

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: **HC-MD-CIV-ACT-DEL-2019/03366**

In the matter between:

**O&L LEISURE (PTY) LTD T/A MIDGARD COUNTRY ESTATE
PLAINTIFF**

and

**WILLIAM ALLIES
DEFENDANT**

Neutral Citation: *O&L Leisure (PTY) Ltd t/a Midgard Country Estate v Allies* (HC-MD-CIV-ACT-DEL-2019/03366) [2021] NAHCMD 30 (08 February 2021)

Coram: PRINSLOO J
Heard: 25 January 2021
Delivered: 08 February 2021

Flynote: Contract – breach – requirements for a successful claim for damages – causal link between breach and damage suffered.

Civil practice – plea – mere denial of a plaintiff's particulars of claim without any particularity amounts to a bare denial.

Civil practice – Witness statements – parties must comply with rules 92 and 93 of the High Court – witness statement must amount to more than a mere summary of the evidence a witness intends to give – non-compliance with these rules has devastating consequences for the errant party.

Summary: The parties entered into a lease agreement in terms of which the defendant leased from the plaintiff Farm Midgard in the Okahandja District, for purposes of grazing his livestock.

The defendant breached the terms of the lease agreement in that he failed to pay rent as agreed. As a result of the breach plaintiff instituted action proceedings against the defendant claiming the arrear rent; cancellation of the lease agreement; defendant's eviction from the property; and damages for the defendant's continued occupation of the property.

The defendant denied that the lease period and the terms regarding the consequences of breach of the agreement. Defendant also filed a counterclaim wherein he pleaded that plaintiff failed to pay him for the entire duration of the lease agreement for the security services rendered and as such plaintiff was indebted to the defendant for payment of said services.

Held that a defendant who has knowledge of a fact alleged and is not prepared to admit it must deny it. It is however not sufficient to merely deny the paragraph containing the allegations made by the plaintiff.

Held that to succeed with a claim for damages caused by a breach of contract, the plaintiff must allege and prove that (a) there has been a breach of contract by the defendant, (b) it has suffered damage, as well as the exact extent of the damage, and (c) the damages were suffered as a direct result of the breach of contract. There must thus be a causal link between the breach and the damage, in that the damage has actually been caused by the breach.

Held accordingly that the plaintiff has met the aforementioned requirements and succeeds with its claim.

ORDER

Judgment is granted in favour of the plaintiff in the following terms:

1. Confirmation of the cancellation of the lease agreement;
2. Evicting the defendant, including his livestock and all those occupying the premises through the defendant, from the premises;
3. Payment in the amount of **N\$192 787.11**, which is calculated as follows:
 - (a) As per reconciliation Exhibit B
N\$233 776.22
 - (b) Less N\$ 4989.11 carried over from 2017
N\$229 787.11
 - (c) Less N\$ 36 000 tendered in respect of security servicesTotal:
N\$192 787.11
4. Payment in the amount of N\$7746.71 in respect of each month or part thereof which the defendant continues to occupy the property beyond January 2021.
5. Interest on all outstanding amounts at the prime lending rate of Bank Windhoek from time to time, compounded and calculated monthly in arrears from date of judgment to date of final payment.
6. Costs. Such costs to include the cost of one instructing and one instructed counsel.

JUDGMENT

PRINSLOO J

Introduction

[1] The action before me arose from a lease agreement entered into between the plaintiff and defendant in terms of which the plaintiff claims the following relief:

- (a) Payment in the amount of N\$62 617.85,

- (b) Confirming cancellation of the agreement;
- (c) An order evicting the defendant from the property; and
- (d) Damages calculated at a rate of N\$60 per head of large livestock and N\$10 per head of small livestock per month of unlawful occupation to date of ejection of the defendant from the property.

Pleadings

[2] The parties entered into a lease agreement on 4 March 2018 and 8 May 2018 respectively, in terms of which the defendant would lease the immovable property known as Farm Midgard, No. 191, situated in the Okahandja district. The lease period would commence on 1 January 2018 and terminate on 31 December 2018, where after the lease agreement would be valid on a month to month basis until such time that the lease is renewed or terminated.

[3] The agreement reached between the parties is comprehensive and for purposes of this judgment I will refer to the most germane terms of the agreement, which are as follows:

- a) The plaintiff would let the property to the defendant with all the fixtures, fittings and permanent improvements excluding the portion of land that is officially utilised and known as Midgard Lodge. The defendant would utilise the property for grazing purposes of livestock only.

- b) The defendant was entitled to keep a fair number of livestock and the rental payable per month would be the amount of N\$60 per head of large livestock and N\$10 per head of small livestock. The number of livestock would be provided by the defendant to the plaintiff before the last day of every month, which number would be utilised by the parties to calculate the monthly rental payable every month. The rental payable would be adjusted monthly in line with the number of livestock as per the stock list of the defendant.

- c) The number of stock on the date of signature of the agreement amounted to 110 large adult livestock and 45 small adult livestock.

d) The rental was payable by the defendant to the plaintiff on or before the 7th of each and every month in arrears.

e) Should the defendant fail to promptly make payment due in terms of the agreement or should the defendant breach any of the terms of the agreement, the plaintiff shall be entitled to give the defendant not less than 15 days written notice to make payment or remedy such breach, and in the event of the defendant failing to comply with such notice the plaintiff shall be entitled to cancel the agreement and to sue the defendant for ejectment and/or arrear rent and/or any other amount due by the defendant and/or damages sustained by the plaintiff or to sue for such arrears rent and/or other amount and/or damages without cancelling the agreement.

f) The plaintiff would have the right to increase the annual rental by an amount equivalent to the increase of the Consumer Price Index as published by the bank of Namibia for the immediately preceding 12 months.

g) The defendant undertook to maintain the property which included all fences of the property and fixtures, installations and appurtenances forming part of the property. In addition thereto the defendant had to ensure that at least two persons operating as security guards would monitor the property in particular the border fences for 24 hours, 7 days per week in order to identify immediate suspicious criminal behaviour. The guards would monitor the area on horseback and would receive all the equipment and remuneration to do so from the defendant. In lieu of the aforesaid security the plaintiff would remunerate the defendant with a monthly amount not exceeding N\$2500.

[4] The plaintiff pleaded that no invoices were rendered by the defendant for the period April 2018 to February 2019 in respect of the security services rendered and that the last invoice in the amount of N\$2400 dates back to April 2018. As a result the plaintiff tenders the amount of N\$36 000 to the defendant for the period April 2018 to February 2019, in spite of not having received any invoices.

[5] The plaintiff pleaded that it complied with all its obligations in terms of the agreement in that it made the property available to the defendant for grazing purposes during the subsistence of the agreement, however the defendant breached the agreement in a number of respects.

[6] First and foremost, the plaintiff pleaded that the defendant failed to make payment of the monthly rental for the months January 2018 to July 2019 and that the defendant was in arrears in the amount of N\$98 617.85. Further to this the plaintiff pleaded that it is entitled to cancel the agreement upon breach thereof and evict the defendant should he fail to rectify his breach within 15 days from receiving written notice of demand. In exercising this right plaintiff pleaded that it cancels the agreement and serves notice that the defendant must vacate the property. The plaintiff also pleaded that the fair and reasonable letting value of the property is not less than the sum of N\$60 per head of large livestock and N\$10 per head of small livestock and as a result of the continued occupation of the property the plaintiff is unable to re-let the property and therefore suffers damages at the rate as set out above.

[7] In response to the plaintiff's claim the defendant filed a cryptic plea wherein the defendant admitted the general terms of the agreement but denied the lease period and the terms regarding the consequences of breach of the agreement. The defendant also denied that the plaintiff was only indebted to him in the amount of N\$36 000, which amount was tendered by the plaintiff for the security services rendered.

[8] The defendant also filed a counterclaim wherein he pleaded that he undertook to ensure that at least two security guards would monitor the border fence for 24 hours, 7 days per week and that he complied with this obligation but that plaintiff breached this term of the agreement as the plaintiff failed to pay the defendant for the entire duration of the agreements between the parties and that the plaintiff is indebted to the defendant for a period of 52 months, which equals an amount of N\$127 500.

[9] The defendant proceeded to claim relief in the following terms:

- (a) payment in the amount of N\$127 500 for outstanding security costs;
- (b) that the plaintiff's claim against the defendant be dismissed with costs;
- (c) cost of suit;
- (d) further and/or alternative relief.

[10] In its plea to the counterclaim the plaintiff denied that the defendant complied with his obligations regarding the security guards and in amplification the plaintiff pleaded that the defendant failed to monitor the border fences and failed to notice the deterioration thereof and that the defendant failed to notify the plaintiff that the infrastructure of the farm was being disassembled and carried away by strangers.

[11] The plaintiff further pleaded that it paid the agreed amount of N\$2400 per month from the onset of the agreement up to and including November 2017 and as the defendant breached the agreement in failing to pay the rent and effectively monitor the border fences of the farm that the plaintiff was entitled to stop payment in respect of the monthly remuneration to the defendant and is entitled to apply set off.

The issues for determination

[12] In terms of the pre-trial order dated 13 October 2020 the following issues stand to be determined by this court:

- (a) Issues of fact to be resolved:
 - (i) Whether or not the lease agreement concerned terminated on 31 December 2018;
 - (ii) Whether the defendant effected timeous and complete payments of rental due to the plaintiff;
 - (iii) Whether the amount claimed by the plaintiff is the correct amount;
 - (iv) Whether the defendant employed the security guards as provided for in the agreement;
 - (v) Whether the defendant paid the security guards as envisaged in the agreement;

- (vi) Whether the defendant employed two security guards.
- (b) Issues of law to be resolved:
- (i) Whether the defendant is in breach of the lease agreement;
 - (ii) Whether the defendant is entitled to payment of the security services provided in terms of the lease agreement;
 - (iii) Whether the defendant is in unlawful occupation of the plaintiff's property;
 - (iv) Whether the defendant failed to protect the plaintiff's property from unlawful intruders who let their livestock graze on the plaintiff's property and dismantled and stole the farm's infrastructure and border fences.
 - (v) Whether agreement (attached to the particulars of claim) is binding on the defendant.

The evidence

[13] Two witnesses testified on behalf of the plaintiff, i.e. Sonja Bartsch and Gero von der Wense. The defendant, Mr Allies, was the only witness to testify in support of his case.

On behalf of the plaintiff

Sonja Bartsch

[14] Ms Bartsch is the Financial Director of the plaintiff. The witness testified that the defendant has been leasing grazing land for his animals since 2008, when the first agreement was entered into. Thereafter further agreements were entered into and the lease agreement relevant to the current action was entered into with the defendant during 2018.

[15] Ms Bartsch confirmed the terms of the lease agreement agreed upon and further testified that the agreement was valid for a period of one year from 1 January 2018 to 31 December 2018, with an option to renew. In terms of the agreement, the defendant had to give a three month notice of his desire to renew the agreement but the defendant did not exercise this option and therefore the agreement continued on the same terms and conditions as before on a month to month basis.

[16] According to Ms Bartsch the agreement between the parties was that the rent was calculated at a rate of N\$60 per head of large livestock and N\$10 per head of small livestock and at the time of concluding the agreement the defendant had 110 head of large livestock and 45 head of small livestock. Ms Bartsch confirmed that the defendant was due to provide the plaintiff with the livestock numbers before the last day of every month in order for the rental figure to be calculated or verified.

[17] Ms Bartsch testified that the defendant did not comply with this specific term of the agreement as he failed to provide the plaintiff with accurate monthly head counts of his livestock and the plaintiff could therefore not invoice the defendant. Ms Bartsch testified that regardless of the number of stock on the farm, the defendant always paid the amount of N\$5407 per month, which was the rental amount payable under a previous agreement and it appears that the defendant continued to pay this amount as a flat rate under the current contract. According to Ms Bartsch the monthly rent due and payable for the period 2018 was N\$7050 per month and the rental escalated as per agreement as follows: 1 January 2019 to N\$7409.55, on 1 January 2020 to N\$7565.15 and on 1 January 2021 to N\$7746.71.

[18] The witness testified that the defendant failed to make regular payments as stipulated in the lease agreement and from her reconciliation of the outstanding rent one could see that the defendant paid intermittent lump sums instead of regular monthly payments. The defendant made only three payments for the whole of 2018, which were as follows:

- 1) N\$5407 paid on 8 January 2018;
- 2) N\$21 628 paid on 25 April 2018 (which equates to four months of rent);
- 3) N\$16 221 paid on 22 August 2018 (which equates to three months of rent).

[19] Ms Bartsch testified that since August 2018 the defendant made no payments to date but is still in occupation of the property.

[20] Ms Bartsch testified that in addition to the defendant's breach in respect of his non-payment of the monthly rent the defendant also breached the agreement relating to the security guards in that he failed to employ such security guards in

terms of the agreement. The witness testified that under the previous agreements the plaintiff paid the amount of N\$2400 per month but made no payments under the 2018 lease agreement as the defendant firstly did not invoice the plaintiff and more importantly did not comply with the terms of the agreement relating to the security guards. The witness however testified that in spite of the fact that these services were not rendered the plaintiff tendered to pay the defendant the amount of N\$36 000 for the period April 2018 to February 2019. The defendant was however unwilling to accept the tender.

[21] Ms Bartsch testified that the numerous calls to the defendant to discuss the state of affairs went unanswered. The defendant was also given written notice of the breach of the agreement but the defendant failed to remedy his breach to date, which left the plaintiff with no other option than to institute the current proceedings.

[22] During cross-examination the witness was questioned as to whether any of the plaintiff's staff members went to the farm to count the animals or to obtain the number of the livestock on the farm from the caretaker. Ms Bartsch indicated in this regard that it would be a case of impossibility to try and count the livestock because of the size the farm, which extends to a few thousand hectares in size. Ms Bartsch testified that the caretaker was approached to determine the number of animals but he was unwilling to assist.

Gero von der Wense

[23] Mr von der Wense testified that he has been in the employ of Olthaver and List Group since 2009 and currently occupies the position of the Managing Director: Organic Energy Solutions. During 2018 WUM Properties (Pty) Ltd, a subsidiary of O&L Finance and Trading Limited took over the management of Farm Midgard and Mr von der Wense was tasked to manage the farm on behalf of WUM Properties (Pty) Ltd.

[24] Mr von der Wense testified that he was well acquainted with the farm from as far back as 2015 when he was tasked to compile a concept paper for the plaintiff outlining the possible opportunities to enhance the utilisation of Farm Midgard. When he attended the farm in 2015 he took photographs of the infrastructure of the

farm. The witness testified that he again took photographs in 2019, which photographs were presented to court during his evidence to consider the current state of the fencing and reservoir.

[25] Mr von der Wense testified that the border fences and the reservoir had fallen into a state of disrepair, in spite of the lease agreement that stipulates that the defendant would at his cost care for and maintain all the fences on the property. Mr von der Wense further testified that the border fences and wooden droppers were stolen as well as the corrugated iron that formed the reservoir. When confronted with defendant's version that he found the property in the state complained of when he took occupation of the farm in 2007/8 Mr von der Wense denied that this was the case and stated that his (Mr von der Wense's) version was supported by the photographs submitted to court. Mr von der Wense submitted that if one has regard to the photographs then it is clear that that the theft of the fences, droppers and corrugated iron must have taken place within the period 2015 to 2020.

[26] Mr von der Wense testified that he is well aware of the current lease agreement with the defendant and was also acquainted with the terms of the agreement and that it was an express term of the lease agreement that the defendant would ensure that two security guards monitor the property, in particular the border fence, 24 hours a day, 7 days a week and to notify the plaintiff of any suspicious or criminal activities in the area.

[27] The witness testified that the defendant only employed one person by the name of Aaron, who was staying at the cattle post. The gentleman, however, did not perform any security services. The witness testified that in any event it would be impossible for one person to perform the required security services. As a result, the border fence between the farm and the Ovitoto Communal Area was cut open at several places and the fencing was stolen. The witness testified that as a matter of fact, the corrugated iron stolen from the reservoir had to be transported past the house occupied by Aaron, as it is the only access road from Ovitoto to Midgard.

[28] Mr von der Wense was questioned whether any steps were taken to determine the number of stock grazing on the farm and he indicated that Aaron was

approached but he did not give any number. Mr von der Wense added that it is a fairly simple process for a cattle farmer to precisely determine the number of livestock he owns because under Meatco's NamLITS system all cattle in Namibia must be ear tagged with a specific number.

On behalf of the defendant

William Jacobus Allies

[29] Mr Allies testified that he has been leasing farmland for grazing from the plaintiff since 2007. The lease agreement that is the subject matter of this action was entered into between the parties on 4 March 2018, which commenced on 1 January 2018 and terminated on 31 December 2018.

[30] During his evidence Mr Allies confirmed the express terms of the agreement as set out in the particulars of claim but added that the agreement also contained a dispute resolution clause. The witness testified that this matter was never referred to arbitration as per the agreement and therefore the plaintiff failed to follow the procedure as laid down between the parties.

[31] Mr Allies testified that he indeed employed security guards as per the agreement between the parties and the plaintiff breached the agreement by failing to compensate him for the services of the security guards as agreed. Mr Allies stated the reason why Mr von der Wense did not see the security guards is because he would only briefly pass by the cattle post and the security guards would not necessarily be at the cattle post. The witness further testified that there were two security guards who patrolled the border fences. He further testified that the missing fences that are depicted on the photographs presented to court are internal fences and not border fences.

[32] Mr Allies further testified that the plaintiff never provide him with an invoice for the rent due and payable and that when the plaintiff did its reconciliation to determine the outstanding amount due it omitted to take into consideration the

several payments that the defendant made in favour of the plaintiff and as a result he is not indebted to the plaintiff in the amount set out in the particulars of claim. The defendant testified that he would make payment by way of cash deposits into the bank account of the plaintiff and that these payments were not taken into consideration in calculating the outstanding amount. He testified that he went as far as obtaining the bank statement of WUM Properties as proof of the alleged rental payments he had made to the plaintiff.

[33] Mr Allies testified that the amount claimed by the plaintiff is based on the number of head of cattle that he had when the parties entered into the agreement but due to drought and theft the number of cattle had decreased drastically and that he currently has a total of 34 head of cattle on the farm.

[34] During cross-examination Mr Allies confirmed that the previous rental amount paid was N\$5407 but denies that he paid this amount as a flat rate, in spite of the yearly increment in respect of the rent amount. Mr Allies testified that this amount which he paid over to the plaintiff was a random amount that he received on a monthly basis from an insurance policy. When plaintiff's counsel, Mr Dicks, confronted the witness with the fact that the amount of N\$5407 could not be an arbitrary amount as in terms of the 2017 agreement the defendant paid monthly rental of N\$46.50 per head of large livestock and N\$6.50 per head of small livestock, which given the numbers at the time of 110 large livestock and 45 small livestock amounts to a monthly rental of N\$5407, the defendant indicated that he could not say for certain.

[35] The defendant confirmed that he fell in arrears with his payments in 2018 and when he sold weaners he managed to make two lump sum payments. In addition thereto the defendant made payment into a different bank account but is unable to produce proof of payment. The defendant was also unable to show any other payments made by him from the bank statement of WUM Properties and could not indicate on the papers which other payments he made towards the plaintiff. The defendant however denied the amount as set out in the reconciliation (Exh B) and testified that the amount is incorrectly calculated as it was based on the wrong number of livestock. When confronted with para 8.1.1¹ of the agreement

¹ 8. 'LESSEE'S GENERAL OBLIGATIONS

which provides that the defendant had to provide the plaintiff with the number of livestock present on the property before the last day of each and every month, the defendant conceded that he did not notify the plaintiff of the numbers on a monthly basis and stated that he saw that clause for the first time whilst in court. The defendant testified that he would in the past provide the numbers only once a year to the plaintiff. The defendant testified that he provided the numbers to the plaintiff's legal practitioner as well as Mr von der Wense but stated that he could not provide any proof to that effect.

[36] Mr Allies conceded that he fell behind with his monthly payments and that the last payment made toward the rent was in August 2018 placing him in arrears. Mr Allies further testified that he did not receive a letter putting him on terms but that he received a letter informing him to vacate his animals from the farm. Despite his best efforts, Mr Allies testified that he has been unable to find alternative grazing grounds for his animals and thus remains in occupation of Farm Midgard.

Discussion of the evidence

[37] The evidence of Ms Bartsch and Mr von der Wense was clear, concise and to the point and was not placed in dispute during cross-examination.

[38] Mr Allies, the defendant, hardly placed anything in dispute during his evidence. The defendant confirmed that the current agreement was valid for the period 1 January 2018 to 31 January 2018 and that he was in arrears with the rent due and payable as the last payment effected in favour of the plaintiff was August 2018.

[39] During his evidence defendant alleged that he made further payment to the plaintiff into a different account but that he could not provide proof thereof. The defendant apparently lost the proof of payments but then one would expect that the plaintiff's bank or the defendant's bank would have proof thereof. Evidence of these payments was not presented to court. The court must therefore accept that there

8.1.1 provide the Lessor with monthly statements of the number of livestock present on the Property before last business day of each and every month for the duration of this Agreement, which list shall distinguish between large and small livestock;'

was no such payment made and the payments that were indeed made by the defendant are limited to the reconciliation (Exh B).

[40] When the defendant did make payments it would appear that he did not comply with the new lease agreement as he kept on paying the rent in terms of the previous agreement.

[41] On his own admission Mr Allies made his last rental payment 18 months prior to summons being issued but fails to explain why he failed to make payment thereafter. According to the defendant this was a mere coincidence that the amount paid over, even in lump sums, could be converted back to the monthly rental for the 2017 period.

[42] The defendant persisted in his averment that the rental amount was incorrectly calculated as he no longer has the number of livestock upon which the rental amount was calculated. He however conceded (when the relevant clause as per the agreement was pointed out to him by Mr Dicks) that he had to provide the numbers of the livestock on a monthly basis to the plaintiff but stated that he had not been aware of this clause prior to his appearance in court. However interestingly enough in the defendant's plea this clause was admitted. The court can therefore not place much reliance on the defendant's alleged ignorance in respect of this clause.

[43] The defendant also attempted to make out a case that he employed the required security guards who had to patrol the farm's border fences 24/7. Yet from the evidence of Mr von der Wense, the border fences and the reservoir were not only in total disrepair, but the fencing and wooden droppers were missing altogether and the reservoir was completely dismantled. The defendant testified that the fences and the reservoir were in the current condition when he occupied the farm in 2007/2008.

Mr von der Wense was in firm disagreement with the defendant in this regard and testified that the destruction of the infrastructure happened progressively over the period 2015 to 2020. During his evidence Mr Allies denied that the photographs presented during the evidence of Mr von der Wense depicted the state of the border fences and testified that it was indeed internal

fences. This version was however not put to Mr von der Wense during cross-examination in order to test his evidence. The only question that the defendant's counsel had regarding the photographs was regarding the fact that there was no date displayed on the photographs and how the court would be able to accept the evidence as to when the photographs were taken. The evidence of the defendant in this regard is also doubtful as the defendant had the obligation to maintain the infrastructure of the farm, including the fences, in terms of the agreement. This was clearly not done.

[44] There is absolutely no evidence before court regarding the employment of the two security guards. Surely the defendant must have some proof that he employed two security guards in compliance with this specific term of the agreement. The easiest would have been to call the security guards in support of his case. It actually boggles the mind why the defendant did not call the security guards in support of his case. There is also no documentary proof that he paid the security guards. It is the defendant's case that the plaintiff never during the entire period of lease, from 2007/2008 to date, made any payment regarding the security guards. The defendant however failed to present any evidence in this regard.

Defendant's pleadings and witness statement

Pleadings

[45] This is yet another matter where the court must make certain observations regarding the defendant's pleadings and witness statements.

[46] The plea of the defendant left much to be desired. The defendant is expected to either admit, deny or confess and avoid all the material facts alleged in the combined summons. The defendant indeed admitted the terms of the agreement as set out in para 4 of the particulars of claim with the exclusion of paras 4.4, 4.13 and 4.17. The defendant denied the remainder of the plaintiff's claim, which denial amounted to a bare denial without any particularity. The defendant's denial read as follows 'the defendant denies the allegations contained therein and puts the plaintiff to the proof thereof'. That was the extent thereof. It is common cause that a defendant who has knowledge of a fact alleged and is not prepared to admit it must

deny it. It is however not sufficient to merely deny the paragraph containing the allegations made by the plaintiff. Such pleadings not only contravene the express wording of the rules² which provides that every plea must clearly and concisely state all material facts on which the defendant relies in defence or answer to the plaintiff's claim, but the plea must also be fair and a substantial answer of substance in the plaintiff's case and must acquaint the plaintiff of the nature of the defence it will have to meet³.

[47] The defendant's counsel attempted to take the point during her cross-examination as well as her closing argument that the plaintiff should have complied with the arbitration clause as set out in the lease agreement. This issue was never pleaded nor did the defendant raise a special dilatory plea that arbitration is a condition precedent to the claim of the plaintiff or apply for a stay of further proceedings in terms of s 6 of the Arbitration Act, 42 of 1965. This relief is no longer available to the defendant. Yet the defendant's legal practitioner persisted with this point even up to her closing argument.

Witness statement

[48] The formal requirements of witness statements are governed by rule 92 of the Rules of Court. Witness statements relate to the oral evidence which a party serving intends to adduce during the trial in relation to any issues of fact to be decided at the trial.

[49] Rule 93 deals with the use of served witness statements at a trial. Rule 93(2), which the following rendering:

'Where a witness is called to give oral evidence under this rule his or her witness statement will stand as his or her oral evidence-in-chief unless the court orders otherwise'.
(my underlining)

² Rule 46(2)(c).

³ Herbstein and Van Winsen *Civil Practice of the Superior Courts in South Africa* 3rd ed at 318.

[50] The Practice Note⁴ of the Judge President issued 21 May 2013 pertinently deals with witness statements as well.

[51] The defendant's 'statement' was a mere summary of the evidence that the defendant intended to give. The 'witness statement' was lacking in detail and there was no application to rectify these deficiencies. Some of the deficiencies in the defendant's statement were absolutely glaring. For example, the defendant's statement hardly addresses his counterclaim therein. The defendant focused in his statement on issues like arbitration, which is not an issue between the parties, not in his plea nor in the issues to be determined in the pre-trial order.

[52] I will yet again reiterate what the court remarked in *Josea v Ahrens*⁵. Schimming-Chase AJ said the following in this regard:

'[15] . . . [it] is advisable to follow the chronological sequence of events and to deal with each factual allegation in such a manner as to enable the reader to understand the evidence that will be given. Each paragraph should be numbered, and, so far as possible, be confined to a distinct portion of the subject. All facts must be set out clearly and with adequate particularity⁶.

[16] I think parties should attempt as much as possible to prepare the witness statement as if the witness is giving evidence in chief already, and telling the story which brought the litigants to court in the first place, in a simple and chronological fashion.' (my underlining)

[53] The defendant's legal practitioner should know all the issues pointed out regarding the drafting of witness statements but apparently chose to disregard the importance of rules 92 and 93. The non-compliance with these rules, as in the current matter, has devastating consequences for the errant party.

Legal principles and the application to the facts

⁴ '2. In the first place, the witness statement need not be under oath. In fact it is preferable that it is not under oath, unless the parties choose to provide statements under oath.

3. Counsel must be required to prepare statements that are sufficient to constitute the witness' evidence-in-chief and should not provide summaries. The statement must identify all the documents that the witness will have admitted as exhibits.'

⁵ *Josea v Ahrens* (I 3821-2013) [2015] NAHCMD 157 (2 July 2015).

⁶ *Blackstone's Civil Practice* (2011) Oxford University Press Chapter 49 par 49.5.

[54] In *Ndilula v Real Time Investments CC*⁷ Ueitele J discussed the principles as follows:

[81] If someone else's action or failure to act causes a person named the plaintiff to suffer damage, loss, or injury, the plaintiff may claim compensation from that person. In order to succeed with its claim, the plaintiff must prove one of two things namely; either that it has a contractual claim against that person because of breach of contract on his or her part; or that the plaintiff has a civil claim against that person, because of a delict committed against the plaintiff. This judgment is concerned with claim of damages for breach of contract.

[82] To succeed with a claim for damages caused by a breach of contract, the plaintiff must allege and prove that (a) there has been a breach of contract by the defendant, (b) it has suffered damages, as well as the exact extent of the damage, and (c) the damages were suffered as a direct result of the breach of contract. There must thus be a causal link between the breach and the damage, in that the damage has actually been caused by the breach.

[83] The way damages are measured depends on the type of claim. Unlike damages for delict, damages for breach of contract are as a general rule not intended to recompense the innocent party for its loss, but to put him in a position he would have been in if the contract had been properly performed.' (Footnotes omitted)

[55] Having considered the facts before me I am satisfied that all the aforementioned requirements have been met. The defendant is in breach of the agreement on his own version and the defence, if it can be called that, that he has no place to go with the animals and therefore remained in occupation of the property is not a defence and must be rejected.

[56] I am satisfied that the plaintiff made out its case on a balance of probabilities that the defendant is in breach of the lease agreement and as a result of the defendant's breach the plaintiff suffered substantial damages. The defendant on the other hand was unable to make out a case for his counterclaim and same is hereby dismissed.

⁷ *Ndilula v Real Time Investments CC* (I 522/2013) [2020] NAHCMD 157 (08 May 2020).

[57] The defendant will be liable for the payment of the rental amount to and including 31 January 2021, taking into consideration the yearly increment and the plaintiff will be entitled to a cancellation of the agreement and ejection of the defendant and his livestock from the property. The amount for the security payments for 2018/2019 which amounts to N\$36 000 and which was tendered by the defendant will be set-off against the amount payable by the defendant.

[58] My order is therefor as follows:

1. Confirmation of the cancellation of the lease agreement;
 2. Evicting the defendant, including his livestock and all those occupying the premises through the defendant, from the premises;
 3. Payment in the amount of **N\$192 787.11**, which is calculated as follows:
 - (a) As per reconciliation Exhibit B
N\$233 776.22
 - (b) Less N\$4989.11 carried over from 2017
N\$229 787.11
 - (c) Less N\$36 000 tendered in respect of security servicesTotal:
N\$192 787.11
 4. Payment in the amount of N\$7746.71 in respect of each month or part thereof which the defendant continues to occupy the property beyond January 2021.
 5. Interest on all outstanding amounts at the prime lending rate of Bank Windhoek from time to time, compounded and calculated monthly in arrears from date of judgment to date of final payment.
 6. Costs. Such costs to include the cost of one instructing and one instructed counsel.
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J S PRINSLOO

Judge

APPEARANCES

For Plaintiff:

G Dicks

Instructed by Engling, Stritter & Partners

For Defendant:

K !Naruses

Of K L !Naruses & Associates