

**REPUBLIC OF NAMIBIA**



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

**EX TEMPORE JUDGMENT**

Case No: HC-MD-CIV-ACT-CON-2021/00203

In the matter between:

**BV INVESTMENTS 422 CC**

**PLAINTIFF**

and

**THE MINISTER OF WORKS, TRANSPORT AND  
COMMUNICATION**

**FIRST DEFENDANT**

**THE MINISTER OF SAFETY AND SECURITY**

**SECOND DEFENDANT**

**THE MINISTER OF FINANCE**

**THIRD DEFENDANT**

**Neutral citation:** *BV Investments 422 CC v The Minister of Works, Transport and Communication* (HC-MD-CIV-ACT-CON-2021/00203) [2022] NAHCMD 445 (21 July 2023)

**Coram:** USIKU J

**Heard:** 6 and 21 July 2023

**Delivered:** 21 July 2023

**Flynote:** Landlord and tenant – Lease – Breach – Agreement providing that the tenant shall keep premises clean, tidy, and in a sanitary condition at its own cost – Tenant handing back the premises upon termination of lease in a dilapidated state – Tenant liable to pay cost of repairs to restore the premises to lettable status – Tenant

liable to pay damages for loss of rental income for a reasonable period after termination of lease.

**Summary:** The plaintiff let its premises to the defendants. Upon the termination of the lease, the defendants handed the premises back to the plaintiff in a dilapidated state. The plaintiff sued the defendants for the cost of repairs to restore the premises to their original lettable status and for damages for loss of rental income for a period that the premises were unfit to be let out. The court grants judgment in favour of the plaintiff.

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### ORDER

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1. The court grants judgment against the first and second defendants jointly and severally, the one paying the other to be absolved, in the following terms:
    - (a) payment in the amount of N\$2 365 345.23;
    - (b) interest on the abovestated amount calculated at the rate of 20% p.a. from the date of judgment to the date of full payment;
    - (c) costs of suit.
  
  2. The matter is removed from the roll and is regarded finalised.
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### JUDGMENT

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USIKU J:

#### Introduction

[1] In this matter, the plaintiff claims cost of repairs and damages for loss of income arising from breach of a lease agreement entered into between the plaintiff and the first defendant. The claim against the second defendant is premised on vicarious liability, in that employees of the second defendant who took occupation of the leased premises, caused damage to the property, while acting within the scope and course of their employment with the second defendant.

## Background

[2] The plaintiff and the first defendant entered into a lease agreement in terms of which the plaintiff leased certain premises to the first defendant.

[3] The terms of the agreement were, amongst others, that:

- (a) the rental amount was N\$305 741.13 per month;
- (b) the duration of the lease was a fixed period commencing from 1 September 2017 and concluding on 28 February 2019; but renewable for another period of time to be mutually agreed upon by the parties;
- (c) either party may terminate the agreement at any time before the termination date, by giving the other at least four months notice prior to the termination date;
- (d) the defendant was to keep the premises clean, tidy and in a sanitary condition at its own cost, to the satisfaction of the plaintiff;
- (e) the defendant was to be responsible for the replacement of broken lights, toilet seats, doors, door handles, keys, windows, tiles and damage due to negligence.

[4] The plaintiff let the premises to the first defendant and the second defendant took occupation of the premises.

[5] On or about 29 August 2019, the first defendant served notice on the plaintiff, of its intention to terminate the agreement effective from 30 November 2019.

[6] On or about 9 December 2019, the plaintiff notified the defendants that the premises were in an unacceptable condition and that they needed to be restored to their original state as per the agreement, before handover to the plaintiff.

[7] The second defendant hired members of the police force to renovate and restore the premises back to their original state. However, the property was still in a deplorable condition with numerous defects.

[8] On or about 26 January 2021, the plaintiff issued out summons against the defendants seeking relief in the following terms:

- '1. payment in the amount of N\$4 535 555.14;
2. interest on N\$4 535 555.14, calculated at a rate of 20% per annum calculated from the date of judgment, until date of payment in full;
3. costs of suit;
4. further and/or alternative relief.'

[9] The aforesaid amount is made up of:

- (a) N\$ 3 974 634.69: (loss of rental income, for thirteen months);
- (b) N\$ 484 339.75: (general renovation fees);
- (c) N\$ 47 745.70: (plumbing maintenance fees);
- (d) N\$ 28 835: (electrical repairs fees).

[10] The defendants entered appearance to defend. However, the defendants failed to file their plea when they were ordered to do so and were subsequently barred in terms of the applicable rules of court.

[11] Later on, the court called upon the plaintiff to lead evidence and prove its claims.

#### Plaintiff's case

[12] The plaintiff called four witnesses in support of its claim. I am not going to rehearse the testimonies of the witnesses here. I will only outline certain salient facts. Ms Rosalinde Nakale testified that the plaintiff now claims loss of rental income for twelve months calculated from August 2020 to July 2021, in the total amount of N\$3 668 893.56. She avers that the premises were not let out for nearly three years on account of their dilapidated condition.

[13] Furthermore, she states that renovations of the premises could not be undertaken much earlier on, because the plaintiff did not have funds to do so. The plaintiff was only able to effect partial renovations to the premises.

[14] The defendants have paid rent until 28 July 2020.

[15] According to her, full renovations of the premises were undertaken during March 2023 and were finalised on 31 June 2023. New tenants have moved into the premises as from 1 April 2023.

### Analysis

[16] It is a general principle that a lessee is obliged to restore the leased premises to the lessor in a good condition, or at least in substantially the same condition as they were at the time he took occupation thereof.<sup>1</sup>

[17] Having considered the evidence and materials placed before court, I find that in the present case, the defendants have left the premises in a state not fit for use and as a result could not be rent out.

[18] That being the case, I am of the view that the cost of repairs effected to the premises by the plaintiff was a necessary expense incurred in restoring the premises back to their original lettable status. I therefore, find that the plaintiff is entitled to reasonable cost of repairs they effected to the premises.

[19] On the evidence before court, the plaintiff has indicated that complete renovations and repairs have been effected to the total costs of N\$225 157.32. On the evidence given, I am satisfied that the foregoing amount represents reasonable cost of repairs effected to the premises to restore them to their original lettable status. The plaintiff is therefore, entitled to payment of that amount.

[20] I now move to the claim for loss of rental income. It is a trite principle that the purpose of awarding damages to an aggrieved party based on breach of contract is to place that party in the position he would have occupied had the breach not occurred, by the payment of money and without causing undue hardship to the defaulting party.<sup>2</sup>

[21] As a general principle, a person seeking damages based on breach of contract has a duty to mitigate his loss.

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<sup>1</sup> *Cash Wholesalers (Pty) Ltd V Marcuse* 1961 (2) SA 347 at 353D-H.

<sup>2</sup> *Rowland Electro Engineering Pty Ltd v Zimbank* 2007 (1) ZLR1 at p 13.

[22] In the present matter, the plaintiff claims damages based on loss of rental income, for a period of one year. The plaintiff avers that it could not speedily restore the premises to occupiable status because it had no funds to do so.

[23] I am not persuaded that a period of one year is a reasonable period for claiming damages for loss of income on account of the premises being not fit to be let until restored to their lettable status, in the circumstances of this case. I am of the view that a period of at least seven months is sufficient for that purpose. Within that period one would be able to source funds, including sourcing funds from financial institutions, registration of a mortgage bond if applicable and effect the necessary renovations to restore the premises to occupiable condition. In any event, in the present case the plaintiff was able to complete renovations and repairs within a period of three months, from March 2023 to June 2023.

[24] I would therefore, grant damages for loss of rental income for a period of seven months in favour of the plaintiff. On the evidence adduced and the argument advanced by the plaintiff, I am persuaded that it is fair to use the amount of N\$305 741. 13, which was agreed by the parties as the monthly rental, as the basis for calculating loss of rental income. The damages for loss of rental income for a period of seven months would translate to N\$2 140 187.91. To this amount shall be added the cost of repairs effected to the premises, in the amount of N\$225 157.32. Therefore, the plaintiff is entitled to payment of the total amount of N\$2 365 345.23.

[25] In regard to the issue of costs, the general rule is that the successful party is entitled to its costs. There is no reason to not grant costs to the successful party in the present case and I shall grant an order to that effect.

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

1. The court grants judgment against the first and second defendants jointly and severally, the one paying the other to be absolved, in the following terms:
  - (a) payment in the amount of N\$2 365 345.23;

- (b) interest on the abovestated amount calculated at the rate of 20% p.a. from the date of judgment to the date of full payment;
- (c) costs of suit.

2. The matter is removed from the roll and is regarded finalised.

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B USIKU  
Judge

## APPEARANCES

PLAINTIFF: R Walters  
Adv. SS Makando Chambers, Windhoek

1<sup>st</sup> & 2<sup>nd</sup>

RESPONDENTS: F Kadhila  
Office of the Government Attorney, Windhoek,  
(holding watching brief)