HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-ACT-CON-2021/04814**

In the matter between:

SIMON HERCULES STEYN N.O. **PLAINTIFF**

and

NOSSOP CATTLE FARMING (PTY) LTD **DEFENDANT**

Neutral citation *Simon Hercules Steyn N.O. v Nossop Cattle Farming (Pty) Ltd* (HC-MD-CIV-ACT-CON-2021/04814) [2023] NAHCMD 574 (18 September 2023)

Coram: MAASDORP AJ
Heard: **15, 16 and 17 May 2023**
Delivered: **18 September 2023**

Flynote: Contract – Sale of immovable property – Occupational rental payable pending registration of transfer – Seller's claim against purchaser for breach of duty to pay – Purchaser's defense of breach of reciprocal duty to grant full possession of property due to presence on property of animals belonging to unknown third parties – Seller's reliance on *Arnold v Viljoen* – Court declines to follow contention that purchaser that remained on the premises is liable for full rental and only entitled to establish claim

for set – off or counterclaim for damages – purchaser entitled to seek proportionate reduction of obligations

Contract – *Voetstoots* clause – Meaning of 'defect' – Purchaser claiming that animals belonging to third parties grazing across property meant purchaser could only occupy one per cent of property – seller replicating that defense precluded by express *voetstoots* clause – purchaser alleging that presence of animals not a defect in the property – 'liberal approach' to identifying a defect – defect includes any material imperfection which prevented or hindered ordinary common use of object of sale – purpose for which object is purchased may influence question of whether hindrance is a defect - for court to accept purchaser's contention that presence of animals prevented it from using 99 per cent of the property, the presence of the animals must qualify as a defect - seller's reliance on *voetstoots* clause succeeds

Summary: The farm Wilhelsmhoehe was going to be auctioned in early December 2020. Prior to the auction, Mr Burnett Staal twice inspected the farm on behalf of the defendant. He looked at the infrastructure and grazing and found several animals grazing across the farm. He must have been satisfied with what he had seen as the defendant subsequently submitted the highest bid for the farm.

The plaintiff is the liquidator of the close corporation that owned the farm. The plaintiff and the defendant concluded a written agreement for the sale of a farm on 19 December 2020. Under the agreement, the purchaser was entitled to take occupation pending the transfer of the farm to the defendant, against payment of N$70 000 per month or part thereof. The defendant indeed took occupation during January 2021 on its version, or early March 2021 on the plaintiff's version. At all relevant times, there were approximately 450 sheep, cattle and horses grazing on the farm. The defendant knew there were animals on the farm and that the animals did not belong to the defendant. Immediately after the registration of transfer of the farm, the plaintiff sent the defendant an invoice for occupational rental of N$537 532,18 (later reduced to N$467 419,26). There was no dispute on the express terms of the sale agreement. The defendant refused to pay as it claimed it could only occupy one per cent of the farm due to the presence of the animals.

The defendant pleaded that it had been entitled to but had never received undisturbed occupation and possession of the farm due to the animals that had been grazing on the farm throughout the defendant's occupation. The defendant relied on a tacit term that would render it liable only for *pro rata* occupational rental, for the part it actually occupied and possessed. It also relied on the principle of reciprocity. Since the plaintiff only delivered partial instead of full occupation defendant and could no longer make good its defective performance, the plaintiff was not entitled to any rental.

The plaintiff replicated that the defence was invalid since it was contrary to the entire agreement clause (clause 9), contrary to the *voetstoots* clause (clause 6), because the defendant had known about the animals on the farm at all times and consented thereto, alternatively because the animals occupied the farm as a result of an agreement between the defendant and the owner of the animals, or because the defendant's knowledge of the presence of the animals at the time it took occupation meant the defendant had waived or by implication had waived any right to claim a reduction of rental.

In argument, the plaintiff also relied on, amongst others, the judgment in *Arnold v Viljoen*, and the line that followed the judgment, for the proposition that the defendant could not remain in occupation and claim remission of rental. On this line, it did not matter whether the defendant's occupation had been completely beneficial, it only mattered that the defendant had occupation. The defendant could not remain in occupation and avoid liability for the full rental. It had an election between (1) quitting the premises and so avoiding any further rental, or (2) staying, paying full rental, and addressing its harm by establishing a claim for set – off or a counterclaim for damages.

The plaintiff also argued that even if the court should decline to follow *Arnold v Viljoen* and find for the defendant in respect of the contractual defences, the defendant still had the duty to prove the amount of remission to which it is entitled. The defense must fail as the defendant had failed to plead or prove the amount of remission.

Held: *Thompson v Scholtz* precludes categorical reliance on *Arnold v Viljoen* in disputes about a contract regulating occupational interest as opposed to a contract of

lease proper. In addition, several South African judgments have declined to follow *Arnold v Viljoen*. Leading academic writers have harshly criticised the judgment and argue forcefully that remission of rent is available for diminished beneficial occupation while the tenant remains in occupation. This approach was recently followed in Namibia in *Erreicht Farming CC v Gous.*

Held further that, the defendant's proposed tacit term could not be 'blended into' the agreement. The term is not necessary to render the agreement effective. The contract allowed several avenues to address the issue of partial occupation. Further, it would not make commercial sense to calculate pro rata occupational rental simply by prorating the area of land that was not made available against the total acreage of the farm, since different areas within a farm may have different values in general and specific to the purpose for which the land was to be used, and because the ordinary basis of calculating remission is the value of the diminished use and enjoyment of the land, and not necessarily the reduced extent of the land. In addition, introducing the term into the agreement would give rise to several practical difficulties. And the term would also be contrary to the *voetstoots* clause. As the tacit term did not pass the test for the adoption of a tacit term, it was not necessary to decide whether the tacit term was precluded by the entire agreement clause.

Held further that, the undisputed evidence is that plaintiff gave the defendant access to the entire farm in the sense that the plaintiff had not locked any doors, stations, or paddocks. The defendant's true complaint is not that it had been locked out or prevented from accessing any area of the farm. Its true complaint is that it could not use all of the land because of animals grazing on the land. The presence of the animals on the land qualified as a defect that engaged the *voetstoots* clause, on the current liberal approach to the identification of defects as explained and adopted in *Odendaal v Ferraris*. Since the defendant had known about the defect at all times before concluding the sale agreement and before taking occupation but never complained to the plaintiff about the presence of the animals or asked the plaintiff to remove the animals, the defendant could not avoid the consequences of the *voetstoots* clause.

ORDER

Judgment is granted for the plaintiff against the defendant for:

1. Payment of N$ 467 419, 26.
2. Interest at twenty per cent per annum *a tempore morae* from date of judgement to date of final payment.
3. Party and party costs, including the costs of one instructing and one instructed counsel.
4. The matter is deemed finalised and removed from the roll.

JUDGMENT

Maasdorp AJ:

Introduction

[1] The plaintiff is Simon Hercules Steyn in his capacity as liquidator of Andri Trading CC. The defendant is Nossop Cattle Farming (Pty) Ltd, a private company duly registered in Namibia. The plaintiff testified personally, while Mr Burnett Staal, one of the defendant's directors, testified for the defendant.

[2] The parties concluded a written agreement for the sale of farm Wilhelmshoehe No 176 on 19 December 2020, for N$18 200 000 excluding VAT. The defendant testified that it took partial occupation of the farm during middle January 2021. According to the plaintiff, the defendant took occupation around 1 March 2021.

[3] During December 2020, during January 2021, and on 4 March 2021 when the plaintiff formally asked the defendant whether it wanted to occupy the farm pending

restitution and the defendant confirmed it did, animals that did not belong to the defendant were grazing on the farm. The exact number of animals is not clear but appears to have been around 450 animals in total, made up of sheep, horses and cattle.

[4] The transfer of the farm was registered on 22 September 2021. On 28 September 2021, the plaintiff sent the defendant an invoice for occupational rental of N$537 532,18 (later reduced to N$467 419,26). The defendant disputed liability, whereafter the plaintiff instituted this action.

[5] In this action, the plaintiff relied on clause 5.2 of the sale agreement, that stipulated the defendant would be liable for occupational rent of N$70 000 per month or *pro rata* part thereof if the date of occupation did not coincide with the date of registration. It is common cause that the occupation date did not coincide with registration. The difference was approximately seven and a half months.

[6] The defendant pleaded that it was entitled to but had never received undisturbed possession of the farm due to the animals that had been grazing on the farm throughout the defendant's occupation. It claimed that it was only able to occupy about one per cent of the farm, 51 hectares out of 4 887,8938 hectares. The defendant relied on a tacit term that would render it liable only for *pro rata* occupational rental, for the part it actually occupied and possessed.

[7] The plaintiff replicated that the defence was unavailable because it was contrary to the entire agreement clause (clause 9); contrary to the *voetstoots* clause (clause 6); because the defendant had known about the animals on the farm at all times and consented thereto, alternatively because the animals occupied the farm as a result of an agreement between Mr Staal and the owner of the animals; and because the defendant's knowledge of the presence of the animals at the time it took occupation meant the defendant had waived or by implication waived any right to claim a reduction of rental.

Plaintiff's case

[8] The plaintiff's case, argued with reference to several judgments,[1] can be summarised as follows:

(a) If a lessee takes occupation of property that has a defect, is aware of the defect, but remains in occupation, the lessee is liable for the full rental. The question is simply whether the lessee was in occupation or in possession, and not whether the possession or occupation was beneficial. [2]

(b) In leases, the principle that a party may not call upon the other party to perform his contract without being ready himself to perform his part, does not apply.[3]

(c) Despite the lessor being entitled to claim the full amount of rental, the lessee may establish a claim for set-off or counterclaim for damages.[4]

(d) Here, there is no counterclaim for damages. Set-off cannot apply because the defendant's claim, if any, would be illiquid.

(e) Even if this court should decline to follow *Arnold v Viljoen* (which has been criticised and doubted but not overruled), the defence falls on the principles confirmed in *Thompson v Scholtz*.[5]

[9] The plaintiff summarized the material facts from *Thompson v Scholtz*, and the relevance to this case, as follows:

"57. In the event that the court were to not follow *Arnold v Viljoen*, the judgment by the SCA in *Thompson v Scholtz* applies. The plaintiff had sold the defendant a farm which

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[1] *Arnold v Viljoen* 1954 (3) SA 322 (C), *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W), *Thompson v Scholtz* 1999 (1) SA 232 (SCA), *Sanders v Chaperon* 1919 AD 191 at 194, *Poynton v Cran* 1910 AD 205 at 228, *TWP Projects (Pty) Ltd v Old Mutual Life Insurance Company (South Africa)* 2010 JDR 0858 (GSJ), *Erreicht Farming CC v Gous (*HC-MD-CIV-ACT-CON-2019/04951) [2022] NAHCMD 492 (20 September 2022) paras 14 – 18.
[2] *Arnold v Viljoen* 1954 (3) SA 322 (C) at 331-332.
[3] *Arnold v Viljoen* 1954 (3) SA 322 (C).
[4] *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W).
[5] *Thompson v Scholtz* 1999 (1) SA 232 (SCA)

included a farmhouse. The plaintiff had not vacated the farmhouse when the defendant took occupation of the farm. The defendant remained in occupation of the farm and utilised the farm but could not occupy the farmhouse. The plaintiff then (as in the present matter) claimed for payment of the occupational rental and the registration of the transfer subsequently took place.

58. The defendant raised the *exception non adimpleti contractus* to allege that the seller had failed to provide the purchaser with complete possession.

59. The SCA per Nienaber JA held that the *exceptio* did not apply in respect to the claim for occupational rental and importantly also held that the judgment of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* did not apply. The SCA held that "*The present case is different. The obligation of the seller to allow the purchaser to occupy the property pending payment pari passu with registration of transfer was a continuing one. Its breach, committed when the plaintiff did not vacate the farmhouse, was likewise a continuing one*." [6]

[10] The plaintiff denies that the defendant has any entitlement to remission of rental. Instead, the plaintiff argues:

(a) The defendant's decision to take occupation with the knowledge that there were animals grazing on the farm before and at the time of taking occupation, amounted to waiver or renunciation of any rights to rely on the presence of the defect (the animals); [7]

(b) On the defendant's own evidence, there was no difference in the condition of property between the time of the conclusion of the sale agreement in December 2020 and the time when the defendant took occupation (January 2021 or 4 March 2021). As a result, the defendant is not entitled to any remission; [8]

(c) It was the defendant's duty to plead and prove the nature and extent of the impediment, and to what extent occupational rent should be reduced. The defendant

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[6] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 242A-D.
[7] Relying on *Sanders v Chaperon* 1919 AD 191 at 194 and *Poynton v Cran* 1910 AD 205 at 228.
[8] Relying on *TWP Projects (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* 2010 JDR 0858 (SGJ) at paras 14 and 15.

failed to plead or prove the extent and nature of the impediment or the extent of reduction in rental. As such, the defendant is not entitled to any remission. [9]

Defendant's case

The tacit term

[11] Clause 5.2 stipulates that:

"5.2 If the date of occupation and possession do not coincide with the date of transfer, the party enjoying occupation and possession of the property while it is registered in the name of the other party, shall in consideration thereof and for the period of such occupation, pay to the other party occupational rental of N$ 70,000.000 (seventy thousand Namibia Dollars) per month or *pro rata* part thereof, payable monthly in advance on or before the 1st day of each successive month."

[12] The defendant pleaded the proposed tacit term as follows:

"3.2 Defendant pleads that it was further a tacit, alternatively an implied term of the agreement that, if the date of occupation and possession do not coincide with the date of transfer, the party enjoying partial occupation and possession of the property while it is registered in the name of the other party shall, in consideration thereof and for the period of such occupation, pay the other party *pro rata* occupational rental for the part so occupied and possessed, calculated on the basis of N$70,000 per month for the entire 4887,8938 hectares per month or *pro rata* part of a month." (my emphasis)

[9] With reliance on *Erreicht Farming CC v Gous* (HC-MD-CIV-ACT-CON-2019/04951) [2022] NAHCMD 492 (20 September 2022) par 18

[13] In support of the tacit term, the defendant argues that the parties clearly considered a *pro rata* payment in respect of the period of occupation but did not consider what would happen if only partial occupation occurred, leaving a gap in the agreement that had to be filled by the tacit term. The defendant relies on the celebrated judgment in *Alfred McAlpine & Son* [10] and a 2013 article in the De Jure on tacit terms.[11]

[14] The second argument in support of the tacit term is that the plaintiff's testimony supports the conclusion, for two reasons. Firstly, because the plaintiff had testified in cross-examination that it would not be fair to charge full rental if the defendant only occupied a small portion of the farm. Secondly, because the plaintiff testified that the terms 'possession' and 'occupation' are used interchangeably in clauses 5.1 and 5.2 and mean 'vacant possession and occupation'.

Non – variation clause not engaged

[15] The defendant argues that the tacit term is not affected by the non-variation clause, because it is not a variation but is simply read or blended into the contract, thus 'contained' in it. The defendant relies on the judgments in *Wilkens v Voges*[12] and *Sweets from Heaven*[13]*.*

Voetstoots clause not engaged

[16] With reliance on *Ellis v Cilliers*[14], the defendant argues that the presence of animals on the land was not a defect in the property. As such, the voetstoots clause is not engaged.

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[10] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H-533B.
[11] *Tacit Terms and the Common Unexpressed Intention of the Parties to a Contract* (2013) 46 De Jure Vol 4 at 1088 at 1090 and 1094.
[12] *Wilkens v Voges* 1994 (3) SA 130 (A) at 144.
[13] *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W) par 8.
[14] *Ellis and Another v Cilliers N O and Others* 2016 (1) SA 293 (WCC).

Reciprocal obligations

[17] The defendant argues that the interpretation of 'occupation and possession' as 'vacant', and the provisions of clause 5.2, gives rise to reciprocal / bilateral obligations. With reliance on *Cradle City*[15] and *Damaraland Builders CC*,[16] the defendant argues that it is excused from performance because the plaintiff did not perform its contractual obligation to provide vacant possession.

[18] In addition, the defendant relies on *BK Tooling*[17] as applied in *Damaraland Builders* to argue that the plaintiff had a duty to make out a case for a reduced contract price. As the plaintiff did not make out a case for a reduced contract price by leading evidence on the exact or at least approximate reduction in its performance, the plaintiff's claim must be dismissed.

[19] Finally, if the court should find for the plaintiff, the defendant argues that the court should direct the defendant to pay reduced *pro rata* rental for 51 hectares of the property.

Factual findings

[20] On my understanding of the pre-trial order, the evidence, the parties' submissions and the applicable law, there are really just two material factual disputes. The first is whether the defendant had known of the animals on the farm at the time it took occupation. Closely associated with the first question is whether the defendant's undisputed failure to object to the presence of the animals is properly before court. The second factual issue is whether the tacit term pleaded by the defendant forms part of the sale agreement.[18]

[21] I find that the defendant had known at all material times before it took occupation that the animals, which did not belong to the defendant, were grazing on

[15] *Cradle City (Pty) Ltd v Lindley Farm 528 (Pty) Ltd* 2018 (3) SA 65 (SCA).
[16] *Damaraland Builders CC v Ugab Terrace Lodge CC* 2012 (1) NR 5 (HC).
[17] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)
[18] This is probably a legal issue – see the final sentence from the quotation from *Tacit Terms* at par 20 of the defendant's heads – but is treated under this heading as it appears as a factual issue in the pre-trial order.

the farm. It also knew how many animals were grazing on the farm. Even if it did not know exactly how many before 5 March 2021, it knew the exact figure from that date. The finding flows from the following factors:

(a) Mr Staal's evidence[19] that he visited the farm on 5 and 9 December when he drove through the farm, looked at the infrastructure and grazing, and noticed that there were cattle, horses and sheep on the farm;

(b) Mr Staal's evidence at par 14 of his witness statement.

"14. I visited Wilhelmshoehe for the second time on 5 March 2021. Whilst on the farm, Andries Jooste and I counted all the cattle which occupied the farm at that stage. According to our figures and observations, there were 223 cattle occupying 3 posts and approximately 10 to 12 camps at that stage. I also counted approximately 50 wild horses occupying 3 different posts at that stage. Wilhelmshoehe was further occupied by 14 Cattle and 5 horses occupying one camp belonging to a person who was at that stage unknown to me, but whom I subsequently was informed was a certain Mr Hendrik van Niekerk. There was also the horses, milk cows and 170 sheep belonging to Madelyn Jooste, which grazed in the camps closer the homestead. There are 11 posts and 44 camps on Wilhelmshoehe."

(c) The admission at par 3.6 of the pre-trial order.

"3.6 Prior to the occupation of the property by the defendant, the defendant was aware of such cattle and animals occupying the property."

The defendant argued that this admission did not specify the number of animals or the exact date when this awareness arose and is ineffective to prove the plaintiff's case of knowledge. Even if the argument is accepted, it does not reduce the force of the evidence in paras 7 and 14 of Mr Staal's witness statement;

(d) The undisputed conversation in December 2020 between Mr Staal and the plaintiff. Mr Staal informed the plaintiff that the animals on the farm would soon be out of water because the electricity had been disconnected. The plaintiff answered

[19] Par 7 of his witness statement

that he did not want to be hard-hearted, but the animals on the farm were not his problem;

(e) The relationship between Mr Staal and the previous owners of the property. Mr Staal is a director of Voskor Trading (Pty) Ltd (Voskor). Voskor already owned Okahoah No 177, a farm adjacent to Farm Wilhelmshoehe, before December 2020. Voskor is a cattle trading company. Prior to December 2020, Voskor had used Wilhelmshoehe to unload cattle at the loading dock on that farm for processing and injecting by Andries Jooste. After processing, the animals were moved approximately 2km by foot to Okahoah. Mr Jooste was one of the previous owners of the property.[20] After signing the sale agreement, Mr Staal told Mr Jooste he could remain in the farmhouse and work for the defendant at a salary of N$30 000 per month. Most of the animals on the farm belonged to the previous owners or their wives, including Andries Jooste's wife.

[22] Moving to the associated issue about the defendant's failure to raise any objection to the presence of the animals. The defendant argued that this issue was never raised on the pleadings or the pretrial order, but for the first time in the plaintiff's witness statement. I agree with the defendant that the words 'the defendant never objected' do not expressly appear on the pleadings or in the pre-trial order. However, both parties' witnesses testified to the absence of any complaint about the animals. The defendant did not object to this during the hearing. And the absence of any complaint by the defendant was implicit in the plaintiff's replication of waiver, which is listed as one of the issues to be decided under the pre-trial order. It follows that the undisputed evidence that the defendant never raised any objection to the presence of the animals is properly before court.

[23] Turning to the defendant's plea that the sale agreement included a tacit term.[21]

[20] Mr Staal's witness statement par 24.

[21] As pleaded by the defendant at par 3.2 of its plea:
"Defendant pleads that it was further a tacit, alternatively an implied term of the agreement that, if the date of occupation and possession do not coincide with the date of transfer, the party enjoying partial occupation and possession of the property while it is registered in the name of the other party shall, in consideration thereof and for the period of such occupation, pay the other party *pro rata* occupational rental for the part so occupied and possessed, calculated on the basis of N$70,000 per month for the entire 4887,8938 hectares per month or *pro rata* part of a month." (my emphasis)

The facts do not support the tacit term on which the defendant relies. Assuming for a moment that the defendant is correct in contending that the parties did not consider the issue of partial occupation, the tacit term does not make commercial sense, appears incompatible with the voetstoots clause, and would not be necessary to make the agreement effective.

[24] These are some of the difficulties with the proposed tacit term that comes to mind, which renders it unlikely that the parties would have agreed on it if asked. Who decides whether the occupation was partial? Would the occupying party get to choose how much it wants to occupy? When must the occupier inform its counterpart how much it will occupy, so that the counterpart may utilize what the occupier cannot and so mitigate its losses? Why should the value of partial occupation only be calculated with reference only to the average hectare price hectares? What if the farm's boreholes are all in one area? Or the good grazing is only in ten camps? Or half of the camps have predators? Or the defendant only intended to grow export quality crops on one specific portion of the land that has suitable nutrients? *Thompson v Scholtz* makes plain that 'subjective factors peculiar to the tenant' must be considered in assessing any remission in rental. And 'it is the value of the diminished use and enjoyment, rather than the diminished extent of the let premises, that is relevant to the calculation of a remission in rent'.[22] The proposed tacit term would only favour one party and potentially create chaos.

[25] The tacit term would clash with the *voetstoots* clause. The term would allow the defendant to inspect the farm, become aware of animals that could prevent the defendant from using a part of the farm to fulfil the purpose of the purchase of the farm, inform the plaintiff of the presence of the animals but without informing the plaintiff that the presence of the animals was going to interfere with the defendant's plans for the farm while aware that the plaintiff already said the animals were not the plaintiff's problem, sign the sale agreement still without saying anything, and then refuse to pay occupational interest for that part which it claims it couldn't use, and had known from the start that it couldn't use. This would undermine an important part of the reasons for including a *voetstoots* clause.

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[22] *Hencetrade 15 (Pty) Ltd v Tudor Hotel Brasserie & Bar (Pty) Ltd* (15275/2015) [2016] ZAWCHC 55 (20 April 2016) par 14. The judgment was upheld on appeal but on different grounds.

[26] The term is not necessary to make the agreement effective. It is only necessary for a party who overlooked the *voetstoots* clause, or did not do a proper inspection, or did not take the necessary steps after inspection to ensure that its concerns with the impediment or hinderance that would lead to partial occupation was addressed within the bounds of the sale agreement. The options included invoking the agreement's breach clause.

[27] The proposed term does not pass the test to import a tacit term. Thus, it is not necessary to engage with *Wilkens v Voges*[23] and *Sweets from Heaven*[24] to consider whether the reliance on the proposed tacit term would have been precluded by the entire agreement clause.

The facts to the law

Arnold v Viljoen is not applicable

[28] The first question concerns the application of the principles in *Arnold v Viljoen* [25] and *Basinghall*.[26] If those principles applied to this case, the plaintiff's case would have succeeded on this basis alone. However, it appears they do not apply without qualification. The South African Supreme Court of Appeal found as such in *Thompson v Scholtz*.[27] After discussing the criticism of *Arnold v Viljoen* and the cases that relied on it, the court agreed with the criticism but found that it was unnecessary to make a firm finding because:

"The contract under discussion is not, after all, a contract of lease proper and, despite its similarity to lease, is not on all forms with it." [28]

[29] The Supreme Court of Appeal engaged with a contract similar to that between

[23] *Wilkens v Voges* 1994 (3) SA 130 (A) at 144.
[24] *Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W) par 8.
[25] *Arnold v Viljoen* 1954 (3) SA 322 (C).
[26] *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W).
[27] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 245A-246F.
[28] At 246H-G.

the plaintiff and the defendant in this case – a sale of farmland with an occupational interest clause. It held that, in this type of agreement, there is 'reciprocity between the seller's obligation to give occupation and the purchaser's obligation to pay occupational interest'. [29] The court held that the first principle from *BK Tooling* is applicable to such contracts – if the seller fails to give the purchaser any occupation or possession, obviously it is not entitled to recover any occupational rental. However, when it comes to partial performance only, the court held that a rigid application of the second proposition in *BK Tooling* may often lead to unfairness or injustice in cases of the breach of an obligation of a continuing nature, where that breach can no longer be cured by specific performance, such as in this case. To achieve the fairness that is the foundation of the second proposition in *BK Tooling*, the court held that the appropriate remedy in the case of partial performance and enjoyment is remission of rental on the basis of what is fair in all the circumstances.[30]

[30] It follows that the defendant's argument that the principle of reciprocity applies to the parties' agreement is arguably correct.[31] However, the defendant's argument that the *BK Tooling*[32] principles must be rigidly applied in the present context as in a construction context in *Damaraland Builders*, is not accepted. This conclusion is supported by the Namibian High Court judgment in *Erreicht Farming CC v Gous.* [33]

[31] Despite agreeing with the defendant on the reciprocal nature of this sale agreement incorporating an agreement for occupational rent, I do not agree that the plaintiff's claim for the full occupational rental should fail. Instead, it appears the plaintiff's case must succeed on the authorities cited by the plaintiff in support of its reliance on the *voetstoots* clause, and those authorities on the defendant's knowledge at the time of sale and occupation of the presence on the farm of animals that did not

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[29] At 238G-H.
[30] At 248E-249C
[31] 'Arguably' since the sale agreement provides for payment of the occupational rental monthly in advance. In *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd* (793/2016) [2017] ZASCA 111 (20 September 2017) par 17, the SCA held that every agreement must be evaluated on its own terms to assess whether it is truly a reciprocal agreement. A provision that provides for rental payable in advance supports an argument that the principle does not apply to that agreement. This issue was not raised in argument and is therefore not decided. It is also not material to the outcome reached in this judgment.
[32] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)
[33] Also see *Erreicht Farming CC v Gous (*HC-MD-CIV-ACT-CON-2019/04951) [2022] NAHCMD 492 (20 September 2022) paras 17 - 18

belong to the defendant.

The presence of the animals on the farms constitutes a defect, as such defendant's defence is precluded by application of voetstoots clause

[32] The voetstoots clause in the agreement reads as follows:

'Subject to clause 6.4 below, the Property is further sold "*voetstoots*" and as it stands, the Seller giving no warranty regarding the buildings, any improvements upon the Property, nor the water extraction rights, nor the functionality or capacity of the boreholes. The Seller shall not be liable for any defects in the property, either latent or patent nor for any damage occasioned to or suffered by the Purchaser by reason of such defect. The Purchaser acknowledges that he has fully acquainted himself with the property and that no guarantees or warranties of any nature were made by the Seller regarding the condition or quality of the Property or any of the improvements thereon, the functionality thereof, or accessories thereof.'

[33] It is trite that *voetstoots* clauses are permissible in agreements for the sale or lease of immovable property. There is no unequivocal statement or suggestion in *Thompson v Scholtz* or any of the authorities to which the parties referred, that the ordinary contractual principles would not apply to the interpretation of this agreement. It is therefore appropriate to rely on the ordinary principles on the interpretation and application of *voetstoots* clauses within similar although not identical contracts, and the definition of a defect, as set out in *Odendaal*[34] , *TWP Projects* [35] and *Ellis*.[36]

[34] In a nutshell, the plaintiff's argument is that the *voetstoots* clause prevented the defendant from relying on its defence that the defendant was entitled to undisturbed or vacant possession or occupation but that the animals on the farm prevented the defendant from taking and enjoying undisturbed or vacant possession. The defendant's counterargument is that the *voetstoots* clause does not apply because the presence of the animals on the farm is not a defect as regulated under the voetstoots clause.

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[34] *Odendaal v Ferraris* 2009 (4) SA 131 (SCA).
[35] *TWP Projects (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* 2010 JDR 0858 (SGJ).
[36] *Ellis and Another v Cilliers N O and Others* 2016 (1) SA 293 (WCC).

[35] Relying on *Ellis*, [37] the defendant argued the defect must be in the object itself. It argued that the defect cannot be something that roams on the property that will probably be removed in a few months and slaughtered at the abattoirs. The defendant argued that the most important part of the *Ellis* judgment is at paras 32 to 37, quoted below:

"[32] The aforesaid raises the issue as to what precisely is a latent defect. In Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) Corbett JA at 683H – 684A puts it as follows:

> 'Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of a res vendita, for the purposes for which it has been sold or for which it is commonly used . . . . Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the res vendita.'

[33] As pointed out in Odendaal v Ferraris op cit at 321C, the question of the nature of a defect which would fall within the scope of a voetstoots clause was left open in *Ornelas v Andrew's Cafe and Another* 1980 (1) SA 378 (W) at 388G – 390C. However, Cachalia JA did express the following opinion in Odendaal v Ferraris at 321C:

> 'In a broad sense, any imperfection may be described as a defect. Whether the notion of a defect is to be restricted only to physical attributes of the merx or to apply more broadly to extraneous factors affecting its use or value has generated discontent and additional opinion.'

[34] Professor Kerr in 24 Lawsa 2 ed para 36 describes the approach of our courts, as to the problem of identifying a defect, as being a 'liberal approach' — also referred to by Cachalia JA in *Odendaal v Ferraris* op cit at 321C as the 'broad sense'.

[35] An example is Odendaal v Ferraris op cit where it was held that the absence of statutory approval to make building alterations to a property, coupled with problems in the structure of the alterations, constituted a latent defect. In essence the court found that any material imperfection which prevented or hindered the ordinary common use of the res vendita was an Aedilitian defect (at 322A).

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[37] *Ellis and Another v Cilliers N O and Others* 2016 (1) SA 293 (WCC).

[36] So too in *Glaston House (Pty) Ltd v Inag* (Pty) Ltd 1977 (2) SA 846 (A) the court took a broad view of what constituted a latent defect, and held that the existence of a sculpture within a pediment and cornice, which had been declared a special national monument and was embedded in a dilapidated building, thus precluding the redevelopment for which the property had been bought, was a latent defect. The reasoning of the court was that the sculpture — even though valuable in itself and therefore hardly a physical defect — hindered the use to which the property was to be put. (See also Odendaal v Ferraris op cit at 321F – 322A).

[37] This led the Supreme Court of Appeal in Odendaal v Ferraris to conclude as follows at 322A:

> 'It is now settled that any material imperfection preventing or hindering the ordinary or common use of the res vendita is an Aedilitian defect.' ”

[36] The passages quoted from *Ellis* appear to support the plaintiff’s case and not the defendant’s case.

[37] In this case, it is undisputed that the plaintiff granted the defendant physical access to every portion of the farm. The plaintiff testified that it had not locked any doors, docking stations or paddocks, that could have prevented the defendant from moving wherever it wanted to. The defendant did not dispute this. Here, unlike in, for example, *Thompson v Scholtz* where the owner refused to move out of the homestead knowing full well that the purchaser wanted to occupy the homestead, the issue is that the defendant claims that it could not use all of the land to which it had access, because of the presence of the animals.

[38] On the one hand, the defendant’s case is that the presence of the animals on the farm prevented it from occupying 99 per cent of the farm. It did not plead a special use for the farm. So one must, at best for the defendant, assume a common use for the farm, such as cattle farming.[38] On the defendant’s own case, the presence of the

[38] The parties do not agree that the presence of the animals prevented the defendant from utilizing the farm for the purpose for which it was acquired. The defendant did not plead or testify that the farm was going to be used for cattle farming. In cross examination, the defendant’s counsel put to the plaintiff that a farmer would not mix his animals with other animals without knowing if the animals had been properly medicated, with

animals was a material hinderance of the ordinary or common use of the farm. On the application of the 'liberal approach' to identification of a defect, it must follow that the presence of the animals was a defect as intended in the voetstoots clause. [39]

[39] *Ellis* also confirmed[40] that 'the purpose for which an object is bought can influence the question of whether or not it is a defect.' The defendant's case that it purchased the farm for cattle farming. As such, it would not matter if there were animals on the farm which could safely co-exist with cattle farming. This proposition gives context to the words used in this voetstoots clause. The defendant argued that the terms 'condition, quality and functionality' of the property as used in the *voetstoots* clause,[41] could not relate to animals on the farm. I agree that the argument could have been correct if the purpose of purchasing the farm had been something wholly unrelated to cattle farming, where the presence of the animals would have had no impact on the purchaser's realisation of the purpose. But then the defendant would have had a difficult time in proving that the presence of the animals genuinely prevented it from doing what it wanted to do on the farm.

[40] It may now be useful to refer briefly to the facts and findings in *TWP Projects*. [42]

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special emphasis on the risk of sexually transmitted disease. The plaintiff said he did not know but the proposition sounded logical. Mr Staal only testified about growing crops on the farm. On a closer inspection of the record, it appears the defendant had informed the plaintiff that it intended to commence a cattle farming operation. We don't know when this conversation took place. (Typed record 32, lines 24 to 18). Even so, the defendant did not lead evidence to support its conclusion that it could only use 51 hectares of the almost 5000 - hectare farm. In par 14 of Mr Staal's witness statement, he stated that the farm has 11 posts and 44 camps. He referred clearly to animals occupying 13 camps and 6 posts. Then he refers vaguely to more animals grazing in camps closer to the homestead. He did not provide any reason for the vagueness on this potentially critical issue, n which the defendant had the onus. If it were necessary to decide this question, the defendant would clearly have failed to prove the extent of its reduced occupation or possession. It was ultimately not necessary to resolve this dispute because the plaintiff's claim would have succeeded on either position.

[39] This result aligns with the discussion of voetstoots clauses in agreements for the sale of immovable property Glover, *Kerr's Law of Sale and Lease*, 4th Edition, 2014, Lexisnexis, p286 - 292

[40] Paras 44 - 48

[41] "Subject to clause 6.4 below, the Property is further sold "*voetstoots*" and as it stands, the Seller giving no warranty regarding the buildings, any improvements upon the Property, nor the water extraction rights, nor the functionality or capacity of the boreholes. The Seller shall not be liable for any defects in the property, either latent or patent nor for any damage occasioned to or suffered by the Purchaser by reason of such defect. The Purchaser acknowledges that he has fully acquainted himself with the property and that no guarantees or warranties of any nature were made by the Seller regarding the condition or quality of the Property or any of the improvements thereon, the functionality thereof, or accessories thereof."

[42] *TWP Projects (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* 2010 JDR 0858 (SGJ). Also see *Thompson v Scholtz* at 243F – 244A, where the court appears to accept that an expression of unhappiness, or a complaint, by the defendant would have been necessary for it to rely on the plaintiff's incomplete performance for a remission of rental.

The plaintiffs had leased a building from the defendant. When called upon to pay rental, they claimed they had not received beneficial occupation and were therefore not required to pay. The defence was dismissed on at least two bases directly applicable to this case:

(a) There were no material differences in the condition of the premises between the time of conclusion of the agreement and the time when the tenant takes occupation; and

(b) The voetstoots clause in the parties' agreement applied to the lease and occupation of the property, excluded any claims against the lessor and precluded the defendant from denying liability.

[41] The essence of *TWP* is that '… a lessee who accepts premises as they are on the date of occupation, accepts them with all their faults as at that date.[43] *TWP* also supports the plaintiff's argument that the defendant would not be saved by interpreting the defendant's obligation to give occupation and possession as an obligation to give *vacant* occupation and possession.

[42] Although not strictly necessary to decide, it may be useful to refer to the defendant's argument that the plaintiff's evidence demonstrated that the parties intended wholly *vacant* occupation or possession. A careful consideration of the question put the plaintiff in cross examination against the plaintiff's answer, in isolation or as it should probably be interpreted, along with the rest of the plaintiff's evidence, shows that plaintiff consistently accepted that he would have been required to remove the animals, and would have removed the animals, if the defendant had informed him that the animals were preventing it from using the farm for the purpose that it acquired the farm. If he had been unable to remove the animals, then the plaintiff would have granted remission of rental as that would have been fair.

Conclusion

[43] The plaintiff has proven his entitlement to an order that the defendant pay the full amount claimed for occupational rental, and interest.

[43] *TWP Projects (Pty) Ltd v Old Mutual Life Assurance Company (South Africa) Ltd* 2010 JDR 0858 (SGJ) par 30.2.

[44] The plaintiff also seeks an order for costs on a punitive scale. He argues that the defendant never had prospects of successfully defending the claim. The creditors in the insolvent estate that the plaintiff represents should not be out of pocket. The creditors would be out of pocket if only party and party costs are awarded.

[45] I do not agree that the plaintiff had a perfect case or that the defence was vexatious and should never have been tested in court. For example, the confusion about the application of *Arnold v Viljoen* and the question of the incidence of the onus to make out a case for remission if the agreement is reciprocal are both genuinely disputed issues. On the onus, both parties argued that the other had the onus. From *Thompson v Scholtz*, I am unable to agree with either party. One of the questions the court had to answer was whether *the owner* who deprived the purchaser of occupation of the homestead, had placed enough material before the court for it to grant a reduction in the occupational interest.[44] Although this approach appears out of line with the other authorities on remission, it is not clear from the judgment what the court eventually decided on the incidence of the onus, other than that it should take, and did take, all relevant factors into consideration.[45]

[46] The peculiar circumstances of this case show that the defendant may have had a genuine intention to negotiate a remission because of the presence of the animals. The defendant may have genuinely believed that the plaintiff had accepted that a specific lease agreement was necessary to deal with the animals. This follows from the defendant's two requests to the plaintiff, in January 2020 and March 2020, for a lease agreement. The plaintiff never supplied the lease agreement but also did not inform the defendant that he would not be supplying the agreement because he believed the occupational rental clause already covered everything, as he testified under cross examination. The plaintiff did not issue monthly invoices for the occupational rental. If he had issued monthly invoices, the defendant could have objected already on receipt of the first invoice. Considering the plaintiff's explanation for having only issued an invoice on registration of transfer – he said this is how it is done in practice and no evidence was presented to suggest this was false or should not be accepted - I do not

[44] *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 249C – E.
[45] 249H – 250B

find that the plaintiff was malicious in issuing only one invoice and only on date of registration.

[47] It appears that neither party was malicious. I accept the plaintiff's evidence that he would have tried to remove the animals if the defendant had asked him. I also accept that it would be unfair in the circumstances to expect the insolvent estate to suffer the loss of the income generating opportunity it would have had, if the plaintiff had known that the defendant was only going to use one per cent of the farm unless the plaintiff removed the animals. At the same time, I cannot find that the defendant had known that it would definitely be held liable for the full occupational rent, despite the presence of the animals on the farm, its requests for the conclusion of a lease agreement, and the absence of monthly invoices. Ultimately, considering the express terms of the sale agreement and the peculiar facts, the defendant ought to have done more to avoid the consequences of the agreement.

[48] In the premises, judgment is granted for the plaintiff against the defendant for:

1. Payment of N$ 467 419,26.
2. Interest at twenty per cent per annum *a tempore morae* from date of judgment to date of final payment.
3. Party and party costs, including the costs of one instructing and one instructed counsel.
4. The matter is deemed finalised and removed from the roll.

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RAMON MAASDORP

Acting Judge

APPEARANCES

PLAINTIFF	Mr Gibson Instructed by ENS Africa
DEFENDANT	Mr Dicks Instructed by Dr Weder, Kauta & Hoveka