REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/02083

In the matter between:

AUSTIN AMALU **PLAINTIFF**

and

CECILIA SMITH **DEFENDANT**

Neutral citation: *Amalu v Smith* (HC-MD-CIV-ACT-CON-2021/02083) [2022] NAHCMD 490 (20 September 2022)

Coram: ANGULA DJP
Heard: **25 – 28 April 2022; 21 June 2022**
Delivered: **20 September 2022**

Flynote: Contract – Breach of a lease agreement – Damages allegedly sustained as a consequence of defendant's failure to maintain the premises as agreed – Plaintiff is required to prove that there is sufficient causal connection between the alleged breaches and the damages he alleged he suffered.

Damages – Quantum – Where damages can be assessed with mathematical precision, the plaintiff is expected to adduce sufficient evidence to prove such damages. However, where this cannot be done, the plaintiff is expected to adduce

evidence as available to him or her in order to quantify his or her damages – Plaintiff unable to prove quantum of damages allegedly suffered.

Summary: This matter concerned claims for payment of rent as well as an amount of money representing repairs effected to the plaintiff's premises after the defendant vacated the house. The plaintiff alleged that the defendant breached the terms and conditions of the lease agreement in that she failed to maintain the house during her tenancy and returned the premises in a damaged condition, excluding reasonable wear and tear.

The defendant denied that she caused damage or failed to maintain the premises and alleged that when she took occupation after she had concluded the lease agreement for the initial period in 2018, the premises suffered from defects which ought to have been rectified by the plaintiff but he failed to do so.

It was common cause that when the defendant took occupation in January 2018 she paid a deposit of N$17 000. It was agreed that the deposit was to be utilized by the plaintiff to repair the defects that might be found to have been caused by the defendant during her tenancy. Defendant pleaded that the deposit was not used to repair the damages to the premises but was utilized in respect of alterations made to the plaintiff's house.

Held that the defendant failed to adduce evidence to prove that the deposit amount was utilized to effect alterations to the plaintiff's house. In any event the defendant did not file a counterclaim claiming refund of the said deposit.

The plaintiff further claimed payment of the sum of N$15 000 being unpaid rental for February 2021. Defendant pleaded that she was verbally instructed by the plaintiff to keep the rental for February 2021 while waiting for the plaintiff to instruct her to use it to pay the contractor who would carry out repairs to the leaking roof of the house. No instructions were given by the plaintiff to the defendant to pay the sum of N$15 000. It was common cause that the defendant vacated the premises before the repairs were effected to the roof. The defendant tendered to pay the sum of N$15 000

representing the rental for February 2021 which according to her, was available at all material times.

Held that no genuine dispute existed in respect of the said amount of N$15 000 and that the non-payment was to be ascribed to miscommunication between the plaintiff and his estate agent.

Held further that that being the case there was no basis in law upon which the plaintiff could claim a penalty of N$600 stipulated in the agreement in the event of defendant paying the rent late in a particular month. Accordingly the claim for the payment of the sum of N$600 was dismissed.

The plaintiff further claimed payment of N$15 000 being rental for March 2021 based on the defendant's breach of the agreement by failing to give the plaintiff 60 days' notice of her intention not to renew the agreement.

Held, that there was no contractual obligation on the defendant to give the plaintiff notice of her intention not to renew the agreement. And that such notice only applied in the event the defendant decided to exercise her option to renew the agreement. The claim in respect of alleged rental for March 2021 was accordingly dismissed.

The plaintiff further claimed payment of the sum of N$4761 being expenses incurred in respect of labour to repair the electric fence around the house.

Held that based on the evidence before court, the plaintiff had failed to prove that the defendant was liable to the plaintiff for the payment of the said sum of N$4761. Accordingly the claim was dismissed.

On the question whether the defendant had confirmed to the estate agent when she took occupation of the house that the house was in good order and condition, and further whether the defendant undertook to be responsible for the maintenance of inside and outside the house?

The court *held* that it was improbable that the defendant could have confirmed to the estate agent that she received the house in good condition given the fact that when the defendant took occupation during 2018, she drew up a list of defects found existing in the house. The court also found that the plaintiff had failed to prove that the defendant undertook to be responsible for the inside and outside of the premises including the pruning of the plants and maintaining the swimming pool for the reason that there was no such provision in the lease agreement.

As regards the claim for the total sum of N$96 498.60 as expenses incurred to repair the premises, the court held that the evidence led on behalf of the plaintiff failed to establish on a balance of probabilities that the defects or damages were caused by the defendant's breach of contract. The court in addition held that the plaintiff had failed to establish that such expenses were fair and reasonable. Accordingly, the defendant was absolved from the instance in respect of this claim.

ORDER

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1. The plaintiff's claim in the sum of N$600 as penalty for the alleged late payment of the February 2021 rental is dismissed.

2. The plaintiff's claim in the sum of N$15 000 representing the alleged rental for March 2021 is dismissed.

3. The plaintiff's claim in the sum of N$4761 being expenses relating to the repair of the fence around the house is dismissed.

4. An absolution from the instance is granted in respect of the claim in the sum of N$96 498.60 for alleged expenses incurred by the plaintiff for works and repairs in respect of the house.

5. The plaintiff is to pay the defendant's costs.

6. The matter is removed from the roll and is considered finalized.

JUDGMENT

ANGULA DJP:

Introduction

[1] This matter concerns a dispute between the plaintiff and the defendant arising from a written lease agreement in respect of the plaintiff's house situated in Ludwigsdorf, a suburb in Windhoek ('the premises' or 'the house'). In terms of the lease agreement, the defendant leased from the plaintiff the premises and the plaintiff leased to the defendant the house for a period of 12 months. The first lease commenced on 1 March 2018 and expired on 28 February 2019. Thereafter a further new agreement was entered into for the period of 1 March 2019 to 28 February 2020. A further agreement was entered for the period 1 March 2020 28 February 2021.

[2] The defendant did not enter into a further agreement at the end of February 2021 but moved out of the house. Subsequent thereto the plaintiff sued out summons against the defendant claiming payment of the sum of N$131 859.60 as damages which he alleges he suffered as a result of the defendant's breach of the terms and conditions of the lease agreement in that she *inter alia* failed to maintain the house and further failed to deliver the house in the same condition she received it, reasonable wear and tear excluded. The defendant defended the claim and denied that she breached the terms and conditions of the lease agreement.

The parties

[3] The plaintiff is Mr Austin Amalu, a major male. When the matter was heard he was receiving medical treatment in the United States of America. As a result he was unable to be present at the trial to give evidence. He was represented by his estate agent, Ms Lilia Galitskaia.

[4] The defendant is Mrs Cecilia Smith, a major married woman, whose employment address is situated at Schanzenweg Street, Windhoek, Republic of Namibia.

[5] Ms Kasuto, from Kasuto Law Chambers, represented the plaintiff while the defendant was represented by Mr Lombaard, from PD Theron & Associates.

Pleadings

The plaintiff's case

[6] It is unnecessary to narrate all the allegations contained in the plaintiff's particulars of claim save for those which are germane to the dispute between the parties. The plaintiff alleged in his particulars of claim that the lease agreement, upon which the cause of action is based, was concluded on 12 February 2020. The plaintiff was represented by his estate agent Ms Galitskaia. The defendant acted in person. The agreement commenced on 1 March 2020 and terminated on 28 February 2021. The agreement stipulated, *inter alia*, that monthly rental in the sum of

N$15 000 was payable in advance. In the event that the rent was paid late the defendant would be charged a penalty in the sum of N$600. It needs mentioning in this regard that after the conclusion of the initial agreement during January 2018, the defendant had paid a deposit in the sum of N$17 000 which was to be utilized to defray the repair costs of any damages that the defendant might cause to the house during her occupancy of the house. The deposit was carried over when two subsequent agreements were entered into.

[7] The plaintiff further alleged that the defendant acknowledged that she received the house inside and outside in good order and condition and undertook to

maintain and deliver the house in the same condition at the expiry of the lease, normal wear and tear excepted.

[8] The plaintiff further alleged that the defendant committed a number of breaches of the terms of the lease agreement as a result of which he suffered patrimonial loss. The alleged breaches are set out below.

[9] The plaintiff alleged that the defendant breached the agreement by failing to timeously pay the rent for February 2021 in the sum of N$15 000 which is due and payable. As a result, the defendant is liable to pay a penalty in the sum of N$600 which is likewise due and payable.

[10] It is further alleged that the defendant breached the agreement in that on 10 February 2021 the defendant gave notice of her intention to vacate the house by 28 February 2021. According to the plaintiff the defendant ought to have given the plaintiff 60 days' notice. As a result of her failure to give such notice, the defendant is liable to the plaintiff for the payment of the sum of N$15 000 being the rental for March 2021.

[11] The plaintiff further alleges that the defendant committed a further breach of the agreement in that she failed to maintain the house and to deliver the house to the plaintiff in the same condition in which she received it. As a result the plaintiff was obliged to incur costs in the sum of N$96 498.60, to repair and restore the premises to a habitable condition. The amount consists of costs for the materials bought and costs for labour.

[12] The plaintiff further alleges that the defendant committed a further breach of the agreement, in that she failed to maintain and to deliver the electric fence surrounding the house, in a working condition. As a result the plaintiff was obliged to spend a sum of N$4761 to repair the said fence. That concludes the plaintiff's pleaded case.

The defendant's case

[13] The defendant filed a plea in which she admits that she concluded the lease agreement with the plaintiff and that subsequent thereto she and her family took occupation of the house. She further admits that she paid a deposit of N$17 000 for the purpose of repairing the damages that she might have caused to the house during her tenancy. She denies that the deposit was meant to pay for alterations effected to the house by the plaintiff.

[14] With regard to the plaintiff's allegation that she received the house in good order and condition, the defendant denied that allegation. She states that upon taking occupation of the house she notified the plaintiff of various defects both inside and outside of the house. She points out that it was agreed that the plaintiff would repair the existing carport netting and install a second carport but failed to do so. The defendant further pleads that during December 2018 she informed the plaintiff's estate agent that the roof in both the kitchen and bathroom were leaking; that the sprinklers of the thatched roof were not in working order and; that the electrical switches were in a poor state. She pleads further that on 17 January 2018 she sent a 'repair list' to the plaintiff's agent, which listed a number of defects in the house which needed to be repaired.

[15] As regards the plaintiff's allegation that it was agreed that the defendant would be responsible for cleaning the yard, watering and pruning the plants, and maintaining and cleaning the swimming pool, she denies those allegations and pleads that it was not a term of the agreement. The defendant went on to plead that in any event the swimming pool could not be backwashed as the backwash pipe was not connected to a storm drain pipe as per municipal regulations. Regarding the watering of the plants, the defendant pleads that during July 2019 the municipality introduced a prohibition on watering gardens due to the drought that prevailed.

[16] Regarding the damages claim in the sum of N$96 498.60 which the plaintiff alleges that the defendant is liable to compensate the plaintiff, the defendant denies liability. The defendant pleads that the house was not in good condition when she took occupation. She pleads further that the house was old and needed repair. She pointed out in this regard that she had effected the necessary repairs which she paid for.

[17] In response to the plaintiff's allegation that she has to pay the plaintiff N$15 000 because she ought to have given him 60 days' notice of her intention to vacate the house, the defendant pleads that there is no such term in the agreement. She points out further in this regard that the agreement was for a fixed term, which expired on 28 February 2021. The defendant therefore denies that she breached the agreement by not giving a 60 days' notice of her intention to vacate the house.

[18] As regards the plaintiff's claim of N$15 000 for the alleged arrear rent for February 2021, the defendant denies liability and pleads that the plaintiff had requested or instructed her to use the rent for February 2021 to pay the contractor to repair the leak in the roof of the house.

[19] Regarding the plaintiff's claim of N$4761 for the repair of the electric fence, the defendant denied liability.

[20] Finally the defendant denies that she is liable to the plaintiff for the payment of the sum of N$131 859.60.

Issues for determination

[21] A number of issues were identified and agreed upon by the parties at a pre-trial conference for determination and the proposed pre-trial order was made an order of court on 8 November 2021. I will consider each of those issues as the judgment unfolds. But before doing so, a brief summary of the parties' respective evidence is made.

Evidence on behalf of the plaintiff

[22] Three witnesses testified on behalf of the plaintiff. They were: Ms Lilia Galitskaia, the estate agent for the plaintiff; Mr Raymond Hoeseb, the contractor who carried out the repairs to the house and to the fixtures and fittings; and Ms Helena Nyundu, a self-employed businesswoman who attended to the cleaning of the house after the defendant and her family vacated the house. As mentioned earlier in the

judgment, the plaintiff could not attend the trial. The court was informed that he was receiving medical treatment at a hospital in the United States of America.

Evidence by Ms Lilia Galitskaia

[23] Ms Galitskaia testified that she has been managing the plaintiff's said house since the year 2012. She secured the defendant as a tenant. The initial lease agreement between the plaintiff and the defendant was entered for the period 1 March 2018 to 28 February 2019. Thereafter a new lease was concluded for the period 1 March 2019 to 28 February 2020. A further agreement was entered a third time for the period 1 March 2020 to 28 February 2021.

[24] She testified that at the conclusion of the initial agreement the defendant received the keys to the house on 17 January 2018 and moved in. The defendant did not pay the rent for January and February 2018, however, in exchange, she undertook to attend to fixing some fixtures and fittings and to attend to repairing some defects to the premises at her own cost. The defendant's undertaking was recorded in an email handed in evidence as Exhibit "CS3". It was Ms Galitskaia's evidence that the defendant only attended to fixing half of the listed items because after the defendant vacated the house in February 2021, she discovered that the rest of the items on the list had not been attended to.

[25] Ms Galitskaia, further testified that after the defendant vacated the house she carried out an inspection of the house on 1 March 2021. She compiled a report dated 4 March 2021 in which she recorded all defects she found in the house. According to her the house was in a bad state.

[26] According to Ms Galitskaia all the Wispeco windows were not functioning: they were dirty and some were broken. In this regard she submitted into evidence video clips which she took marked Exhibits "1N", "1O", "1Q" and "1R". According to the witness, when the defendant took occupation of the premises all the Wispeco windows were clean and in working condition.

[27] The videos depict a window whose frame had come off the window rail (exhibits “1N” and “1R” are videos of the same window); a window with the outlines of what appeared to be butterfly stickers previously affixed to the window (“1O”); and a broken window which Ms Galitskaia described as being a window in the hobby room of the premises (“1Q”).

[28] Ms Galitskaia, confirmed that there are four bedrooms in the house which all had carpet flooring. After the defendant vacated the house she found the carpets to be in a bad state. They gave a foul smell similar that of an animal’s urine. The condition of the carpets were depicted in the photos handed in evidence as Exhibits: “2E”; “2F”; “2G” and “2H”. It was her testimony that a carpet in one of the bedrooms could be cleaned however the carpets in the other three bedrooms were badly stained. The stains could not be removed. As a result she decided to remove the carperts and replaced with tiles.

[29] The pictures show brown dirt stains on the carpets (“2E” and “2H”) and a blue and yellow blotch (“2F” and “2G”, respectively).

[30] Ms Galitskaia further testified that upon inspection, she found some of the doors’ hinges broken. In this regard she tendered into evidence photos as Exhibits marked “2T”, “2U” and “2V” as well as a videos marked as Exhibits “1S” and “1T”.

[31] The photos depict a door with the external door handle bent away from the door. The door in the video submitted as exhibit “1S” shows a door with the bolts of the top hinge of the door sticking out. In video exhibit “1T” the top hinge of a security door appears to be broken and is jutting out of the wall.

[32] It was Ms Galitskaia’s further testimony that when the defendant took occupation of the house there were three palm trees on the left side of the boundary wall along Ilse Street and one palm tree on the right side of the boundary wall along Dr Kwame Nkrumah Street, as well as one lemon tree and succulent plants on the inside of the premises. However after the defendant vacated the premises she discovered that the four palm trees, the lemon tree and the succulents plants were missing from the premises. It was further her evidence in this regard that the palm

trees were at a mature stage and no longer required watering when the defendant took occupation. According to her, the palm trees were about 2.4 to 2.5 meters in height. The witness further testified in this regard that she obtained a quotation from Ferreira's Garden Centre to demonstrate how much it would cost to replace the four palm trees. The quotation shows that it would cost about N$25 000 to replace the four palm trees which would be much smaller than those which were on the premises when the defendant took occupation.

[33] As regards the claim for payment of the sum of N$4761 for fixing the fence alarm, Ms Galitskaia's evidence was that this amount has been reduced to N$1500 in respect of labour. This is because the plaintiff in the meantime paid the service provider, Alarm Fix, N$2640 in respect of the spare part, an energizer, which was replaced, excluding VAT as the latter was waived.

[34] Ms Galitskaia further testified that her close corporation, Equity Real Estate CC, invoiced the plaintiff with the sum of N$9800 for facilitating the repair works, overseeing and supervising the repair works. It was her evidence that the work took about a month. According to the witness her normal hourly rate is N$800. However she charged the plaintiff at a reduced rate of N$250 per hour According to her that type of work would normally cost about N$25 000. She has therefore given the plaintiff a substantial discount.

[35] Finally, Ms Galitskaia testified that she paid a total sum of N$96 498.60 in respect of labour and materials to repair and fix the defects caused to the house by the defendant in breach of the terms and conditions of the lease agreement.

[36] That concludes the summary of Ms Galitskaia's evidence. I move to summarise Mr Hoeseb's evidence.

Evidence by Mr Hoeseb

[37] Mr Hoeseb testified that he is a general contractor who does plumbing, tiling, fixes roofs and ceilings and similar related works. He is the sole member of Country

Plumbing and Renovation CC. Early in March 2021, he was contracted by Ms Galitskaia to attend to repair works at the plaintiff's house.

[38] It was his evidence that he replaced broken hinges of cupboards in all the bedrooms. He also replaced broken cupboard handles with new handles in three of bedrooms. He testified that he found the door handle to the laundry room broken and replaced it with a new one. He further found the hinges of the security door broken and out of the wall and replaced the screws because they were damaged. He further found the lock of the balcony door without a key and replaced the old lock with a new one. He testified further that he found the three-way switch next to the security door not functioning. He replaced it. Mr Hoeseb further testified that he found the awning hinge outside on the second floor hanging out of the wall and not functioning: he replaced the broken parts with new ones. He further found the glass to the lobby room broken and replaced it with a complete new glass. In respect of these repair works he issued the plaintiff with the first invoice in the sum of N$4 675 comprised of the costs for materials and labour.

[39] Mr Hoeseb proceeded and testified that next he attended to fixing and repairing all seven Wispeco windows in the house. According to him the windows were stuck and could not open and some parts were broken. He further testified that on 16 March 2021 he received N$12 500 in cash from Ms Galitskaia as an advance payment for spare parts and manufacturing of spare parts for the Wispeco windows. The receipt for that cash money was received in evidence as Exhibit "4". He replaced the damaged and broken parts with new ones. He testified further that on 19 March 2021 he received further cash in the sum of N$17 610 from Ms Galitskaia in respect of work done on the Wispeco windows and as part payment of invoice number 2. Proof of this payment was received in evidence as Exhibit "5".

[40] He further testified that he found the handles of doors without screws holding them in place. He fixed them by supplying new screws and fastened them. He testified further that three wooden strips on the trap door in the kitchen ceiling were missing. He replaced them with new strips. He then issued the plaintiff with a second invoice (invoice number 2) in the sum of N$39 820 in respect of material supplied and for labour.

[41] It was Mr Hoeseb's further testimony that he found some of the light bulbs in the house fused, in particular the bulbs for the chandelier which had six bulbs missing. He replaced all the bulbs in the house which were not functioning. He issued the plaintiff with a third invoice in the sum of N$1022.76 in respect of materials and labour.

[42] Mr Hoeseb proceeded and testified that the next job was to remove the carpets from three bedrooms. He chipped the cement floor and thereafter tiled the bedrooms. He issued the plaintiff with a fourth invoice in the sum of N$15 000 in respect of materials and labour. He testified further that on 17 March 2021, he received cash from Ms Galitskaia in the sum of N$4400 for tiling. Proof of this payment was received in evidence as Exhibit "7". Thereafter again on 22 March 2021 he received a further cash payment from Ms Galitskaia in the sum of N$10 600 for tiling the three bedrooms. Proof of this payment was received into evidence as Exhibit "8".

[43] According to Mr Hoeseb, he also found the roof seal at the main entrance damaged. As a result the roof was leaking. It was further his evidence that on 9 March 2021, he received cash in the sum of N$1000, from Ms Galitskaia which he used to buy the materials used to seal the roof. A receipt as proof that he received that amount was received in evidence as Exhibit "2". He attended to seal the roof and further replaced the damaged ceiling board. He then issued the plaintiff with a fifth invoice in the sum of N$3500 which comprised of materials and labour. He testified in this connection that on 2 March 2021 he received from Ms Galitskaia cash in the sum of N$3500. Proof of this payment was received in evidence as Exhibit "9".

[44] Mr Hoeseb testified further that he attended to cleaning the swimming pool. According to him the swimming pool was in a bad state. The water was dark. He testified that it took him three days to clean the pool. He issued the plaintiff with a sixth invoice in the sum of N$1640.00 comprised of material and labour. He testified in this connection that on 31 March 2021, he received cash payment form Ms Galitskaia cash in the sum of N$1640. Proof of that payment was received in evidence as Exhibit "10".

[45] Finally, Mr Hoeseb testified that he received three separate payments which he was unable to allocate to a specific job he had done on the plaintiff's house during March 2021. These consisted of cash payment in the sum of N$3675 which he received on 12 March 2021. Proof of that payment was received into evidence as Exhibit "3". A further payment was cash in the sum of N$2350 which he received from Ms Galitskaia on 25 March 2021. Proof of receipt of that money was received in evidence as Exhibit "11". The third payment was a cash payment in the sum of N$1637.26 which he received from Ms Galatskaia. Proof of that payment was received in evidence as Exhibit "12".

[46] Mr Hoeseb testified that in total he received a sum of N$65 657.76 from Ms Galitskaia for work done and material bought. The last witness for the plaintiff was Ms Helena Nyundu.

Evidence by Ms Nyundu

[47] Ms Nyundu testified that she does general cleaning works. She testified further that she has five years' experience in providing cleaning services as a general cleaning service provider; that during March 2021 she was contacted by Ms Galitskaia and requested her to clean the plaintiff's house after the defendant vacated the house.

[48] It was her evidence that she commenced with the cleaning work at the plaintiff's house on 12 March 2021. She first cleaned all the windows in the house. According to her, the windows in the kitchen were particularly dirty and greasy. She testified that, she used a special detergent for window cleaning. She did not provide the name of that detergent. It was further her testimony that on 24 March 2021 she resumed the cleaning works. She observed that the two bedrooms downstairs had a pungent smell of urine coming from the carpets. She observed stains on the carpets.

[49] She testified that her normal daily rate is N$260. On 12 March 2021, she received N$170 for her cleaning services. Proof of that payment was received into evidence as Exhibit "13". On 24 March 2021, she received a sum of N$260 in

respect of cleaning services rendered. Proof of that payment was received in evidence as Exhibit “14”. It was further her evidence that on 27 March 2021 and 29 March 2021, she received sums of N$250 and N$180.00, respectively for further cleaning services rendered. Proof of these payments were received into evidence as Exhibit “15”. According to her all the above payments were received in cash from Ms Galitskaia.

Evidence by and on behalf of the defendant

[50] Two witnesses testified for and on behalf of the defendant: the defendant herself and her husband.

Ms Cecilia Smith’s evidence

[51] She testified that when she leased the house from the plaintiff for the first time during 2018 she and her husband made a list of 20 defects and indicated which defects her husband would attend to. She emailed the list to Ms Galitskaia on 17 January 2018. The list was attached to her evidentiary affidavit marked ‘A’. Thereafter, she signed the lease agreement on 17 February 2018 which commenced on 1 March 2018 and terminated on 28 February 2019. She concluded a second agreement which commenced on 1 March 2019 for a further fixed term period of one year. On 12 February 2020 she concluded a third agreement which commenced on 1 March 2020 and terminated on 28 February 2021

[52] She testified that at the conclusion of the initial agreement she paid a deposit of N$17 000; and that the monthly rental was N$15 000. It was agreed that the N$17 000 was to be utilized to repair damages to the house which she might have caused during her occupation of the house. In terms of clause 5 of the agreement, the plaintiff was responsible for the upkeep of the exterior and interior of the house.

[53] Ms Smith testified further that during December 2018 she informed Ms Galistkaia through a WhatsApp message of the condition of the roof in the kitchen and bathroom. The roof was leaking in these areas which caused short circuits in the electricity power. It was her evidence that the water also damaged the

ceiling and the floors in the house. She also informed the agent that the electrical switch sockets were in a bad state of repair. According to her none of those defects were attended to by the plaintiff or his agent.

[54] It was Ms Smith's further testimony that during September 2020 a water pipe above the kitchen ceiling burst which damaged the ceiling. Furthermore, during January and February 2021, there was heavy rainfall in Windhoek which aggravated the roof leakage which extended to the bathroom and the main bedroom entrance. It was her evidence that as a result of the water leakage, the entire carpet in the bedrooms became dirty and was pulling off from the floor when one tried to vacuum the water from it.

[55] As regards the liability for the damages to the house, Ms Smith denied that she is liable to the plaintiff. In respect of the carpets in the bedrooms, it was her evidence that those carpets were very old and 'had seen a lot of traffic'. According to her, the carpet in the main bedroom was stained, the roof leaked and was never completely dry during the rainy season as a result of the water leakage.

[56] In respect of the amount claimed for cleaning of the house, it was her evidence in this regard that before she and her family vacated the house, she had hired a professional cleaning company, Kosha Services, who cleaned the house and she had paid for such service. She tendered into evidence two tax invoices as proof of such payment (Exhibits "AS1" and "AS2"). She therefore denied that she was liable to the plaintiff for the amount he paid to again clean the house.

[57] Regarding the amount claimed from her in respect of repairing the Wispeco windows and the sliding door, Ms Smith testified that the windows are old and have not been maintained over the years. She denied that they were damaged by her. Accordingly, she was not prepared to pay for general wear and tear of the Wispeco windows.

[58] As regards the amount claimed from her in respect of four palm trees, Ms Smith denied liability and pointed out that one tree was driven over by a G4S motor vehicle and died thereafter. The remaining three palm trees died due to a

worm infestation. After they died her husband removed them and made a rock garden where the trees once stood. Ms Smith therefore denied liability towards the plaintiff in respect of the four palm trees.

Evidence of Mr Arthur David Depledge Smith

[59] Mr Smith testified that he is the defendant's husband. They are married in community of property. He basically confirmed what the defendant had already testified.

The law

[60] It is trite law that in an action based on alleged breach of contract, the *onus* is on the plaintiff to adduce sufficient evidence in order to prove on a balance of probabilities that the defendant committed the breach of the terms and conditions of the agreement. In addition the plaintiff must prove that the breach is causally connected with the damages he or she alleges he or she suffered to the extent which is significant in law.[1]

[61] As regards the assessment of alleged damages suffered by the plaintiff it has been held that where damages can be assessed with mathematical precision, the plaintiff is expected to adduce sufficient evidence to prove such damages. However, where that cannot be done, the plaintiff would be expected to adduce evidence as available to him or her in order to quantify his or her damages. In this regard, reference is made the often-quoted passage from the judgment in *Herman v Shapiro & Co* 1926 TPD 379 quoted with approval in *Esso Standard SA v Katz*[2]*:*

'Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial and is a problem which has engaged the attention of the Courts from time to time. Thus in *Hersman v Shapiro & Co* 1926 TPD 367 at 379 STRATFORD J is reported as stating:

[1] A J Kerr *The Principles of the Law of Contract* 6 ed at 739.
[2] *Esso Standard SA v Katz* 1981 (1) SA 964 (A) at 970 E-G.

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it." '

[62] It has further been held in this connection that:

'[I]t is not competent for a Court to embark upon conjecture in assessing damages where there is no factual basis in evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made. *Mkwanazi v. Van der Merwe and Another*, 1970 (1) SA 609 (AD) at p. 630. If there is no or an insufficient evidential basis upon which the loss can be assessed on the probabilities, then no assessment of damages can be made for lack of proof of the quantum of those damages.[3] (Reference to other cases omitted)

[63] What is to be deduced from the cases referred in the preceding paragraphs for the purpose of the present matter is this: The plaintiff is required to prove on a balance of probabilities that the defendant breached the terms and conditions of the lease agreement in the instances alleged in paragraphs 7, 8, 9 and 10 of his particulars of claim. Furthermore, the plaintiff is required to prove that there is sufficient causal connection between the alleged breaches and the damages he alleged he suffered. Finally, the plaintiff is required to quantify the monetary damages he alleged he has suffered as a result of those breaches.

Evaluation of the evidence

[3] *Aarons Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA 652 at 656 C.

[64] I now proceed to consider whether the plaintiff has satisfied those requirements and in doing so I will use the issues agreed for determination by the parties in the pre-trial order as the roadmap but in no particular order. In doing so, I have to evaluate and conduct an assessment of the evidence placed before me and in the end I should be satisfied that the defendant indeed breached the agreement and that there is sufficient causal connection between the breach and damages and what is the quantum thereof.

[65] One of the issues the parties agreed to ask the court to determine is whether it was agreed between the parties that the deposit of N$17 000 may be utilized to pay for the damages which the defendant might have caused to the house during her occupation.

[66] The requirement for payment of the deposit of N$17 000 was embodied in clause 11 of the March 2020 to February 2021 lease agreement. It is common cause that the deposit was paid by the defendant to the plaintiff. It would appear that when the initial agreement concluded during 2018 terminated, the deposit of N$17 000 was simply carried over on each occasion when the two subsequent agreements were concluded.

[67] The dispute appears to be confined to the agreed usage or purpose of the deposit. In paragraph 4.5 of the particulars of claim it is pleaded that it was agreed that the deposit would ‘be used against any damages or alterations which the defendant may cause plaintiff to sustain during defendant’s occupation of the Premises’. The allegation of the usage of the deposit for ‘alterations’ was disputed by the defendant in paragraph 4.5 of her plea.

[68] The evidence shows that only repairs were made and no alterations were made to the house. On the document titled ‘Expenses done (perhaps incurred) on property at 2 Ilse Street due to tenant’s negligence and breach of conditions of lease agreement’ which was compiled by Ms Galitskaia and attached to her evidentiary affidavit marked ‘F’, the deposit of N$17 000 was deducted from the initial expenses amount of N$128 498.60 leaving a balance of N$111 498.60 claimed in the summons.

[69] On the basis of the evidence before me, I am satisfied that the deposit of N$17 000 was not used to cover expenses in respect of alterations to the plaintiff's house. I may also mention in this connection that the defendant did not file a counterclaim to claim refund of the deposit in the event it were found that no damages were caused to the house during her tenancy. It must therefore be accepted that the defendant was satisfied that the deposit amount was utilized for the agreed purpose namely to effect repairs. It is common cause that certain repairs were effected to the house after the defendant vacated the house. The dispute with regard to the usage of the deposit is thus resolved in favour of the plaintiff. I move to consider the next issue for determination.

[70] The next issue agreed for determination is whether or not the defendant breached the lease agreement in that she failed to pay the rental for February 2021 in the sum of N$15 000 and whether as a result thereof she is liable to pay a penalty in the sum of N$600 as per clause 3 of the agreement due to non-payment of the rental for February 2021.

[71] In defence against this claim, the defendant pleaded that the plaintiff had requested her to use the rent amount for February 2021 and used it to pay the repairer of the roof of the house which was leaking. It bears mentioning that the plaintiff did not replicate to the defendant's allegation on this issue. In my view the allegation required to be addressed squarely. In other words it should have been expressly admitted or denied.

[72] In support of her aforesaid plea, Ms Smith testified that during January 2021 the plaintiff instructed her to retain the rent for February 2021 to use it to repair the roof and that once the roof was repaired she should pay the contractor directly. She therefore denied that she breached the agreement by not paying the February 2021 rent but merely complied with the plaintiff's instruction. It was her further testimony that during February 2021 she gave notice that she would not seek leave to enter into a further new agreement. She moved out before the roof was repaired. Therefore she could not use the N$15 000 to pay the contractor. She tendered payment of the amount equal to the February 2021 rental which was N$15 000. For

those reasons, she refused to pay N$600 as a penalty for the late payment of the rent for February 2021.

[73] When confronted during cross-examination with defendant's version regarding her denial of liability for the penalty claimed, Ms Galitskaia testified that the defendant had informed her that she did not want renovations done while she was in occupation of the house and that the ceiling should be repaired only once she vacated the property. The rent for February 2021 was demanded from the defendant and the penalty became due once the rent was demanded. Of course, as it would be expected, Ms Galitskaia could not dispute that plaintiff instructed the defendant to keep the rental for February 2021 as she was not privy to the agreement between the plaintiff and the defendant regarding the retention of rent for February 2021 by the defendant.

[74] In my view the defendant's version appears to be in line with what clause 16.4 of the agreement envisaged. The clause provides that the landlord may request that certain payments be made by the tenant out of the monthly rental. It would thus appear to me that the request by the plaintiff to the defendant was made in terms of this clause. It is probable that Ms Galitskaia did know about this arrangement between the plaintiff and the defendant. Furthermore, according to Ms Galitskaia, the plaintiff was experiencing financial problems, in that on occasion he had to borrow money from a friend which money was collected by Ms Galitskaia to effect the repairs to the house.

[75] In the circumstances it would appear to me that the probabilities favour the defendant's version that the rental for February 2021 was only to become payable after the plaintiff had instructed the defendant to cause the roof to be repaired and thereafter to utilize the February 2021 rent to pay the repairer. There is no evidence that such instruction was given by the plaintiff to the defendant to pay the rental for February 2021 to the repairer. It is, however, common cause that the roof was repaired.

[76] I accept the defendant's version on this issue. I am fortified in my view by the defendant's undisputed evidence that over the period of three years she had rented

the house she never defaulted with a single rental payment and was never late with payment of the monthly rental. I should mention in this connection that the defendant made a good impression as a witness. She was brief and to the point. She did not try to justify her actions.

[77] The only criticism I have about the defendant's belated revelation of the agreement her and the plaintiff regarding the withholding of the payment of the sum of N$15 000 in respect of the February 2021 rent is that this issue should have been resolved at the pre-trial stage. In my opinion, it was incumbent upon the legal practitioners for the parties to determine whether a genuine dispute existed between the parties regarding this issue.

[78] The defendant's offer was confirmed during closing submissions by Mr Lombaard for the defendant. That being the case, it follows thus that there is no basis for the defendant to pay the amount of N$600 as penalty for the late payment of the rental for February 2021. Accordingly, the claim for the payment of the sum of N$600 as penalty cannot be sustained.

[79] In light of the foregoing, it would appear to me that there was no genuine dispute between the parties but a mere miscommunication between the plaintiff and his agent. This is because, the agent thought the money was due whereas the plaintiff had instructed the defendant not to pay the rental for February 2021, but instead to keep it in order to utilize it for repair costs. The issue is further compounded by the fact that the plaintiff could not testify. He bore the burden to prove that the rental for February 2021 was due and payable.

[80] In view of my finding that there is no genuine dispute on this issue and also in the light of the tender made by the defendant to pay the amount of N$15 000, it became unnecessary for me to make a determination on this issue. I would expect the plaintiff to simply make a formal request to the defendant to pay the sum of N$15 000 to him. Should the plaintiff succeed in proving his damages which he attributes to the defendant, he should deduct the amount of N$15 000 from the amount of N$ 131 859.60 he is claiming as damages from the defendant. I turn to consider the next issue for determination.

[81] The next issue the parties have asked the court to determine is whether or not it was necessary and or agreed between the parties that the defendant would give 60 days' notice of her intention to vacate the premises before the fixed term agreement came to an end on 28 February 2021. And if so, whether or not the defendant is liable to pay the rental for March 2021 in the sum of N$15 000 as damages resulting from the defendant's failure to give the plaintiff 60 days' notice of her intention to vacate the premises.

[82] In this respect, the plaintiff alleges in his particulars of claim that he suffered damages as a result of the defendant's failure to give him 60 days' notice, before the expiry of the agreement of her intention to vacate the premises. As a result the plaintiff suffered damages in the sum of N$15 000 representing the rent for March 2021.

[83] Clause 2 of the agreement provides, in part that:

> '[T]he tenant shall have an option to renew the lease upon terms as agreed upon by the parties, provided such option is exercised in writing at least two months before the termination'

It is upon this clause that the plaintiff relies to claim the rental for March 2021 because he alleges that he was not given two months (60 days) notice.

[84] In this regard, it was common cause that the defendant sent a WhatsApp message to Ms Galitskaia on 23 December 2020 informing her that she wished to stay for another period from 1 March 2021 to 28 February 2022. Ms Galitskaia responded by requesting the defendant to rather convey her intention via an email. It is further common cause that no such email was sent by the defendant to Ms Galitskaia; and further that the defendant gave Ms Galitskaia notice on 10 February 2021 of her intention to vacate the premises.

[85] In this connection Ms Galitskaia testified that as a result of the said WhatsApp message from the defendant, she stopped actively looking for tenants. She further

claimed that the plaintiff suffered financial prejudice as a result of the defendant's failure to give sufficient notice, of her intention to vacate the premises.

[86] Mr Lombaard for the defendant argues in his written submission that the lease agreement was for a fixed term; and that that agreement came to an end on 28 February 2021 and therefore no notice to terminate was required. I agree with the submission for the reason that clause 2 of the agreement provides that:

'The tenant shall have an option to renew the Lease upon terms agreed upon by the parties.'

[87] In my view the clause, properly construed, means that at the expiry of each agreement a new agreement was to be entered on new terms to be agreed upon. I am fortified in this view by the fact that the agreement does not have a renewal clause. In judgment, it would have been a different consideration altogether had the agreement read that the agreement would 'be renewed on the same terms and conditions'. In the present matter there is no ambiguity that the agreement was for a fixed period of twelve months on each occasion it was entered.

[88] I therefore agree with counsel's argument that there was no contractual obligation on the defendant to give the plaintiff notice that she would not renew the agreement. Furthermore, it is not the plaintiff's case that the defendant's offer to enter into a new agreement was accepted and therefore the defendant became liable to pay the rent for March 2021. The fact of the matter is that the notice sent by the defendant via WhatsApp was not accepted by Ms Galitskaia. She instead requested the defendant to send an email. The defendant never sent such an email.

[89] It follows therefore, in my view that the defendant cannot be said to have breached the agreement by not having given 60 days' notice of her intention not to enter into a new agreement and therefore no liability arose. The defendant was only under contractual obligation to give notice in the event she wished to exercise the option to enter into a new agreement for a further period of 12 months.

[90] In this connection, it has been held that the date that matters in regard to the termination of the tenant's liability to pay rent in terms of the lease agreement is not the date of breach or the date which the tenant purported to cancel the lease but the date on which he or she actually vacated the premises.[4] In the present matter it is common cause that the defendant vacated the premises at the end of February 2021. By that time there was no agreement: it had already expired and therefore no breach could have occurred and no liability ensued.

[91] For all those reasons and considerations, it follows that the plaintiff's claim for payment of the rental for March 2021 cannot be sustained and stands to be dismissed. I move to consider the next issue for determination.

[92] The next question the parties have asked the court to determine, is whether or not the defendant is liable to the plaintiff for the payment of the sum of N$4761 as damages for the repair of the electric fence and if so whether such amount is fair and reasonable.

[93] In this regard the plaintiff alleges in his particulars of claim that the defendant breached the lease agreement in that she failed to maintain and deliver the electric fence surrounding the house in a working condition and as a result the plaintiff incurred expenses in the sum of N$4761 which he paid the service provider who repaired the said electric fence. The defendant denied liability and pleaded that the electric fence did not work when she and her family moved in the house; and that her husband installed a new energizer because the old energizer was outdated. Furthermore that her husband removed his energizer when they vacated the house at the end of February 2021. Her evidence in this regard was corroborated by her husband.

[94] Ms Galitskaia testified that the claim of N$4761 had to be reduced to N$1500. The tax invoice from Alarm Fix Security Systems CC who repaired the fence reads: 'replaced energizer/exiting energizer outdated N$2 640. Labour and sundries/service entire electric fence, fixed dried joints N$1500.'

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[4] *Marcuse v Cash Wholesalers (Pty) Ltd* 1962 (1) SA 705 at 708H.

[95] During cross-examination Ms Galitskaia conceded that the amount of N$4 761.00 claimed should not have been claimed and would not be persisted with. Upon a question by the court whether she had authority from the plaintiff to abandon the claim, she confirmed that she had a discussion with the plaintiff regarding this claim and that the plaintiff instructed her to abandon this claim. Under re-examination she change her version and claimed that only the sum of N$1500 should be claimed in respect of labour. I should mention that no amendment of the particulars of claim was moved by Ms Kasuto for the plaintiff in this regard following Ms. Galitskaia's evidence.

[96] A witness is not allowed to approbate and reprobate at the same time. The inconsistency in Ms Galitskaia's evidence with regard to this claim makes it impossible for me to accept her evidence as proof on a balance of probabilities that the defendant is liable to the plaintiff for the sum of N$1500. I must mention that overall Ms Galatskaia did not impress me as a good witness. She was verbose and did not answer the questions as asked. Instead of simply stating the facts in response to the question asked, she also tried to convince the court about the veracity thereof.

[97] Ms. Galatskaia did not dispute the defendant's evidence that the electric fence did not function when they moved in and that the defendant's husband installed his own energizer and removed it when they vacated the premises. That being the case I cannot also see the reason why the defendant should be burdened with the labour costs for replacing the energizer following the defendant's removal of her own energizer. I reject Ms Galitskaia's evidence with regard to this claim. In the result this claim stands to be dismissed. I turn to consider the next issue for determination.

[98] The next question the parties agreed to submit to the court for determination is whether or not the defendant confirmed to the estate agent, Ms Galitskaia, that the interior and exterior of the premises were in good condition, and undertook to maintain and deliver the premises in the same condition, fair wear and tear excepted.

[99] It is to be noted in this regard that part of clause 6 of the March 2020 to February 2021 agreement reads as follows:

'The tenant: acknowledges to have received that same in good order and condition and undertaken to maintain and deliver up same at the expiration or sooner determination [termination] of this Lease, in the like good order and condition, reasonable wear and tear and damage by fire only expected."

The clause went on further and states that:

'['T]he tenant acknowledges the defects on Schedule A hereto and accepts the premises subject to these defects.'

[100] During oral arguments, I enquired from Ms Kasuto as to the whereabouts of 'Schedule A'. Counsel responded that no such Schedule was compiled or attached to the agreement. It would thus appear from the evidence that no list of defects was compiled when the agreement was concluded for the second or third time. The only list compiled was the one made by the defendant and emailed to Ms Galitskaia on 17 January 2018 after the first agreement was concluded.

[101] The defendant testified that of the defects which the plaintiff undertook to rectify when the first agreement was concluded in 2018 such defects were never attended to. What I deduce from this evidence leads me to the conclusion that when the defendant signed the third lease agreement, the premises had defects which were carried over from the first and second lease periods. However clause 6 is very clear that the defendant acknowledged that she received the premises in good order and condition. The wording of the clause is very clear and unambiguous and does not require interpretation.

[102] It follows thus from the foregoing that the answer to the question posed at the beginning of this enquiry is in the affirmative that the defendant did acknowledge that she received the premises in good order and condition. The principle *caveat emptor* – let the buyer be aware – as Ms Kasuto correctly submitted applied.

[103] It would appear that the parties simply appeared to have adopted a lackadaisical approach when the third agreement was concluded. There is no evidence as to what had happened when the second agreement was concluded. The evidence shows that when the third agreement was concluded, the parties did not give attention to the details thereof. This is clearly demonstrated by the fact that even though a list of defects was envisaged there is no evidence that such list of defects was ever compiled. My finding on this issue is therefore that despite the acknowledgement on paper that the premises was in good condition when she received it, there is no evidence to prove that fact. The defendant is however bound by her acknowledgment embodied in the agreement that she received the premises in good order and condition. This finding will depend on whether the defendant agreed to maintain the premises in the same condition as she found it. This aspect is considered elsewhere below. I proceed to consider the next issue for determination.

[104] The next issue for determination as agreed between that parties is whether or not it was agreed between the parties that the defendant would take care of the interior and exterior of the premises by regularly cleaning of the house and the yard, watering and pruning of the plants, and cleaning and maintaining the swimming pool.

[105] The plaintiff alleges that it was so agreed. On the other hand the defendant denies in her plea that it was her obligation to clean the yard, water and prune the plants, and clean and maintain the swimming pool. In support of her denial the defendant referred to clause 5 of the lease agreement which states that:

> ‘The landlord shall maintain the exterior and interior of the premises in good order and condition’.

[106] In my view, the clause is clear and unambiguous and does not require extrinsic evidence for interpretation. It says what it says.

Clause 7 of the agreement on the other hand provides that:

> ‘The Tenant shall keep the premises clean and in tidy condition and free from all rubbish, to the satisfaction of the Municipality authorities.’

Again, the wording of the clause is clear. The defendant for her part testified in this regard that she kept the premises clean and in a tidy condition and free from rubbish in accordance with municipal regulations. Ms Galatskaia did not dispute the defendant's evidence in this regard. This is because there was no evidence that she inspected the premises between 2018 and February 2021 to ascertain the cleanness or otherwise of the premises.

[107] The agreement is silent as to who was responsible for cleaning the yard, watering and pruning the plants, cleaning and maintaining the swimming pool. As regards the watering of the plants, it would appear from the defendant's evidence that she accepted the obligation to water the plants. This inference is borne out by her evidence in explanation as to why some plants died during her tenancy of the premises. She explained that the plants died due to water restrictions which were imposed by the Municipality because of drought.

[108] In respect of the question as to who was obligated to prune the trees, that obligation normally rests with the landlord. This is because it entails a big operation which normally involves a service provider specializing in pruning trees. The various photos handed into evidence show that the premises' yard is dotted with big mature high trees. The decision relating to pruning can have a far-reaching effect on the aesthetic appearance of the surrounding of the premises. In view of the fact that the agreement did not stipulate that the defendant would be responsible for cleaning the yard, watering and pruning the plants, cleaning and maintaining the swimming pool, the legal default position is that the plaintiff as landlord would be responsible.[5]

[109] For those reasons and considerations set out above, I am of the considered view that it was never in the contemplation of the parties that the defendant would be responsible for the cleaning of the yard, watering and pruning of the trees.

[110] As regards the obligation to clean and maintain the swimming pool, there is no evidence that the defendant and her family used the pool. There appears to be no dispute between the parties that when the defendant moved in the house during January 2018 the swimming pool was not functioning. According to the list of defects

[5] A J Kerr *The Principles of the Law of Contract* 6 ed at 305.

of 17 January 2018, the motor for the pool was out of order . In this respect, the defendant undertook that her husband would establish whether he could repair the motor, failing which the plaintiff would have to replace it. It would appear that the motor was eventually fixed. Photos showing the defendant's husband cleaning the swimming pool were placed before court. In this respect a narration of the email dated 29 January 2018 with three photos reads:

'We have managed to remove all the dirt, leaves, rock, sticks and a condom or two. We had the water tested and have added a lot of chemicals and shocked the pool as advised based on the water tests.'

[111] It thus appears from the foregoing that the defendant initially in 2018 assumed the obligation to clean and maintain the swimming pool. It is to be recalled in this connection that most of the items on the 17 January 2018 list including cleaning the swimming pool, were undertaken as *quid pro quo* for the defendant not to pay the rental for February 2018. There is no evidence that the defendant assumed such obligation when the 2020/2021 agreement was concluded.

[112] The *onus* was on the plaintiff to adduce evidence to show that such obligation continued when the lease agreements were concluded in 2019 and 2020. No such evidence was adduced. It follows therefore that the plaintiff has failed to prove that the defendant had agreed to clean and maintain the swimming pool.

[113] Last, but not least the court is asked to determine whether or not the defendant is liable to the plaintiff for the payment of the sum of N$96 498.60 made up of expenses incurred by the plaintiff to repair defects to the premises resulting from the defendant's alleged breach of the agreement by failing to return the house in the same condition it was when she took occupation, and if so, whether such expenses are fair and reasonable.

[114] The sum of N$96 498.60 is made up of different components of expenses as testified by Ms Galitskaia. The list of expenses was attached to her evidentiary affidavit marked annexure 'F'. The list contains 14 items of expenses. I will first deal

with the expenses which are not repairs related but which are more rental related. Again I will do so not necessarily following the sequence of Ms Galitskaia's list.

[115] First I deal with an invoice for the sum of N$9800 from Ms Galitskaia's Equity Real Estate CC. The invoice is in respect of services rendered by Ms Galitskaia's close corporation, to the plaintiff. According to Ms Galitskaia she had to charge the plaintiff because the supervisory work she carried out on his behalf (when the repair works were done) was outside her normal mandate as an estate agent. According to Ms Galitskaia, her normal charge-out rate is N$800 per hour, however because she knew that the plaintiff was experiencing financial problems she decided to reduce her rate to N$250 per hour. She claimed that on average, she had spent three hours supervising the repair and cleaning works to the plaintiff's house. That is how she arrived at the sum of N$9800. It was her evidence that this charge was accepted by the plaintiff.

[116] I have difficulty in accepting this evidence. Firstly, the plaintiff did not testify to confirm that he accepted Ms Galatskaia's invoice. Her evidence about what the plaintiff said constituted inadmissible hearsay because it is tendered to prove truthfulness of the plaintiff's statement that he has accepted the charge. Secondly, the evidence by Ms Galitskaia about the normal rate in the industry is of an expert nature. She is not an expert in the area of supervising repairs and the cleaning of premises. On her own evidence the work was outside her normal mandate as an estate agent. Thirdly, I consider her evidence about arbitrarily reducing the rate from the industry rate of N$800 to N$250 rather as self-serving. Ordinarily in business, one cannot reduce ones hourly rate out of pity because the person who hired you is experiencing financial challenges. Lastly, no basis has been laid through evidence upon which this court can assess whether the amount claimed is fair and reasonable.

[117] In the light of the aforegoing I am not satisfied that the plaintiff has proved on a balance of probabilities, firstly that the amount of N$9800 forms part of the damages suffered by him as a result of the defendant's alleged breach of the lease agreement and secondly that the said amount is fair and reasonable. It follows therefore that the defendant stands to be absolved from the instance in respect of

the amount of N$9 800.

[118] The next item which is not repairs related but forms part of the sum of N$96 498.60, is the sum of N$20 000 described as ‘Missing 4 x palm trees, 1x lemon tree and 3 large succulents (price to be confirmed)’.

[119] It would be recalled that Ms Galitskaia testified that she obtained a quotation from Ferreira’s Garden Centre indicating the costs to replace the four missing palm trees to be N$21 600, for a lemon tree N$2389.99, and three succulent plants to be N$1050. The total amount including VAT is N$ 25 039.99.

[120] It was put to Ms Galitskaia during cross-examination that the lemon tree and the succulent plants died due to water restriction which was imposed by the municipality. She conceded that that was possible. She however insisted that she was not informed by the defendant that there was a problem with the trees. In respect of one palm tree the witness also conceded under cross-examination that the defendant had informed her that it was overrun by G4S security company’s motor vehicle and as a result it died eventually.

[121] It was further put to Ms Galitskaia under cross examination that the palm trees died during 2018 due worms infestation. She respondent that she was not informed that there was a problem with the palm trees. She testified that the palm trees had grown and did not require watering. She was convinced that the defendant’s husband dug out the palm trees and sold it away. It is common cause that Mr Smith is a manager at Ferreira’s Garden Centre. The insinuation appeared to be that he sold the palm trees to Ferreira’s Garden Centre. Mr Smith rejected the said insinuation and explained that it takes about two years to nurture a palm tree after one has dug it out before one can replant it again.

[122] I consider Ms Galitskaia’s assertion that the palm trees were removed and sold, to be mere speculation. No evidence was adduced to support such allegation. If Ms Galitskaia seriously believed that the palm trees had been sold one wonders why no criminal charge was laid with the police. The defendant testified that she had

informed Ms Galitskaia's daughter about the condition of the palm trees. I consider the defendant's version more probable. However I found the defendant's behaviour troublesome. It should have been the easiest thing to do to inform the plaintiff's representative firstly, that the palm trees have been infested with worms and secondly, that they ultimately died. In my view that would have been the most responsible thing to do. The defendant's conduct in this regard leaves a dark cloud hanging over her head.

[123] As regards proof of the quantum claimed in respect of the palm trees, no expert evidence was led. The person who prepared the quotation was not called to testify. Ms Galitskaia is not an expert in the market value or prices of palm trees. It this regard it was held in *Eyambeko Construction CC* that a quotation is not conclusive evidence of quantum of damages.[6]

[124] In the light of all the considerations and findings, I am of the considered view that the plaintiff has failed to prove on a balance of probabilities that the defendant breached the agreement in respect of the missing palm trees, which caused the plaintiff to suffer damages. In addition the plaintiff has failed to prove the quantum of the alleged damages he suffered as a result of the missing palm trees. It follows therefore that the defendant stands to be absolve from the instance in respect of this claim. I turn to consider the repairs related claims.

[125] The claims related to the repairs carried out in respect of the defects, are to be viewed and considered with reference clause 5 of the agreement which reads as follows:

'The Landlord shall keep all main walls and roof in order but does not hold himself responsible for the damages caused through the Tenant's negligence. The Landlord shall maintain the exterior and interior of the premises in good order and condition.' (underlining supplied for emphasis)

[126] Clause 6 of the lease agreement is also relevant. It reads in part with regard to the tenant's (the defendant's) responsibilities as follows:

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[6] *Eyambeko Construction CC v FP Du Toit Group* (HC-MD-CIV-ACT-DEL-2018/01104) [2020] NAHCMD 220.

'The Tenant shall be responsible for the inside of the premises together with all locks, keys, fastenings and conveniences and for plates and other glass, and acknowledges to have received that same in good order and condition, and undertakes to maintain and deliver up to the same at the expiration or sooner termination of this Lease, in the like good order and condition, reasonable wear and tear and damage by fire expected.' (underlining supplied for emphasis)

[127] Before I consider the meaning and import of the clauses quoted above, I deem it necessary to refer to what the learned author Kerr[7] says with regard to the respective duties and obligations of the tenant and the landlord. According to the learned author, if a lessee undertakes to 'maintain the premises in good repair, he does not have to put them initially into that condition – that remains the lessor's duty'.

[128] The meaning of the phrase 'fair wear and tear' is also relevant. Kerr (supra) explains the concept at page 306 as follows:

'The phrase 'fair wear and tear' refers to 'dilapidation or depreciation which comes by reason of lapse of time, action of weather ,etc, and normal use and the exception removes from the ambit of the lessee's undertaking, and leaves with the lessor, the responsibility for the repair which become necessary owing to such wear and tear.'

[129] Keeping in mind the legal principles referred to in the preceding paragraphs I proceed to deal with the individual claims for repairs. But before doing so I should make some general observations here. Firstly the plaintiff's claims relating to repairs done do not admit any wear and tear. Secondly the claims do not differentiate between the costs for labour and the costs for materials. Thirdly, invoices which were issued by Country Plumbing and Renovations CC to the plaintiff are contained in a three page undated document. It is clear that the invoices were not issued when specific repairs were done. Fourthly, no quotations were sourced from other service providers in order to facilitate the assessment in prices of materials and labour rates. This makes it impossible for the court to determine whether the amounts charged for materials and labour are fair and reasonable by comparing the different quotations.

[7] A J Kerr *The Principles of the Law of Contract* 6 ed at 308.

Having said that I now proceed to consider individual repair costs submitted into evidence by Ms Galitskaia together with invoices from Country Plumbing CC.

[130] The first line item on the list of repair costs is the costs incurred by the plaintiff to clean the swimming pool after the defendant and her family vacated the premises. A sum of N$1818.22 is claimed. The basis of the claim is stated as: 'Swimming pool left dirty (see photos) despite initial arrangement.' The photo was admitted in evidence as exhibit '2X' It depicts a swimming pool's cover removed at the corner of the pool. The swimming pool water is visible depicting a dark colour and in an unclean state. The defendant disputed that she was under contractual obligation to clean or maintain the swimming pool.

[131] Earlier in this judgment I considered the question who, between the plaintiff and the defendant was responsible for the cleaning and maintenance of the swimming pool. I found that the plaintiff has failed to prove that the defendant had agreed to clean and maintain the swimming pool when the agreement was concluded for the third time.

[132] It was put to Ms Galitskaia during cross-examination that the lease agreement attached to the summons does not impose an obligation on the defendant to maintain the swimming pool. She referred the court to clause 6 of the agreement. I have carefully read clause 6 of the lease agreement. It does not impose an obligation on the defendant to maintain the swimming pool. The legal position as articulated by Kerr (supra) is that the plaintiff as the lessor retains any responsibility in respect of the leased premises which has not clearly shifted to the defendant as the lessee. It follows thus that in the present matter the plaintiff retained the obligation towards the swimming pool.

[133] As regards proof of damages and quantum, the invoice from Country Plumbing & Renovations CC is cryptic; it simply states: 'Cleaning swimming pool labour and material included – N$1640'. To my mind, the invoice ought to have described what chemicals were used to clean the swimming pool and in what quantity. Equally the hours spent on cleaning the pool should have been disclosed with a corresponding hourly rate. Mr Hoeseb did not claim to be an expert in

swimming pools. There is no explanation why quotations were not sourced from well-known professional entities such as LIC Pool or Sundance Pool who specialize in maintenance and cleaning of swimming pools in Windhoek.

[134] During cross-examination Ms Galitskaia admitted that the pump for the swimming pool was still defective. Given this admitted fact, it begs the question how Mr Hoeseb could have cleaned the swimming pool with a pump that was defective. In this connection there was evidence that the pump was not connected to the municipal waste water discharge system. Whereas a photo depicting the state of the swimming pool before it was cleaned was placed before the court, the court was not provided with photos taken (if any) of the pool after it had been cleaned. In my view this is a relevant consideration.

[135] In the light of the foregoing considerations and findings, I am of the considered view that the plaintiff has failed to prove on a balance of probabilities that it was the defendant's obligation to clean the swimming pool. Furthermore, the plaintiff failed to prove that there is a .causal connection between the sum of N$1818.22 and the defendant's conduct. In any event the plaintiff failed to prove that such amount is fair and reasonable. It thus follows that the defendant stands to be absolved from the instance in respect of this claim. I turn to consider the next item.

[136] An amount of N$15 000 is claimed in respect materials and labour employed to remove the carpets and to replace it with tiles in three of the four bedrooms. It is to be recalled that Ms Galitskaia testified that the carpets in the three bedrooms were replaced with tiles after the defendant and her family vacated the house. She could not shed any light about the status of the carpets before the plaintiff moved in. She also did not know how old the carpets were, even though she had been managing the property since 2012 – a period of ten years. According to her, the carpets were badly stained. It was her decision – not the plaintiff's – to replace the carpets with the tiles. She testified that the tiles were cheaper than the carpets. She conceded that she was not an expert either in tiles or carpets.

[137] Ms Galitskaia's opinion that the tiles were cheaper than the carpets, could have carried weight if for instance quotations were sourced from well-known carpet

suppliers such as Flordeck and from tile suppliers such as CTM. That would have placed the court at a vantage position to compare the costs based on the quotations for tiles and for carpets in order to determine whether it is indeed so that the tiles are cheaper than the carpet. I think it is fair to say that the names of CTM and Flordek as suppliers of tiles and carpets respectively are notorious and that this court would have been entitled to take judicial notice thereof.

[138] It was further put to Ms Galitskaia during cross-examination that the roof leaked and that the leaking water damaged the carpets. She agreed that she was aware that the roof leaked but denied that the carpets were damaged by water leaking from the roof. On the other hand it was suggested to Mr. Smith that the pungent smell of the carpets smelled like animal urine. He rejected the suggestion and testified that their dogs were not allowed inside the house.

[139] I prefer the defendant's version over that put forward on behalf of the plaintiff. The reason for that is that while the defendant lived in the house she experienced the water leakage from the roof. It was common cause that the roof was repaired only after the defendant had vacated the house. In fact it would appear that even the plaintiff himself was aware that the roof was leaking. That must have been the reason why he had made arrangement with the defendant to retain the rent for February 2021 in order to pay the repairer of the roof. Under those circumstances it is most probable that the leaking water indeed damaged the carpets.

[140] As regards the sum of N$15 000 charged by Mr Hoeseb of Country Plumbing & Renovation CC, no evidence was led as to how the amount has been calculated and arrived at. Invoice 4 simply states 'Description: Tiling of floor at 3 bedrooms (totaling 42m^2). Labour and materials included N$15 000.' Whereas the size of the area tiled is specified, Mr Hoeseb did not state his rate charged per square meter. Neither was evidence led about the average rate charged in the tiling industry. To complicate matters, the costs for labour and the materials were bundled together.

[141] Again, like with expenses for the swimming pool, there is no evidence from which well-known suppliers of tiles, such as CTM or Pupkewitz Mega Build, that he bought the tiles. Neither is there evidence of how many bags of cement or grout he

bought and used. It is fair to assume that there were receipts issued in respect of the purchase of the materials purchased. Why such receipts were not tendered into evidence is not explained.

[142] Mr Hoeseb did not testify as an expert witness but merely as a factual witness. He however testified that that he has experience in plumbing, tiling, repair of appliances and the repair of roofs and ceilings. He could however not explain the concept ‘wear and tear’. He could further not explain how he arrived at each of the amounts he invoiced the plaintiff.

[143] It follows therefore, in my view, that the plaintiff has failed to prove on a balance of probabilities that the costs for buying the materials in connection with the tiling of the three bedrooms as well as the labour costs were fair and reasonable. The defendant stands to be absolved from the instance in respect of this claim. I move to consider the next item.

[144] An amount of N$400 constitutes part of the repair costs indicated as item 5 on Ms Galitskaia’s list. It is described on the repair costs list as ‘Carpet cleaning in fourth bedroom (lots of stains despite first professional cleaning.)’.

[145] The next item related to cleaning of the house is item 10 on the list. It is described on the list as:

> ‘Cleaner services (3 days labour and materials: N$750.00 + N$568.74) = N$1318.74.’

[146] This claim is based on Ms Nyundu’s cleaning works. Ealier in this judgment I summarised Ms Nyundu’s evidence. I have no issue with her testimony or with her as a witness. The evidence by Ms Nyundu was that she commenced with the cleaning on 12 March 2021. She went back again on 24 March 2021, 27 March 2021 and finally on 29 March 2021. She testified that her daily rate was N$250 from 07h00 to 18h00. Exhibit “13” shows that she was paid N$170 on 12 March 2021 because she worked half day. Exhibit 14 shows that on 24 March 2021 she was paid N$260

'because the house was too dirty'. Exhibit "15" shows that on 27 March 2021 she was paid N$250 and on 29 March 2021 she was paid N$180.

[147] The defendant testified that before she moved out she caused the house to be cleaned by a professional cleaning service company. An invoice for cleaning service from Kosha Service was attached to her evidentiary affidavit marked 'F'. It is dated 27 February 2021. It further reflects a sum of N$1759.50 as due. The defendant testified that she paid that invoice. The invoice shows an amount charged for transport, the products used to clean and well as the areas which were cleaned. The defendant's stance in respect of this claim is that given the fact that she caused the house to be clean immediately before they vacated the house, she denied being liable to the plaintiff for the payment of the sum of N$1318.74.

[148] The plaintiff's witness, Ms Galitskaia did not dispute that the house was cleaned by professional people when the defendant vacated the house. It is also clear from Ms Nyundu's evidence that two weeks passed after the defendant had vacated the house and before Ms Nyundu could do her cleaning. Furthermore, the receipts for cash paid by Ms Galitskaia show that Mr Hoeseb received the first cash of N$3500 on 2 March 2021 to purchase material for the repair of the ceiling. He continued to receive cash henceforth intermittently until 31 March 2021 when he received cash of N$1640 for cleaning the swimming pool. Ms Nyundu also testified during the time she did the cleaning of the house there were people doing repair works around the house. Against that background, it means that in assessing the evidence concerning the claim for the expenses of the cleaning aspect, the court has to factor in the fact that during that period of almost a month the house was unoccupied and there was ongoing repair work been carried out in the house.

[149] Under the circumstances described in the immediate preceding paragraph I am of the view that it is more than probable that the house became dirty or untidy given the repair works which were taking place in and around the house. I am therefore satisfied that the probabilities favour the defendant's version that she caused the house to be cleaned before she moved out. It would have been a

different consideration if there was no evidence that the defendant hired and paid a professional entity to clean the house before she vacated the house.

[150] Given the undisputed facts that the defendant had caused the house to be cleaned before she moved out, I do not see any sound legal basis why the defendant should be held liable to pay the plaintiff the sum of N$1318.74 as damages while she had already spent more money on cleaning the house. The plaintiff's claim for N$400 for cleaning of the carpet as described in paragraph [144] above stands to fall the same fate as the claim for N$1318.74. It would appear to me in considering the issue of cleanness of the house or otherwise involves a subjective element. By this I mean what appears to be a clean house to one person might not be the case to another person. In this connection Mr Lombard for the defendant, correctly in my view, pointed out Ms Galitskaia aim was to have the house squeaky clean because she was marketing the house for lease.

[151] The conclusion, I have arrived on this item is that the plaintiff has also failed to prove on a balance of probabilities that the defendant breached the agreement by failing to return the house in a state it was when she took occupation thereof. In addition the plaintiff failed to prove that the sum of N$1318.74 is fair and reasonable. The defendant stands to be absolved from this claim.

[152] The next sub-item claimed under the global amount of N$96 498.60 is the sum of N$3912.90. Invoice 1 provides a description of work done as follows: 'Balancing cupboards in all bedrooms,fixing broken cupboard handles, door handle to laundry, broken hinge of security door, lock replacement at balcony, replacement of 3 way switch, fixing awning hinge, and replacement of broken glass at hobby room Labour and materials included – N$4 675'. I should point out that there is a discrepancy between the description of the work done as per invoice 1 and the list drawn up by Ms Galitskaia. The latter contains 'missing key in balcony door, missing plug cover, broken wooden door trap in the kitchen.' These items are not on invoice 1. There is also a difference between the amount on invoice 1 which is reflected as N$4 675 whereas the lists reflects the amount as N$3 912.90. The discrepancy was not explained and no amendment of the particulars of claim was sought before the

plaintiff's case was closed or at any time thereafter. In this regard, the well-established principle is that unless an amendment is sought and granted a party falls or stands by his or her pleadings.

[153] The defendant's attitude regarding this item, is that work done and invoiced for in respect of this claim, resorted under wear and tear. I do not agree. I do so for the reason that in terms of clause 6 of the agreement the defendant agreed to be responsible for the inside of the premises 'together with all locks, keys, fastenings and conveniences and for plates and other glass. In my view, except for the 'broken wooden trap in the kitchen, all the items repaired fall within the obligation assumed by the defendant in clause 6 of the agreement.

[154] As regards the broken wooden trap door in the kitchen, it appears from the photos that the ceiling is made of pine timber consisting of small pine timber glued together. It is a high ceiling not easily reachable unless by means of a high ladder. Three pieces fell off. It was clear that the pieces fell off due to water leakage of the roof or simply due to wear and tear. During closing oral submissions Ms Kasuto wisely conceded that the trap door was indeed an issue of wear and tear and could not be ascribed to the defendant's conduct. The concession means that the plaintiff has abandoned the evidence to prove that he was entitled to be compensated for the costs incurred in repairing the wooden trap door. Unfortunately, the costs incurred in repairing each item under this sub-heading were not kept apart.

[155] In respect of the quantum, neither Ms Galitskaia nor Mr Hoeseb could explain how the amount of N$3912.90 was calculated and arrived at. As pointed out elsewhere in this judgment, the practice by Mr Hoeseb in preparing his invoices was that the costs for materials and labour were not separated. This makes it impossible for this court to determine whether the amount claimed is fair and reasonable. For instance even though a concession was made in respect of the costs for repairing the trapdoor it is not possible to subtract that cost from the global amount of N$3912.90 charged under this heading.

[156] In my view, the amount appears to be on the higher side if assessed against the type of work done. It is a type of work which could be undertaken as on DIY - 'do

it yourself' - basis on a Saturday morning. Earlier in this judgement, I referred to *Esso Standard SA*[8] (supra) where a court's approach to assessment of damages is discussed. I respectfully fully align myself with that approach. In that matter, the court warned that it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis on evidence or, an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could have been made.

[157] In the present matter the plaintiff and those who acted on his behalf and advised him failed to adhere to the basic approach to the preparation of an invoice namely to show costs for labour separate from the costs of the materials used. The plaintiff could have produced receipts for the purchase of the materials used to effect the repairs. Surely such evidence was available but has not been produced. As far as labour is concerned, evidence should have been produced as to how many hours the contractor spent on repairing the defects and what his charge-out rate was. It is fair to assume this information was available to the plaintiff but the plaintiff failed to produce available evidence upon which a proper assessment of his alleged quantum could have been made. If such information was not available, the court was not appraised of the reason why it was not available. In the circumstances, I decline to embark upon arbitrary approximation of alleged damages suffered by the plaintiff. The defendant thus stands to be absolved from the instance in respect of this claim. I turn to consider the next item.

[158] The next item which forms part of the total amount of N$96 498.60 is item number 7 for the sum of N$42 285.98. It is described on the list prepared by Ms Galitskaia as: 'Repair of 7 windows (Wispeco, vertically sliding) replacement of wheels on sliding doors and fixing of night locks on sliding doors, door handles (as per initial agreement) N$42, 285.98.' Invoice number 2 issued by Mr Hoeseb in respect of this item reads: 'Description: Repair of 7 Wispeco windows (new spare plus fixing of existing parts), replacement of damaged wheels and fixing of night locks on sliding doors, fixing of wobbling door handles, wooden door trap fixing. Labour and materials included – N$39 820.'

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[8] *Esso Standard SA v Katz* 1981(1) SA 964 (A).

[159] The first thing to be noted is that there is a difference between the amount of N$42 285.98 as indicated on the list prepared by Ms Galitskaia and the amount of N$39 820 charged on the invoice of Mr Hoeseb. This discrepancy was not explained or clarified during evidence. It is to be recalled that Mr Hoeseb testified that in respect of this item he first received N$12 500 in cash from Ms Galitskaia to buy spare parts and manufacture new parts. Thereafter he received a further sum of N$17 610 after he completed the work. The two amounts added together is N$30 110. He then issued the plaintiff with the second invoice with the amount of N$39 820. It is clear that the figures do not add up.

[160] Neither Ms Galitskaia nor Mr Hoeseb could explain how the amounts, whether N$42 285 98 or N$39 820 have been made up and calculated. Ms Galitskaia was questioned whether she knew when the windows were installed. She replied that she did not know. The defendant's case was that the windows and sliding doors were old and have not been maintained for many years. She denied that she caused any damage to the windows and attributed any defect to wear and tear.

[161] I think this court is entitled to take judicial notice of a notorious fact that Wispeco, the manufacturer and distributor of the windows and doors in question, is based in Windhoek and other main towns in Namibia. No explanation was tendered why expert evidence could not have been obtained or tendered by an expert from Wispeco about the status of the windows and doors and what was the cause of their disrepair. There was evidence that certain spare parts could not be obtained and Mr Hoeseb had to manufacture those parts himself. It is difficult to conceive how the Wispeco windows could be damaged by the defendant. In my view, the fact that certain spare parts could not be supplied by Wispeco, seem to suggest that the windows are old and out of production. I think it is fair to say that it is common knowledge that wheels of sliding doors do get worn out after a certain period depending on usage and require replacement after a reasonable period of usage. In my view the worn out wheels would fall under wear and tear.

[162] Having regard to the quality of evidence placed before me in respect of this claim, I am not satisfied that the plaintiff has proven on a balance of probabilities that

the claim in respect of this item was caused by the breach of agreement by the defendant. On the contrary the evidence suggests that the repair was necessitated by ordinary wear and tear. As regards the quantum, there are glaring and unexplained contradictions in the amounts presented in evidence. In addition, I am of the view that the plaintiff could have presented evidence of expert nature from Wispeco. He failed to do so. In the result the defendant stands to be absolved from liability in respect of this claim.

[163] The next item on the list compiled by Ms Galitskaia was item number 10. It reads: 'Alarm system (not working) – N$2 500.00'. During her testimony in respect of this item Ms Galitskaia produced in evidence Tax invoice from Techno Alarms showing a sum of N$2 875. The description of work done reads: 'Rewire radio transmission to G4S, replace fuses that is bridged with wire and missing battery terminals, install new battery and replace missing door contact as per quote.'

[164] Like with other items, no expert witness was called from Techno Alarms to testify what could probably have been the cause of the alarm not functioning. And or that the malfunctioning was caused by the defendant's conduct. In addition, no evidence was led that the work done was necessary and that the amount claimed was fair and reasonable. Again no explanation was given why a technician from Techno Alarms, was not called to testify as an expert. Judging from the information on the invoice Techno Alarms is based in Windhoek. The evidence presented in this regard was insufficient to prove both that the repair was necessary and that the amount charged is fair and reasonable.

[165] My conclusion in respect of this claim is again that the plaintiff has failed to prove on a balance of probabilities that the fact that the alarm was not working was caused by the defendant's conduct and that such breach caused the plaintiff to suffer damages in the sum of N$2500. Accordingly, the defendant stands to be absolved from this claim. I move to consider the next item.

[166] Item 11 was the claim for the sum of N$440 in respect of garden services rendered for a period of two days. The gardener who carried out the cleaning work or a witness from an entity which rendered the garden cleaning services was not called

to testify. During her testimony Ms Galitskaia referred the court to video that depicted leaves gathered at the patio. It was put to her that trees regularly shed leaves. She agreed. In my view it cannot be blamed on the defendant that after she had left, the trees shed leaves which caused the need for the premises to be cleaned.

[167] I am of the considered view that the plaintiff again failed to prove this claim on a balance of probabilities. Accordingly, the defendant stands to be absolved form this claim.

[168] The last item which makes up the sum of N$96 498.60 is the sum of N$1022.76 claimed in respect of replacing light bulbs in and around the house. Mr Hoeseb testified that most of the bulbs were not working. According to him six bulbs of the chandelier were missing and that only two were working. He further testified that he replaced one flourescent tube in the garage; one bulb in the corridor; and three bulbs in the bedroom. It was his evidence that he had to replace the whole light unit in the main entrance. He also replaced a bulb at the washing line. He then issued an invoice for the sum of N$1022.76 inclusive of labour and materials.

[169] In my view, this claim suffered from the same defects as others earlier considered. The costs for labour and materials have not been separated. There are for instance many type of bulbs for instance LED bulbs which are more expensive than the incandescent light bulbs. I would also expect the bulbs for the chandelier to be different from the normal bulbs. There is no explanation why the receipts in respect of the purchase of the bulbs were not tendered in evidence. Further there is no evidence as to how long it took Mr Hoeseb to replace the bulbs and what were his costs for labour. Again, I think that it is fair to assume that this evidence ought to have been available but it was not placed before court. If the receipts were not available for one or other reason no explanation was given to court as to what happened to such receipts.

[170] It follows that on the evidence before court the plaintiff has likewise failed to prove this claim on a balance of probabilities, both in respect of the merits and quantum. In the circumstances, the defendant stands to be absolved from the instance in respect of this claim.

Conclusion

[171] In summary and in conclusion, some of the plaintiff's claims stand to be dismissed and in respect of other claims due to insufficient evidence presented the defendant stands to be absolved from the instance.

Costs

[172] The normal rule is that costs follows the result. The plaintiff failed to prove his case. Accordingly, the defendant is entitled to be reimbursed the costs she incurred in defending the plaintiff's case against her.

Order

[173] In the result, I make the following order:

1. The plaintiff's claim in the sum of N$600 as penalty for the alleged late payment of the February 2021 rental is dismissed.

2. The plaintiff's claim in the sum of N$15 000 representing the alleged rental for March 2021 is dismissed.

3. The plaintiff's claim in the sum of N$4761 being expenses relating to the repair of the fence around the house is dismissed.

4. An absolution from the instance is granted in respect of the claim in the sum of N$96 498.60 for alleged expenses incurred by the plaintiff for works and repairs in respect of the house.

5. The plaintiff is to pay the defendant's costs.

6. The matter is removed from the roll and is considered finalized.

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H ANGULA

Deputy Judge-President

APPEARANCES

PLAINTIFF: N N KASUTO
Of Kasuto Law Chambers, Windhoek.

DEFENDANT: J LOMBAARD
Of PD Theron & Associates, Windhoek.