**REPUBLIC OF NAMIBIA**

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

**JUDGMENT**

In the matter between: HC-MD-CIV-ACT-CON-2019/04951

**ERREICHT FARMING CC** **PLAINTIFF**

and

**EVERHARDUS PETRUS FACKULYN GOUS** **DEFENDANT**

**Neutral citation:** *Erreicht Farming CC v Gous* (HC-MD-CIV-ACT-CON-2019/04951) [2022] NAHCMD 492 (20 September 2022)

**Coram:** MILLER AJ
**Heard**: **1 June 2022**
**Delivered**: **20 September 2022**

**Flynote**: Civil procedure – Contracts – Lease agreement – Partial performance – Reduction of obligations – Incorrect calculations of amounts claimed – Counterclaims dismissed – Plaintiff's claim upheld on corrected amounts.

**Summary**: On 10 August 2009 the plaintiff and the defendant concluded a written lease agreement. The rental payable was agreed at N$28 750 per month (including VAT) and was payable free of deduction and set off, which amount was payable on

or before the 10th day of each month commencing on 10 July 2009. In effect the defendant leased the entire farm, together with the improvements thereon and the game, the latter which was agreed to be 500 springboks and 30 Oryx.

By way of a further agreement between the parties in October 2018, the rental amount was reduced to N$15 000 per month. The defendant filed a counterclaim containing six claims. The defendant further seeks some interdictory and eviction relief i.e the eviction of the plaintiff from utilizing the improvements on the farm and interdicting the plaintiff from hunting on the farm or grazing cattle on the farm. Notably, this is not accompanied by any tender to pay the agreed rental should the relief be so granted.

*Held*, that the counterclaims must fail because there is no acceptable evidence to substantiate the amounts claimed by the defendant. No expert testimony was tendered to establish the reasonableness or otherwise of the amounts claimed by the defendant. There is insufficient evidence upon which it is possible to make any assessment of the value of the claims.

*Held further that*, the plaintiff is incorrect in its calculation of the amounts due however their claim succeeds with the correct calculations as reflected in the order.

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**ORDER**

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There will be judgment for the plaintiff in the following amounts:

1. N$200 000 plus VAT being the rental for the period February 2018 to September 2018.

2. N$165 000 excluding VAT being the rental payable for the period October 2018 to August 2019.

3. Interest on the aforesaid amount at the rate of 20% per annum a tempore morae.

4. The counterclaims are dismissed.

5. The defendant is ordered to pay the plaintiff's costs which will include the cost of one instructing and one instructed counsel.

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**JUDGMENT**

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MILLER AJ:

[1] The plaintiff is a close corporation. The sole member of the plaintiff is Mr Louis van der Westhuizen. The plaintiff was at all material times the owner of the farm Erreicht.

[2] The defendant is an admitted legal practitioner practicing under the name and style of Evert Gous Legal Practitioners at 22 Promenaden Road in Windhoek. The defendant described himself, apart from the above as a part-time farmer and registered professional hunter.

[3] On 10 August 2009, the plaintiff and the defendant concluded a written agreement of lease. The lease commenced on 1 April 2009. It was further agreed that the initial period of the agreement was for a period of 5 years. Upon expiry of the initial period, the lease shall continue for an indefinite period '. . .on condition that each party can give to the other party one year's written notice of his intention to terminate the agreement; on condition that such written notice is given six months before the expiry of the initial period of 5 years and annually thereafter six months prior to the annual renewal i.e. before and or the first December of any year in order to terminate the lease by 30 June in the next year: unless terminated by mutual agreement between the parties at any other time'.

[4] The rental payable was agreed at N$28 750 per month (including VAT) and was payable free of deduction and set off, which amount was payable on or before the 10th day of each month commencing on 10 July 2009.

[5] In effect, the defendant leased the entire farm, together with the improvements thereon and the game. The latter was agreed to be 500 springboks

and 30 oryx. Despite the wording relating to the game which ostensibly formed part of the lease, the plaintiff and the defendant are *ad idem* what was actually being leased was something different. What they actually intended was that the defendant was entitled to hunt the game on the farm but at the conclusion of the agreement, for whatever reason, 500 springboks and 30 oryx had be returned to the plaintiff together with the other assets that were subject to the lease.

[6] This must be read together with clause 4.1 of the agreement which reads as follows:

> '4.1 The farm is let to the Lessee for the purposes of conducting the farming activities of livestock farming, game farming, hunting and all objects ancillary thereto and shall not be used for any other purpose whatsoever.'

[7] Following upon the conclusion of the agreement, the defendant took occupation of the farm, as defined in the agreement. The defendant brought a number of his own stock onto the farm. In addition, he leased livestock from the plaintiff and his wife in terms of a separate agreement.

[8] In a further development during July 2014, and by way of a verbal agreement admittedly concluded between the parties, the plaintiff was permitted to once more take occupation of ostensibly the major portion of the farmstead and to utilise two camps on the farm measuring approximately 2000 hectares in order to graze cattle.

[9] By way of a further agreement between the parties in October 2018, the rental amount was reduced to N$15 000 per month. This was mainly due to deteriorating farming conditions and to drought which prevailed in the area where the farm was located. In order to make sense of the arrangement, regard must be had to the fact that the rental for the farm was N$25 000 per month (excluding VAT) together with the sum of N$15 000 for the livestock that the defendant rented from the plaintiff in the sum of N$15,000 per month which in turn totals N$40 000 per month. In terms of the 2018 agreement the rental for the farm was reduced to N$15 000 per month over the rental of the livestock was reduced to N$16 000 per month (including VAT), which totals N$25 000 per month. The agreement to reduce the rental payable,

probably has its origin in clause 18 of the agreement which provided for a proportionate abatement of the rent in certain circumstances.

[10] It is common cause that the defendant ceased paying any rent to the plaintiff since February 2018. The defendant nonetheless remained in occupation of the farm until at least June 2019, when the defendant removed the last of his cattle from the farm. On 19 July 2019, the plaintiff demanded payment of the arrear rental and when no payment was made, the plaintiff on 16 September 2019, gave the defendant notice in terms of clause 10.1 of the agreement to cancel the agreement. As indicated, the defendant had by then in any event already vacated the farm, for all practical purposes.

[11] The plaintiff's claim is for payment of the outstanding rental, together with interest and costs. In its particulars of claim, the amount claimed is N$488 750. This amount is arrived at by calculating the amount of N$28 750 for a period of 17 months, being the period between February 2018 and June 2019. This calculation overlooks the fact that in October 2018 the rental was reduced to N$15 000 per month (VAT included). This will result in a reduction of the amount claimed. If need be I will return to that in due course.

[12] In his plea, the defendant admits to not paying the rent agreed apart from time to time. He pleads that he was not obliged to. As is apparent from paragraphs 1.6 to 1.10 of the pre-trial order, that the plaintiff too breached the agreement by:

a) Illegally hunting game on the farm.
b) Depriving the defendant of the use of the improvements.
c) Grazing 100 head of cattle on the farm.
d) Grazing 100 head of sheep on the farm.

[14] In addition, the defendant filed a counterclaim containing six claims. In claim 1, the defendant claims the sum of N$5 000 per month calculated from 1 December 2016. This is in respect of the alleged deprivation of the improvements. What the defendant has in mind and the fact that the plaintiff occupied the house for a period of time. The sum claimed is N$225 000. Claim 2 has to do with the allegation that the plaintiff grazed cattle on the property. An amount of N$520 000 is claimed.

Claim 3 relates to the grazing of the 100 head of sheep. The amount claimed is N$145 000. In claim 4, the defendant claims that because of the plaintiff's breach of the agreement he was forced to relocate 100 head of cattle at a cost of N$54 000. Claim 5 is for payment N$15 000 being the cost of alternative grazing for the cattle so relocated. Claim 6 is for payment of N$1 750,000 as a result of illegal hunting on the farm by the plaintiff.

[15] I may add for the sake of completeness that in the pleadings the defendant seeks some interdictory and eviction relief i.e seeking the eviction of the plaintiff from utilizing the improvements on the farm and interdicting the plaintiff from hunting on the farm or grazing cattle on the farm. Notably, this is not accompanied by any tender to pay the agreed rental should the relief be so granted, and from that date onwards.

[16] As may be apparent from the synopsis of the issues in the proceeding paragraphs, the defence to the plaintiff's claim and the counterclaim is in principle based on the *Exceptio non adimpleti contractus*. In the matter of BK Tooling (Edms) Bpk v Scope Engineering (Edms) Bpk [1978] ZASCA 1 (15 November 1978) Parallel citation: 1979 (1) SA 391 (A) in then Appellant Division of the Supreme Court in South Africa, approved of the views expressed by Ines CJ in *Heamann v Nortje* 1914 AD 293 to the effect that in cases where there has been partial performance by one party which was accepted and utilized by the other party, the court retains a discretion to relax the principles of reciprocity.

[17] It is apparent from the facts of this case that insofar as the homestead is concerned, the defendant accepted and agreed to the plaintiff utilizing the major section of the homestead and availed roughly 2 000 hectares of the farm for the benefit of the plaintiff to graze livestock. It is apparent firstly that the defendant accepted and agreed to what he now claims was only partial performance on the part of the plaintiff. Secondly, even if there was only partial performance, the defendant would have been entitled to a proportionate reduction of his obligations. It did not entitle him to withhold his entire performance in terms of the agreement. It follows in my view that the purported reliance on the exception as a defence to the plaintiff's claim for the rental which became due, must fail. The same applies to the allegation relating to the hunting of game on the farm. Admittedly, the lease

agreement entitled the defendant to hunt on the farm. The right thus conferred was not exclusive and the allegations in the papers that it was, finds no basis in the agreement or any of the facts of the matter. Nothing contained in the agreement granted the defendant the sole and exclusive right to hunt game on the farm.

[18] That leaves for consideration as far as a defence to the claim is concerned the issue of the plaintiff grazing cattle on the farm over and above what was agreed upon between the parties. In my view, it is apparent from a consideration of the evidence as a whole that the defendant claims that the farming operations conducted by the defendant became so impeded that he was entitled to withhold all and any payment which became due. If it was his case that there was a partial impediment of his farming operations which would entitle him to a reduction of his obligations, that was for the defendant to plead and prove what the nature of the impediment was, its extent, and to what extent his obligation should be reduced. Nothing to that effect was tendered in evidence or pleaded for that matter. The defendant in paragraph 8.4 of his plea, makes the bare allegation that the defendant became entitled to a remission of the rental payable, until such time as he was granted undisturbed possession. No attempt was made to plead and establish the amount by which the rental payable should be reduced.

[19] It follows in my view that there was no defence raised in the pleadings and the evidence should be rejected.

[20] Having come to that conclusion, the claims raised in the counterclaim should be considered.

[21] For the reasons already appearing earlier in this judgment, the claims must fail. In addition to that there is no acceptable evidence to substantiate the amounts claimed by the defendant. No expert testimony was tendered to establish the reasonableness or otherwise of the amounts claimed by the defendant. There is insufficient evidence upon which it is possible to make any assessment of the value of the claims. The counterclaims are likewise dismissed.

[22] I already indicated that the amount claimed by the plaintiff is incorrect. By my calculation the amounts due are those reflected in the order which follow.

[23] The following orders will be issued:

There will be judgment for the plaintiff in the following amounts:

1. N$200 000 plus VAT being the rental for the period February 2018 to September 2018.

2. N$165 000 excluding VAT being the rental payable for the period October 2018 to August 2019.

3. Interest on the aforesaid amount at the rate of 20% per annum a tempore morae.

4. The counterclaims are dismissed.

5. The defendant is ordered to pay the plaintiff's costs which will include the cost of one instructing and one instructed counsel.

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K MILLER

JUDGE

APPEARANCES

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| PLAINTIFF: | S J Jacobs<br>Van der Merwe-Greeff Andima Inc., Windhoek |
| DEFENDANT: | J P JONES<br>Theunissen, Louw & Partners, Windhoek |