

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/01293

In the matter between:

HADASAGA (PTY) LTD

FIRST PLAINTIFF

SOUTHERN CROSS SERVICES CC

SECOND PLAINTIFF

and

AHRENS GUNS AND AMMUNITION CC

FIRST DEFENDANT

ARMS AFRICA FIREARM AND SHOOTING

COLLEGE CC

SECOND DEFENDANT

EVERHARDUS PETRUS FAKCULYN GOUS N.O.

THIRD DEFENDANT

MASTER OF THE HIGH COURT

FOURTH DEFENDANT

EVERHARDUS PETRUS FAKCULYN GOUS

FIFTH DEFENDANT

Neutral citation: *Hadasaga (Pty) Ltd v Ahrens Guns and Ammunition CC and Others* (HC-MD-CIV-ACT-CON-2021/01293) [2023] NAHCMD 418 (20 July 2023)

Coram: COLEMAN J

Heard: 24 - 26 October 2022 and 24 March 2023

Delivered: 20 July 2023

Flynote: Occupation of premises by deceased estate – Contractual implications.

Summary: The deceased estate occupied premises owned by the first plaintiff. The deceased, while alive, conducted business on the premises through two close corporations and had an agreement with the owner of the premises in respect of the occupation of the premises. The owner communicated with the executor of the deceased estate in respect of the continued occupation of the premises. The executor avoided direct communication. The owner instituted action against the deceased estate for rent and ancillary payments. The executor did not testify or call any witnesses.

Held that, the executor had a number of aspects to explain and his choice not to testify or call any witnesses leaves the plaintiff's version as factual basis for deciding the matter. The first plaintiff's claims granted.

ORDER

1. The third defendant is ordered to pay the first plaintiff N\$3 535 990,47, plus interest calculated at the rate of 20 per cent per year from 1 January 2021, out of the Estate.
2. The third defendant is ordered to pay the first plaintiff N\$76 900, as damages, plus interest calculated at the rate of 20 per cent per year from the date of this order, out of the Estate.
3. The third defendant is ordered to pay the first plaintiff's costs, to include one instructing and one instructed counsel, out of the Estate.
4. The matter is removed from the roll and regarded as finalised.

JUDGMENT

COLEMAN J:

Introduction

[1] In essence, this is a claim by the owner of a premises occupied by two close corporations and a deceased estate for rent, ancillary payments and damages to the property. Due to my approach herein, I will address only the essential elements of the claims that I see as relevant.

Pertinent facts

[2] The first plaintiff (hereafter referred to as 'Hadasaga') is the owner of the property situated at 6 Gold Street, Prosperita, Windhoek. The late Sven Helmuth Ahrens ('Sven') passed away on 21 September 2016. The third defendant ('Gous') is the executor of Sven's estate ('the Estate').

[3] Sven was, at all material times, the sole member of the first defendant, and a 50 per cent member of second defendant. These close corporations conducted their respective businesses at all material times from Hadasaga's property.

[4] Hadasaga alleges that during or about November 2010, Sven and Hadasaga entered into a verbal agreement in terms whereof Sven rents the property from Hadasaga to use for the purposes of the businesses of the first and second defendants. No rent would be payable, but Sven would maintain the property, insure it, and be liable for the City of Windhoek account for the property as well as water and electricity usage. Gous pleads that he does not know about this and denies it.

[5] Hadasaga alleges further that after Sven's death, it entered into a verbal, alternatively, partly verbal partly written agreement ('the agreement') with Gous, as executor of the Estate, during or about November 2016, or January 2017, or on 14 February 2017. The core terms of the alleged agreement were that the Estate

remains in occupation of the property, free of charge, until the end of February 2017. A further alleged term is that Gous may elect to vacate the property in that time, but if the Estate remains in occupation, the Estate will be liable for payment of monthly rental to Hadasaga at a market related price. As part payment of the rental for 1 March 2017 to 30 July 2017, Gous will transfer ownership of a cooling truck from the estate to Hadasaga, to the value of N\$330 000. The Estate will also be liable for payment of the insurance payments for the property, the City of Windhoek account, and water and electricity usage.

[6] Hadasaga further alleges that the written part of the agreement is contained in an email dispatched to Gous on 25 January 2017. A copy of this email is annexed and marked 'A' to the amended particulars of claim.

[7] In the face of consistent communication and regular invoices having being sent to Gous, he remained in occupation of the property with the Estate until December 2020, despite having denied the existence of the agreement for the first time, on 11 July 2019.

[8] Hadasaga claims N\$3 772 000 in respect of rent for the property for the period of August 2017 to December 2020; N\$601 957,50 in respect of the City of Windhoek accounts paid for the period of 22 September 2016 to December 2020; and N\$142 509,14 in respect of insurance premiums for the period of 22 September 2016 to December 2020. The plaintiffs' counsel accepts that any portion of each of these amounts that became due and payable prior to 1 April 2018 had prescribed. Hadasaga also claims N\$76 900 in respect of damage to the property while occupied by the Estate.

[9] The following witnesses were called on behalf of the plaintiffs, Hasso Wolfgang Ahrens, Erwin Scriba, Gaby Ahrens, Petrus Jurie Scholtz, a registered sworn appraiser and Alex Mc Donald. Gous did not testify and the estate's case was closed without calling any witness.

[10] The evidence presented on behalf of the plaintiffs is elaborate and sets out the history and substance of the matter in some detail. What stands out is that Gous did not respond to the email of 25 January 2015. In addition, he communicated

evasively with Mr Ahrens whenever enquiries were made. He also did not respond to the regular invoices that were sent to him as executor of the Estate.

Conclusion

[11] I considered all the pleadings, evidence and submissions in this matter and mean no disrespect by not articulating specifics. The facts and submissions relating to the other defendants, and alternative claims, are, in my view, not pertinent to the avenue I have taken herein.

[12] In this matter, detailed evidence and some elaborate cross-examination on behalf of Gous was concluded with him not testifying and no witnesses being called on his behalf. One would have expected, in light of the established facts that Hadasaga had no control and limited access to the property until December 2020, while the Estate clearly operated from the property, that Gous would provide some explanation of his position. In addition, the email of 25 January 2015 contained clear terms for an agreement. Equally, the regular invoices represent demands for payment. Gous is a legal practitioner and should know better than to ignore it. One would expect that he would come and testify to explain his position in this regard as well. His conduct of the affairs of the Estate and his interaction with the Ahrens family leave a lot to be desired.

[13] In my view, the evidence presented on behalf of Hadasaga supports its allegations. Despite detailed cross-examination, no contradictory evidence was presented on behalf of Gous. An expert was called on behalf of Hadasaga to address market related rent for the property in question. He was cross-examined in some detail. However, no expert was called to contradict him.

[14] I agree with counsel for the plaintiffs that, under the circumstances, a negative inference is justified.¹ In my view, Gous cannot with conviction contend that the Estate has no case to answer in light of the evidence presented on behalf of Hadasaga, in this matter. I am satisfied that Hadasaga proved its case.

¹ *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at page 9C-D.

[15] As contended by counsel, the claims for the periodic payments should be reduced since the portions preceding 1 April 2018 prescribed. According to calculations provided on behalf of the plaintiffs, on request of the court, the following amounts remain after the prescription is factored in: N\$2 944 000 for rent, N\$500 147,55 for City of Windhoek accounts, and N\$91 842,22 for insurance, totalling N\$3 535 990,47.

Interest

[15] Interest is claimed on the periodic amounts from 2 July 2019, which is the date of the letter of demand. I am not satisfied that interest should be approached in this way. In my view, the last payment in respect of these claims became payable in December 2020. Consequently, it is in my view, more clear cut and fair to have interest run from 1 January 2021.

[16] Consequently, I make the following order:

1. The third defendant is ordered to pay first plaintiff N\$3 535 990,47, plus interest calculated at the rate of 20 per cent per year from 1 January 2021, out of the Estate.
2. The third defendant is ordered to pay the first plaintiff N\$76 900 as damages, plus interest calculated at the rate of 20 per cent per year from the date of this order, out of the Estate.
3. The third defendant is ordered to pay the first plaintiff's costs, to include one instructing and one instructed counsel, out of the Estate.
4. The matter is removed from the roll and regarded as finalised.

G COLEMAN

Judge

APPEARANCES

PLAINTIFFS:

R Lewies

Instructed by Engling, Stritter and Partners,
Windhoek

FIRST DEFENDANT:

D Small

Instructed by Theunissen, Louw & Partners,
WindhoekSECOND, THIRD AND
FIFTH DEFENDANTS:

JP Ravenscroft-Jones

Instructed by Joos Agenbach Attorney &
Notary, Windhoek