plea to the particulars of claim are lacking particularity required by the Rules of Court and the law.

Held, that Defendant's rebuttal on mitigation of losses by plaintiff fell short of specificity.

Held, that plaintiff was successful in his claims

ORDER

IT IS ORDERED THAT:

Judgment is granted for plaintiff against defendant -

Ad claim 1 (unpaid rental for December 2018)

[1] Payment in the amount of **N\$26 875**;

[2] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad claim 2 (rental for August 2019 to December 2019 minus deposit of N\$25 000):

[3] Payment in the amount of **N\$92 575.50**;

[4] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad claim 3 (difference between agreed rental with defendant and the rental income from the new lessee for the last 2 years of the repudiated fixed term lease agreement):

[5] Payment in the amount of **N\$404 329.80**;

[6] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad all claims:

[7] Costs of suit;

JUDGMENT

OOSTHUIZEN J:

Introduction

[1] Plaintiff is Christiaan Andries Albertus Snyman a major male residing at Eros Park, Windhoek, Namibia and the lessor of the premises leased to defendant.

[2] Defendant is Dr. Daniël Marthinus Pienaar with his chosen domicile at 52 Gous Street, Pioneerspark, Windhoek, Namibia.

[3] Facts not in dispute as agreed between the parties in a Pre-Trial Report dated 27 October 2020:

3. FACTS NOT IN DISPUTE:

3.1 The citation of the parties.

3.2 The jurisdiction of the court to entertain the matter.

3.3 That on or about 7 November 2016 and at Windhoek, the Plaintiff and the Defendant entered into a written lease agreement in respect of the rental of Unit no 8, Von Auerplatz, Gous Street, Pionierspark, Windhoek by the Plaintiff to the Defendant.

3.4 That a copy of the written lease agreement which the parties signed is annexed to the Plaintiff's particulars of claim as "B".

3.5 That the relevant material terms of the lease agreement between the parties were, *inter alia*, the following:

3.5.1 The Plaintiff would let to the Defendant the leased property for a fixed period of 60 months commencing on the 1 January 2017 and expiring on 31 December 2021;

3.5.2 Neither party would be entitled to provide the other with notice to terminate the lease agreement with effect prior to 31 December 2021;

3.5.3 The Defendant would pay rental to the Plaintiff in the amount of N\$25,000-00 per month;

3.5.4 The monthly rental payable by the Defendant would escalate at a rate of 7.5% per annum on the 1st day of January of each year;

3.5.5 The monthly rental would be paid monthly in advance by the Defendant on/before the 1st day of each and every successive month;

3.5.6 The Defendant would, upon signature of the agreement, deposit an amount of N\$25,000-00 in an interest bearing account with the Plaintiff;

3.5.7 The Defendant would use the leased property solely for consulting purposes and no trade or other business may be conducted thereon;

3.5.8 The Defendant acknowledged that he inspected the leased property and confirmed that same is suitable for the purpose for which it was let; (The Defendant does not agree to the

inclusion of paragraphs 3.5.8 in the pre-trial report and therefore dispute the fact. The parties will address the Honourable Court on this aspect at the pre-trial conference).

3.5.9 If the Defendant fails to pay rent, or dues and levies under the agreement on the due date or if there should be any breach by the Defendant of any of the terms and conditions herein contained or implied, or if the Defendant becomes insolvent or assigns his estate for the benefit of his creditors, then the Plaintiff shall have the right to terminate the agreement forthwith and to re-enter upon and take possession of the leased property, without prejudice to the Plaintiff's right for the recovery of rent which may then be owing or damages for breach of contract or otherwise;

3.5.10 In the event that the defaulting party is the Defendant the full amount of the deposit shall upon cancellation be forfeited in favour of the Plaintiff;

3.5.11 The agreement constituted the entire agreement between the parties and no amendment or addition would be valid unless reduced to writing and signed by both parties;

3.5.12 No latitude, extension of time or other indulgence which may be given or allowed by the Plaintiff to the Defendant in respect of any payment provided for in this agreement or the performance of any obligation in terms of the agreement would in any circumstances operate as a waiver or a novation of, or otherwise affect, or preclude the Plaintiff from enforcing, at any time and without notice strict and punctual compliance with each and every provision or term of the agreement.

3.6 That the Defendant inspected the leased property prior to signing the lease agreement; (The Defendant does not agree to the inclusion of paragraphs 3.6 in the pre-trial report and therefore dispute the fact. The parties will address the Honourable Court on this aspect at the pre-trial conference).

3.7 That the Defendant knew that the previous lessee was also a medical practitioner and used the premises for the same purpose as the Defendant intended.

3.8 That the Defendant occupied the leased premises and conducted his medical practice from the premises for 30 months without raising any issues regarding the non-suitability of the premises.

3.9 That during or about 24 May 2019 the Defendant, in writing, advised the Plaintiff of his election to terminate the lease agreement with effect from the end of July 2019.

3.10 The Plaintiff complied with all his obligations in terms of the lease agreement, in that he gave the Defendant undisturbed use and enjoyment of the premises from 1 January 2017 until the Defendant vacated the premises;

3.11 That the Defendant vacated the premises on or about 31 July 2019;

3.12 That the building plans for the premises have been approved by the City of Windhoek; (The Defendant does not agree to the inclusion of paragraphs 3.12 in the pre-trial report and therefore dispute the fact. The parties will address the Honourable Court on this aspect at the pre-trial conference).

3.13 That fitness certificates for the premises were issued by the Ministry of Health and Social Services for the period between 1 October 2016 to 30 September 2020. (The Defendant does not agree to the inclusion of paragraphs 3.13 in the pre-trial report and therefore dispute the fact. The parties will address the Honourable Court on this aspect at the pre-trial conference).

3.14 That the Plaintiff only obtained a new tenant in respect of the leased premises for a period of 2 years commencing from 1 January 2020 for a monthly rental of N\$15,000-00 in respect of the first year and N\$15,750-00 in respect of the second year.'

[4] On 19 November 2020, the Managing Judge, Prinsloo, J noted, in the Pre-Trial Order, that defendant's counsel was absent from the pre-trial conference hearing and only filed a letter regarding issues in the proposed order, which is not in accordance with the rules of court. Prinsloo, J directed that a variation of the pre-trial order must be done and resolved prior to the pre-trial status hearing set down for 18 February 2021 and adopted and ordered paragraphs 1 to 3 of the Pre-Trial Report.

[5] On 18 February 2021 the defendant's counsel was again absent, none of the issues irregularly raised in a letter concerning the Pre - Trial Report was addressed by defendant nor resolved.

[6] The Pre - Trial report of 27 October 2020 was however signed and agreed to on behalf of defendant.

[7] Legal practitioners are duty bound to attend all case management conferences, status and informal hearings arranged by the court and to comply with any order or direction given by the court at any stage of the proceedings. *Vide* rule 19 (d) and (e).

[8] A joint pre-trial report, attended to and signed by legal practitioners representing the litigants is in itself a contract between the parties. It is their binding compromise and principally based on the pleadings in the case.

Pleadings

[9] Plaintiff averred that the agreement between him and defendant provided that neither of them shall terminate the agreement prior to 31 December 2021; that the leased premises would be solely used for consulting purposes and that defendant acknowledged and confirmed that he inspected the premises and that it was suitable for consulting purposes.

[10] Defendant admitted the lease agreement and its terms, but then pleaded:

'At the time the agreement was signed by the parties, Defendant was under the firm but mistaken belief that the premises complied with the municipal regulations insofar as to the building plans and building compliance certificate. During the tenancy of the lease, upon inspection by inspectors from the medical board conveyed to Defendant that the premises are not suitable. It also appeared then that the premises did not comply with building regulations as laid down by the City Council of Windhoek. Despite being requested so, Plaintiff could not furnish Defendant with the certificate of fitness for the said premises. It is furthermore pleaded that having regard to the fact that the previous two lessees' also medical practitioners, Defendant assumed the premises is compliant with relevant legislation, which appears not to be the case. Having regard to the aforesaid the Defendant is entitled to have cancelled the agreement.'

[11] Plaintiff pleaded that defendant vacated the premises on 31 July 2019 and in an attempt to mitigate his damages, he, the plaintiff, immediately readvertised the premises but only obtained a new tenant for 2 years commencing on 1 January 2020 for a reduced rental income of N\$15 000 per month. Plaintiff pleaded that despite

his best efforts, he was unable to secure a tenant on similar terms of payment he had with defendant. Plaintiff employed the services of a reputable estate agency and prominently advertised the vacated premises for lease.

[12] Defendant admitted that he vacated the premises on 31 July 2019, say he was entitled to and bluntly deny that plaintiff attempted to mitigate his damages.

[13] In respect of the month unpaid rental (December 2018), defendant pleaded that he did pay.

The Law

[14] Rule 46(2)(c) of the High Court Rules provide that every plea "must clearly and concisely state all material facts on which defendant relies in defence or answer to the plaintiff's claim."

[15] In *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) 634 H-J, a full bench decision of this court's predecessor stated that a defence must be sufficiently clearly pleaded to enable the court and the other litigant to be apprised of the defence. Also that where a litigant relies upon the provisions of a statute he should refer to the Act and the section whereon he relies. He should plead such facts which entitle him to invoke the legislation concerned. A litigant may omit reference to the legislation or section and be entitled to rely on the legislation at the trial if it is clear what his case or defence is.

[16] In *Courtney - Clarke v Bassingthwaite* 1990 NR 89 HC at 95 A-B, Levy J said that it is trite that the pleadings define the issues between litigants and that during the trial the litigants should be confined thereto. A litigant who wishes to rely on illegality must plead it. If a litigant relies on a particular section of a statute he must say so and additionally plead those facts which entitle him to invoke the section. Only in cases where it appears to the court from the terms of the contract or evidence at the trial that the contract is in fact illegal, the court shall not enforce the contract.

[17] It is trite law that where a litigant allege payment, he must prove the payment whether he is the plaintiff or the defendant.

[18] Although the onus rests on the plaintiff to prove his damages, the defendant must plead and show in evidence that the amount claimed by the plaintiff does not reflect the true amount because the plaintiff failed to take reasonable steps in mitigating his losses.

Law applied to the facts and findings

[19] Defendant's plea as in paragraph [10] above concerning his entitlement to unilaterally cancel the fixed term lease agreement due to the alleged unsuitability of the leased premises as consulting rooms, is devoid of specificity required in a pleading and to a certain extent confusing. Defendant introduce unspecified municipal regulations relating to building plans and building compliance certificates and immediately followed it up with inspections from inspectors of the medical board (not municipal inspectors or building compliance inspectors). In evidence the defendant was still not in a position to state the regulations on which he relied. Defendant did not call any witness to corroborate his plea and was plagued by his unpreparedness for the case he had to meet. Plaintiff tendered approved building plans from the municipality and compliance certificates from the Ministry of Health and Social Services.

[20] In respect of payment of the rental for December 2018 the defendant relied on hearsay from his accountant against the clear evidence and import of Exhibit "K" tendered by the plaintiff. Defendant failed to prove payment.

[21] Concerning plaintiff's assertion that he tried to mitigate his damages and give it his best efforts, defendant's "defence" that plaintiff did not reasonably mitigate his losses, failed. Defendant pleaded a bare denial without complying with Rule 46 (2) (c). In evidence he could not take the matter any further because he could not himself tender any reasonable explanation on how the plaintiff should have mitigated his contractual losses. He could not do so during cross - examination of the plaintiff and was unprepared and devoid of any plausible evidence in rebuttal.

[22] Defendant's misapprehension that the plaintiff and the court are bound to do research to credit his vague and unspecific defences, resulted in his failure to meet the case of plaintiff.

[23] The costs shall follow the result.

[24] In the premises the following orders are made against the defendant and in favour of the plaintiff:

Ad claim 1 (unpaid rental for December 2018)

[24.1] Payment in the amount of **N\$26 875**;

[24.2] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad claim 2 (rental for August 2019 to December 2019 minus deposit of N\$25 000):

[24.3] Payment in the amount of **N\$92 575.50**;

[24.4] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad claim 3 (difference between agreed rental with defendant and the rental income from the new lessee for the last 2 years of the repudiated fixed term lease agreement):

[24.5] Payment in the amount of **N\$404 329.80**;

[24.6] Interest on the aforesaid amount from date of service of summons; i.e 6 December 2019 at the rate of 20 % per annum until date of final payment;

Ad all claims:

[24.7] Costs of suit;

H OOSTHUIZEN

Judge

APPEARANCES:

PLAINTIFF:

Francois Erasmus
Francois Erasmus & Partners

DEFENDANT:

Christie Mostert
Advocate Christie Mostert
Namlex Chambers 333 Independence Avenue