



**REPORTABLE**

CASE NO: SA 16/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MOBILE TELECOMMUNICATIONS LIMITED**

**Appellant**

and

**SIEGFRIED ECKLEBEN**

**Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and HOFF JA

**Heard:** 27 March 2017

**Delivered:** 01 June 2017

**Summary:** The respondent purchased a property situated at Plot 91 Nonidas, Swakopmund during April 2010, from the erstwhile owner's estate at a public auction. The late owner Mr Neumann had erected various structures on the property and he had let a small room in the tower to the appellant, for the purpose of setting up a telecommunications base station. The lease agreement commenced on 1 August 2006 on a monthly tenancy of N\$3000 for a fixed period of 10 years, which would have expired on 31 July 2016 with an option to renew for a further period of 10 years. The lease agreement was initially concluded orally between the late Mr Neumann and the appellant. It was later during July 2007 reduced to writing. It was a condition of sale of Plot 91 Nonidas that the purchaser would inherit the lease

agreement. When the respondent purchased the property, he took over the agreement as it was. Shortly after the respondent had acquired the property, he discovered that the radiation intensity emitted by the antennas installed at the premises by the appellant was in excess of twenty times the International Commission for Non Ionizing Radiation Protection (ICNIRP) maximum and constituted a very serious health risk to the public and the respondent's personnel who accessed the sun downer platform. Respondent engaged the appellant's Schmidt-Dumont, a project co-ordinator for radio networks then. Respondent's suggestions were to either raise the antennas to a safe height or relocate to an artificial palm tree or enter into a new contract and he insisted on his suggestions. During these communications, appellant terminated the lease agreement on or about 25 January 2011 providing the respondent with two months termination notice that was until 31 March 2011. Thereafter the appellant discontinued paying any rental to the respondent in terms of its obligations under the lease agreement. Respondent refused to accept the termination. He sued appellant in the High Court for the remainder of the contract period, the escalation and interest added on in the amount of N\$326 644,73, the claim based on appellant's unilateral and unlawful termination of the agreement. Appellant appealed against the decision of the High Court dismissing its defence of the premises let by appellant not being identified or identifiable and its alternative defences of repudiation of the agreement by the respondent, as a result of what the appellant termed as unreasonable demands and supervening impossibility of performance for the reason that the erstwhile owner created a sun downer platform which reduced the safe height level of the antennas contrary to the agreement and the use of the sun downer by the respondent. The defences were repeated or relied on, on appeal.

Held that the premises a small room in tower which is the subject of a written lease agreement is clearly identified or identifiable. A valid lease agreement was therefore concluded.

Held that the agreement between the parties provided for relocation after the permanent tower became available, relocation was therefore contemplated or foreseeable. The demands made by respondent to relocate the antennas were not unreasonable and therefore did not exhibit a deliberate and unequivocal intention no longer to be bound by the contract or did not repudiate the contract.

Held further that the appellant failed to prove that the performance of its obligation in terms of the contract was rendered impossible. Appellant should have enforced the terms and conditions of the contract or explore viable alternatives with the respondent before it terminated the contract. Appeal dismissed.

---

### **APPEAL JUDGMENT**

---

MAINGA JA (DAMASEB DCJ and HOFF JA concurring):

Context

[1] The respondent in this appeal is the owner of Plot 91 Nonidas, Swakopmund, a property which the respondent had purchased on 30 April 2010 from the executor of the estate of the late Mr Thilo Neumann. The late Mr Thilo Neumann had erected various houses and structures on the property and had let a small room in a tower to the appellant for the purpose of setting up a telecommunications base station

commencing on 1 August 2006 on a monthly tenancy of N\$3000 for a fixed period of 10 years which would have expired on 31 July 2016 with an option to renew for a further period of 10 years. With the purchase of the property, the respondent became the landlord of the appellant. The appellant terminated the lease agreement on or about 25 January 2011 providing the respondent with a two months termination notice that was until 31 March 2011. Thereafter the appellant discontinued paying any rental to the respondent in terms of its obligations under the lease agreement.

[2] The respondent (plaintiff then) in the court below claimed for payment of rental for the remainder of the contract period plus the escalation and interest amounting to N\$326 644,73. The ground upon which the claim was based, was the appellant's unilateral and unlawful termination of the lease agreement, which the respondent did not accept. He claimed the termination to be a material breach of the agreement entitling him to damages, which was rental for the remaining period of the lease, interest added on.

[3] The appellant has no quarrel with the agreement and its terms but opposed the claim on three grounds, which were:

1. The lease agreement is not valid for the reason that the premises which formed the subject matter of the lease is not identified or identifiable.
2. In the alternative, should the court find that the lease agreement is valid and enforceable, it is the respondent who breached the agreement, for the following reasons:

- 'a) In terms of the lease agreement the defendant installed aerials on a standalone tower on the property of the plaintiff.
- b) The aerials so installed emit radiation which radiation is dangerous to the health of humans in close proximity.
- c) In or about 2009 the previous owner of the relevant immovable property, the predecessor in title to the plaintiff, constructed a sundeck allowing the public and his staff access thereto in close proximity to the aerials.
- d) Due to the health risk caused by radiation to the public and staff of the plaintiff accessing the sundeck the plaintiff can no longer make use of the premises for the aerials.
- e) Through the above actions the previous owner and the plaintiff have made the premises occupied by the defendant unsuitable for further use, thereby breaching the agreement.
- f) This breach by the plaintiff constitutes a repudiation of the agreement entitling the defendant to cancel the agreement.'

[4] In the further alternative based on breach by the respondent was supervening impossibility, in that:

- 'a) As a result of the radiation and consequent health risk referred to in para 3.2 above the performance by respondent (plaintiff then) in terms of the lease agreement and the use of the premises by the (defendant then) have become impossible.
- b) Due to the impossibility the lease agreement has terminated.'

[5] The High Court dismissed all the three defences holding that:

‘ . . . Where immovable property which is the subject of a written lease agreement the property must be clearly identified or identifiable. The court found that the phrase ‘small room in tower’ in the context of the lease agreement is sufficiently precise. The lease agreement was therefore valid.

At the time of concluding the lease agreement the parties foresaw that the antennas and the equipment would be relocated and that the affixing of the antennas to the tower was a temporary measure and this does not convey to the reasonable person that the plaintiff was indifferent to the terms of the lease agreement. As such the plaintiff did not attempt to enforce an agreement contrary to its terms and thus did not repudiate the lease agreement.

There was no marked change in the circumstances which prevailed at the time when the parties concluded the lease agreement which affected performance by the parties. When the lease agreement was concluded the parties envisaged that a sundeck will be constructed from which a restaurant will be operated. Once the restaurant was constructed the antennas will be relocated. Court was accordingly of the view that defendant was bound by the agreement. Defendant failed to performance in terms of the agreement leading to the breach of contract.’

[6] Counsel for the appellant relied upon all three of the grounds set out above.

As to the first, counsel pointed out that it is trite that the premises leased in terms of a written lease agreement must be ascertained or ascertainable from the terms of the agreement itself, failing which the agreement is *void* and unenforceable. In this regard he makes reference to the case of *Stellmacher v Christians & others* 2008 (1) NR 285 (HC). He further made reference to the lease agreement, particularly, the description of the premises, special conditions, definitions and interpretation of the words ‘the property’ and ‘the premises’ and argued that no photos or diagrams or plans identifying the ‘premises’ were attached to the lease agreement and that the lease agreement contains no other description of the premises to identify the

premises from the written lease agreement itself. Counsel submitted that the terms of the written agreement are wholly inadequate in its description of the premises leased to enable identification of the premises from the terms of the written agreement itself. While the premises are identified as a small room in a tower, the agreement is silent on which tower is leased, the tower cannot be identified and a reader of the agreement also does not know which room in the tower is referred to. He further contends that not only is the description of the premises inadequate, only the temporary premises are described, as para 11 of the schedule states that 'initial installation done in temporary allocated room and tower', the permanent premises which were leased for ten years with a further ten years option is not described at all. That the agreement is silent on where the permanent premises would be, what it would entail and who would erect it, that there is also no indication of when this would be done and when it would become available. The lease agreement was thus *void ab initio* and is unenforceable so contended counsel.

[7] Counsel for the respondent supports the judgment and order of the court below and submits that on the evidence tendered, the parties to the agreement were very clear as to the identity of the portion of the property for use for installing the antennas and that this was the tower and that all the photographic evidence bears this out. To the respondent's heads of argument counsel attached the photographs of the tower and the opposing affidavit to summary judgment of Mr Antonio Miguel Ferreira Geraldés, the Managing Director of the appellant at the time which affidavit is not part of the record on appeal. The documents were not opposed to by counsel for the appellant.

[8] I am unable to accept appellant's contention that the premises appellant had leased was not identified or identifiable, nor for that matter do I accept appellant's contention that the lease agreement was *void ab initio* and is unenforceable. In the lease agreement, the premises is described as 'small room in tower', and para 11 of the schedule (special conditions) states that the initial installation was done in temporary allocated room and tower. It further states that, 'MTC to relocate equipment and antennas to permanent tower and equipment room as it becomes available at no cost to lessor'. The property is defined or 'means the lessor's property upon which the premises are situated as described in the schedule'. The premises is defined or 'means the portion of the property selected by the lessee for purposes of the agreement'. Clause 27 states that the agreement between the parties constitutes the whole agreement between the parties as to the subject matter.

[9] The appellant successfully resisted summary judgment and in the affidavit of Geraldde, the Managing Director of the respondent then, under the heading 'Rectification' stated:

'6 The written agreement does not conform to the common intention of the parties at the time of concluding the agreement. At the time when the agreement was negotiated Mr Hans Schmidt-Dumont acted on behalf of the defendant and he negotiated with the late Mr Neumann. Oral agreement was reached but when the written lease agreement, annexure "A" was prepared, the common intention of the parties was not reflected correctly. Mr Schmidt-Dumont is not legally trained and in preparation of the schedule mistakes occurred. This was at a time before the defendant had a legal department to take care of these matters. Paragraphs 1 and 11 of the schedule are incorrect. It does not reflect the agreement correctly. The correct agreement was as follows:



- 6.1 The defendant would lease a small room in the building adjacent to the tower, the room nearest to the tower. There are a number of rooms and it was specifically agreed that it would be the room adjacent to the existing tower.
  - 6.2 The premises leased would further include the right for the defendant to install its antennas and related equipment on the adjacent tower.
  - 6.3 The late Mr Neumann agreed to erect a larger structure at his own cost. This would entail a tower of between 12 and 16 metres high with a sundeck entertainment area on top. This entertainment area would have as a base a concrete slab which would block any possible radiation.
  - 6.4 Upon completion of this structure the defendant would relocate its equipment and antennas to this tower at its own cost.
7. The equipment was initially set up and installed in the small room in the building adjacent to the tower and the antennas and related equipment were installed on the existing tower. In order to proceed with the construction of the new concrete tower the late Mr Neumann wrote a letter requested payment of the rental of the first year in advance to assist him to finance such construction. This request was declined. This requested was embodied in a letter by the late Mr Neumann to the defendant. This letter can however not be traced at present. All attempts are being made to locate this document.
  8. The late Mr Neumann however did not construct the new tower and the equipment and antennas were not relocated.
  9. I have instructed the legal practitioners of record for the defendant to claim rectification of the lease agreement.'

[10] Whether I accept that it is a small room in the tower or a small room in the building adjacent to the tower, the parties were clearly *ad idem* as to the premises and, indeed, as to all of the essentialia of the lease. It must be remembered that the agreement was drawn by the appellant and sent to the late Mr Neumann for

signature. In my view, appellant should not be heard to complain about the inadequacy of the agreement. From the agreement it is clear that appellant selected the portion of the property on which it had mounted its installations. The appellant mounted its installation in the small room in the tower as per the written agreement which remained like that for over four years before the contract was terminated. The appellant did not complain or enquire about the new premises that the late Mr Neumann should have built to which the appellant's installations should have been relocated. When the respondent purchased the property from the executor of the late estate of Mr Neumann, it was a condition of sale to inherit the lease agreement as it was. The premises leased was never an issue until the respondent discovered the danger of radiation to his staff and visitors to the sun downer platform. One of the reasons why the contract was terminated, was the cost of relocating appellant's equipment and antennas and yet the special condition of the agreement was that 'MTC to relocate equipment and antennas to permanent tower and equipment room as it becomes available at no cost to lessor'. Mr Schmidt-Dumont testified that when the respondent proposed that the antennas be raised or that the appellant erect an artificial palm tree it was an indication to Schmidt-Dumont that respondent no longer wanted to carry on with the existing lease agreement and that he most definitely did not intend building the separate permanent tower with the platform as was contemplated by the late Mr Neumann. That evidence in my view confirms the identity of the premises. Appellant's contention on this point has no merit, and I hold that a valid lease agreement was indeed concluded between the appellant and respondent and the premises so leased was the small room in the tower.

[11] The letter of 14 March 2011 from the appellant's legal representatives confirms Schmidt-Dumont's evidence where it states 'Your client's unreasonable demands to change the terms and conditions of the current agreement constitute such good cause to terminate the agreement. Alternatively, your client's demands to impose new terms and conditions outside the current agreement amounts to a repudiation of the agreement which repudiation has been accepted by our client, alternatively which is hereby accepted'.

[12] The evidence of Schmidt-Dumont and the letter above is clear acceptance of the written agreement and it is disingenuous of the appellant to attack the validity of the contract, even more so that appellant was the author of the contract.

[13] Having held that a valid and binding contract of lease was concluded between the appellant and respondent, I turn to the first alternative ground or defence relied on by the appellant, which turns on the question whether respondent breached the lease agreement or whether the respondent acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. It was pleaded and argued that should the court find that a valid and enforceable lease agreement was concluded the respondent breached the lease agreement in that he demanded that the equipment of the appellant installed be relocated to other premises. In effect the respondent demanded that the premises be changed and that not only did the respondent demand that the premises be changed, but that the appellant had to construct the necessary structure, an artificial palm tree and the demands amounted to a repudiation of the agreement so argued counsel.

[14] The High Court had summarised the evidence on this point as follows:

[14] After the plaintiff, purchased the Plot he visited the site where the antennas and base station telecommunications equipment of the defendant were located. At the time the plaintiff purchased the property, the defendant's base station and antennas were already constructed on the tower. The antennas were located at the top of the tower. The base station equipment was located in a small room on the ground floor of the tower, at the bottom of the staircase. The door to this small room was always locked and the defendant's personnel were the custodians of the keys. Between the top and bottom of the tower, is a sundeck, with stairs leading up to the sundeck from the ground floor.

[15] When the plaintiff visited the sundeck he had concerns about the levels of radiation emission from the antennas. As a result he, by electronic mail, contacted a certain Mr Schmidt-Dumont who was the defendant's project coordinator for radio networks and a meeting was set up for June 2010. The plaintiff's version of what transpired at the June 2010 meeting is not in accord with the evidence of Schmidt-Dumont. The plaintiff alleges that he enquired from Schmidt-Dumont whether there were possibilities to install the antennas on artificial palm trees similar to the ones used in built up areas whilst Schmidt-Dumont alleges that the plaintiff demanded that the antennas be relocated because they posed a health risk to his staff and visitors. I pause here and observe that it was common cause between the parties that the radiation intensity emitted by the antennas installed by the defendant was in excess of 20 times the International Commission for Non Ionising Radiation Protection (ICNIRP) maximum and that this radiation constituted a very serious health risk to human beings. Schmidt-Dumont further testified that he undertook to investigate the possibility of relocating the antennas. The defendant's general manager of networks shot down the idea of relocating the antennas.

[16] Schmidt-Dumont furthermore testified that at the time when the plaintiff made 'demands' for the relocation of the antennas, the defendant had applied to Erongo Red for it to conclude a separate electricity supply contract with Erongo Red. Mr Schmidt-Dumont further testified that the plaintiff did not assist it in its pursuit to conclude a separate electricity supply contract with Erongo Red and the

request/demands by the plaintiff to relocate the antennas made it impractical to continue with the lease agreement and it is because of those reasons that the defendant sent a letter dated 25 January 2011 to the plaintiff. The letter amongst other things reads as follows:

“. . . MTC no longer desires to continue with the lease agreement due to the following circumstances, amongst other, the huge cost of relocating the antenna alternatively the erection of a palm tree as per your request, the high cost of power connection and the increase of radiation risk posed by the antenna as pointed out by you. These factors were not foreseeable at the time of concluding the agreement by the parties. In the premises, MTC hereby gives 2 months termination notice and the lease agreement shall terminate on 31 March 2011.”

[17] The plaintiff responded by, electronic mail dated 01 February 2011, advising the defendant *inter alia* that the lease agreement did not provide for a termination before the expiry date of 31 July 2016 and that he would only accept immediate termination of the agreement against payment of rental including escalation until that date. The electronic mail was followed up with a letter dated 14 February 2011 which was sent by registered mail to the defendant. The letter amongst other things reads as follows:

“As already stated in my e-mail of 01.02.2011 I do not accept the termination of the lease on the following grounds:

1. The lease agreement does not provide for termination before the expiry date of 31<sup>st</sup> July 2016.
2. Since my first request to Mr Hans Schmidt-Dumont in June 2010 MTC had ample time to raise the antennas to a safe height. This time was not used and all my subsequent correspondence in this regard was ignored.

I therefore reiterate my position that either the antennas be raised to a height which avoids exposure of personnel to excessive radiation, or if MTC prefers to remove the installation, I should be compensated for the loss of income.”

[18] Mr Schmidt-Dumont testified that at the time when the memorandum (of termination of the lease agreement) was prepared, he was certain that the plaintiff no longer wanted to carry on with the existing lease agreement and that the plaintiff was unequivocal with his demand that the antenna be raised to a height which avoids exposure to excessive radiation. He testified that the plaintiff's alternative was simply that if the defendant would not do this, the installation could be removed and he be paid for the loss of rental. The plaintiff's proposal for the raising of the antenna and that it be relocated by the defendant erecting an artificial palm tree was to his (Mr Schmidt-Dumont) mind also an indication of the plaintiff no longer wanting to carry on with the existing lease agreement, and that "he most definitely did not intend building the separate permanent tower with the platform as contemplated by the late Mr Neumann.'

[15] The conduct upon which the appellant relies as a repudiation was the demand that the equipment and antennas be relocated to another premises or the premises be changed. The test to determine whether conduct amounts to repudiation has been stated as being 'whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound'. <sup>1</sup>In *Ponisammy & Another v Versailles Estate (Pty) Ltd*<sup>2</sup> the following passage from the judgment of Devlin J is cited with approval:

'A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must "evince an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.'<sup>3</sup>

---

<sup>1</sup> *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd & another* 1993 (3) SA 471 AD at 480I-J. See also the authors W E Cooper: *Landlord & Tenant* 2 ed, Juta & Co Ltd at 321.

<sup>2</sup> 1973 (1) SA 372 (A) at 387B. See also *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (AD) at 653D-E.

<sup>3</sup> In *Universal Cargo Carriers Corporation v Citati* (1957) 2 QB 401 at 436

[16] Alive to this test the court below formulated the question it had to determine as follows: has the plaintiff (respondent) acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract and not what Mr Schmidt-Dumont thought. In *Tuckers Land & Development Corporation (Pty) Ltd v Hovis*,<sup>4</sup> Jansen JA referring to the test in the *Universal Cargo Carriers Corporation* case, stated:

‘The test here propounded is both practicable and fair, and this is the test which I propose to apply in the present case. The question is therefore: has the appellant acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract? Obviously, the “reasonable person” must be placed in the position of the respondent. Would he, in that position, have inferred that the appellant no longer intended to deliver erven 95 and 97? In my view, it would have been obvious to him that, in an attempt to obtain proclamation of the township by submitting the new plan for approval, the appellant was sacrificing his rights to transfer of the erven. It follows that the appellant did commit an anticipatory breach of the contract. As it related to the whole of the contract, the respondent was entitled to rescind and to claim back what he had paid.’

[17] In *Culverwell & another v Brown*<sup>5</sup>, Nicholas AJA puts it thus:

‘If that breach amounted to what may conveniently be termed a ‘repudiatory breach’ (see *Johnson v Agnew* (1980) AC 367 *passim*), or if it constituted a repudiation of the agreement, then the defendants were entitled to cancel the contract. Otherwise not.

By a repudiatory breach is to be understood one which justifies the injured party in resiling from the contract. In *Aucamp v Morton* 1949 (3) SA 611 (A) at 619 Watermeyer CJ said:

---

<sup>4</sup> See footnote 2 at 653F-G

<sup>5</sup> 1990 (1) SA 7 AD at 13G-14A-D

“We are dealing in this case with a contract involving reciprocal obligations of which several, of varying importance, rest upon the appellant, and it is usually laid down with regard to such cases that a breach by one party of one of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfilment of which is essential to the continuation of the contractual tie.”

In *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T) at 4F-G Hiemstra J said that the test is one

‘. . . for which various expressions have been used, such as whether the breach “goes to the root of the contract”, or affects a “vital part” of the obligations or means that there is no “substantial performance”. It amounts to saying that the breach must be so serious that it cannot reasonably be expected of the other party that he should continue with the contract and content himself with an eventual claim for damages.’

The test whether conduct amounts to repudiation of a contract is similar. In *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A-C, Rabie JA referred with approval to statements by Williamson J in *Street v Dublin* 1961 (2) SA 4 (W) at 10B:

“(T)he test as to whether conduct amounts to such a repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound.”

And by Lewis J in *Schlinkman v Van der Walt and others* 1947 (2) SA 900 E at 919:

‘Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by Lord Coleridge LCJ in *Freeth v Burr* (1874) LR 9 CP at 214:

“the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract”, a test which was approved by the House of Lords in *Mersy Steel Co v Naylor* 9 AC 434.”



[18] Having regard to the totality of the evidence on this point, it is undoubtedly clear that the respondent did not evince an intention no longer to be bound by the agreement. For the reason of the health risk caused by radiation to the public and staff of the respondent accessing the sundeck, he made suggestions for the antennas to be raised to a height which did not expose his staff and public to the danger of radiation. That danger was common cause between the parties, the appellant on its *ipse dixit* was aware of the radiation exposure since September 2009. Respondent further suggested that the antennas be relocated by erecting an artificial palm tree. During November 2010 respondent further suggested to Schmidt-Dumont that it would probably be easier to enter into a new lease agreement but he did not insist on that course. Even in his e-mail on which appellant relies as demand from respondent for the premises to be changed, which is not, he amongst other things stated:

'2. Since my first request to Mr Hans Schmidt-Dumont in June 2010 MTC had ample time to raise the antennas to a safe height. This time was not used and all my subsequent correspondence in this regard was ignored.

I therefore reiterate my position that either the antennas be raised to a height which avoids exposure of personnel to excessive radiation or if MTC prefers to remove the installation, I should be compensated for the loss of income.'

[19] The above correspondence speaks for itself, respondent desired the agreement to run its full term, unless the appellant preferred or desired to remove the installation, in which event he had to be compensated for the loss of income on the remainder of the contract. He refused to accept the unilateral termination of the contract. Repudiation of a contract may be done expressly, that is, unlawfully

terminating the contract, in this case the lease agreement and the lessor requesting the lessee to vacate the premises<sup>6</sup> or repudiation may be inferred where a party exhibits a 'deliberate and unequivocal intention no longer to be bound by the contract.'<sup>7</sup>

[20] The appellant made no alternative suggestions to respondent to salvage the contract nor did it insist on the terms of the contract. Schmidt Dumont testified that the erstwhile owner, the late Mr Neumann had informed him of his plans to erect a permanent tower and it is clear from his evidence that the initial installations were temporal. Once the new tower was available the equipment would be relocated to a permanent tower at appellant's costs. Schmidt-Dumont did not inform the respondent of his understanding of para 11 - special conditions. The appellant failed completely to invoke clause 22 of the agreement which provided the procedure for a breach whenever it occurred. Schmidt-Dumont assumed that the respondent had no intention to be bound by the contract, removed appellant's installations and terminated the agreement.

[21] Clause 22.2 of the agreement provides:

'22.2 Should the lessor breach any material term of this agreement and fail to remedy such breach within 30 (thirty) days of the receipt of the lessee's written notice or the lessor be liquidated or sequestrated (whether finally or provisionally) the lessee shall be entitled in any such event and without prejudice to any other claim of any nature whatsoever which it may have against the lessor as a result of such breach, to cancel this lease forthwith and claim compensation for any damages suffered by the lessee.'

---

<sup>6</sup> *Varalla v Jayandee Properties* 1969 (3) SA 203 (T) at 206A-B. See also the author Copper, footnote 1.

<sup>7</sup> Footnote 1

[22] The appellant was obliged to invoke clause 22.2 before it could terminate the contract. Respondent's insistence that the antennas be raised or relocated to a safe distance cannot be said to be unreasonable. In regard to the health risk occasioned by radiation, Geraldès in his affidavit opposing summary judgment stated:

'12. It is a fact that the level of the radiation caused by the equipment of defendant is far too high as a result of the proximity of the sun downer platform. This radiation is harmful to any person making use of the sun downer platform. This fact is common cause and this is confirmed in a letter by legal practitioners on behalf of the plaintiff, Metcalfe Attorneys, dated 16 December 2011'.

[23] Therefore the court below correctly rejected this alternative defence as well. I hold that the respondent's conduct could not lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract. Respondent did not repudiate the lease agreement. It was the appellant who expressly terminated the contract.

[24] What remains is the defence of supervening impossibility. It is argued that should this court find that the lease agreement is valid and enforceable, it is common cause that the premises leased were not fit for the purposes let and submits that the lease agreement could not continue. The common cause of the unfitness of the premises is premised on the pre-trial minutes the parties agreed on as follows:

'2.12 That the radiation intensity emitted by the antennas installed at the premises by the defendant was in excess of twenty times the international commission for Non Ionizing Radiation Protection (ICNIRP) maximum.

2.13 That this radiation constituted a very serious health risk.

2.14 That the health risk posed by radiation to personnel of plaintiff and public afforded access to the sundeck made continuous use of the premises by defendant "impossible".'

[25] The dispute between the parties in the court below was formulated in the pre-trial minutes as whether the lease agreement has terminated due to it becoming impossible for the appellant to make use of the premises for the purpose leased. The court below found that 'there was no marked change in the circumstances which prevailed at the time when the parties concluded the lease agreement'. That court reasoned that 'at the time when the lease agreement was concluded the parties envisaged that the sundeck will be constructed from which a restaurant will be operated. Once the restaurant was constructed the antennas will be relocated'. The court below held the view that appellant was 'bound to perform under the agreement'.

[26] Counsel for appellant submitted that this finding by the court below is wrong as the appellant could no longer make use of the premises and on this point the parties were in agreement in the pre-trial minutes. Counsel argues that the agreement does make provision for the relocation of equipment and antennas but is silent on the location of the new premises. That the new premises were not available yet, the appellant had nowhere to go, and it could not perform under the agreement. He further contends that the finding by the court below is not borne out by the evidence on record as there was no such evidence. Counsel submits that the finding that the appellant was bound to perform under the agreement by moving the antennas once the restaurant was constructed is wrong as there was no lease

agreement in terms of which to perform and that the premises to which the antennas had to be relocated were not agreed upon, there was no lease agreement in respect of this new undefined premises upon which the parties had not agreed.

[27] As a general rule, impossibility of performance brought about by *vis major* or *casus fortuitous* will excuse performance of a contract. But it will not always do so. In each case it is necessary to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created, nor will it avail the defendant if the impossibility is due to his or her fault<sup>8</sup>, save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant.<sup>9</sup>

[28] The test is whether, when the parties entered into the contract, the possibility was contemplated by them that the event which rendered performance impossible might occur, for if the possibility was contemplated and no provision made in the contract against the event, the implication could be made that the claimant should not be relieved because the event did occur. But where the impossibility arose at the time of the inception of the contract and both parties contemplated that the contract be capable of execution in the normal way, there is no reason why the general rule should not be applied.<sup>10</sup>

---

<sup>8</sup> Per *Stratford in Herman v Shapiro & Co* 1926 TPD 367 at 373, quoted with approval in *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 123C-D.

<sup>9</sup> *Transnet Ltd v Owner MV Snow Crystal*, footnote 7 and the cases referred to in footnotes 8 & 9. See also Christie RH: *The Law of Contract in South Africa*, 3 ed at 528.

<sup>10</sup> *Transnet Ltd v Owner MV Snow Crystal*, footnote 7.

[29] The 'impossibility' on which appellant relied was that the premises leased was not fit for the purposes let as a result of the radiation and the consequent health risk the antennas posed to the public and staff of the respondent. In the opposition to summary judgment, Geraldès stated that the actions by the erstwhile owner, the late Mr Neumann and the respondent in creating and using the sundowner platform, constitutes a breach of the agreement in that the appellant was prevented from making use of the premises for the purpose agreed upon. Paragraph 4 of the letter terminating the contract stated: 'However, MTC no longer desires to continue with the lease agreement due to the following circumstances, amongst others the huge cost of relocating the antennas alternatively the erection of a palm tree as per your request, the high cost of power connection and the increased of radiation risk posed by the antenna as pointed out by you. These factors were not foreseeable at the time of concluding the agreement by parties'.

[30] The letter from the appellant's legal representatives cited unreasonable demands by the respondent to change the terms and conditions of the current agreement to constitute good cause to terminate the agreement. The respondent's demands which I held not to be unreasonable given that they were not made for wrong reasons or on wrong principles could not give rise to impossibility of performance, so are the huge costs of relocation and the huge costs of power connection. Paragraph 11 'special conditions' makes provision for relocation. The initial installation was meant to be temporary in allocated room and tower. The equipment and antennas were to be relocated to a permanent tower and equipment room as it became available at no cost to lessor. The relocation and costs were contemplated or foreseeable and could not be an impossibility. Paragraph 11 should

be read together with clause 1.1.3 which defines 'the premises' to mean 'the portion of the property selected by the lessee for purposes of (the) agreement'. I must accept that the appellant selected the premises for the purposes of the agreement and when the permanent tower was to be made available was left open or no time limit was set. The parties intended the contract to be exactly what it purports. The assertions that the common intention of the parties was not reflected correctly in the written agreement or that Schmidt-Dumont is not legally trained and in preparation of the schedule mistakes occurred or that the appellant did not have a legal department then, all in my opinion amounts to negligence on the part of the appellant and the general rule of impossibility does not avail the appellant.

[31] Appellant blames the erstwhile owner for having created the sundowner contrary to the agreement which sundowner allegedly was only discovered during September 2009 after the death of the erstwhile owner, the respondent having bought the property. The appellant also blames the respondent for using the sundowner. The appellant contends further that the sundowner platform reduced the height of the tower and antennas of the appellant relative to the surroundings. The evidence of the two labourers, Nghishoongele and Haihambo who were involved in the construction of the tower seem to contradict the evidence of the appellant or Schmidt-Dumont on that point. Nghishoongele amongst other things, testified that the structure where the appellant's antenna is located was almost completed, the tower was completed except that some walls were not plastered. He further testified that there was a floor and on top there were bricks and planks on which people were allowed to walk. When the technicians of the appellant mounted up the antennas they used the very same wooden planks because at the time the concrete and

plaster had not been laid yet. This evidence is more credible than that of Schmidt-Dumont. The two labourers were physically on the premises and vouched to what was already constructed and what not.

[32] In this regard the court below was correct when it held that there was no marked change in the circumstances which prevailed at the time the parties concluded the lease agreement for the reason that on the evidence of Schmidt-Dumont at the time the contract was concluded, the parties envisaged that the sundeck would be constructed from which a restaurant would be operated. In that event the antennas would have had to be relocated. The court below was also correct to hold that change of circumstances did not relieve the appellant to perform under the contract.

[33] In cross-examination counsel for the appellant made reference to clause 4 (purpose of the premises) and clause 15 (warranty) and it was put to the respondent that the premises was not fit for the purpose of the business of the appellant. The respondent's reply was that the premises was fit and adequate but the appellant's installations were not. I agree. The appellant is silent on a simple suggestion made by the respondent, namely, to have increased the height of the antennas. Appellant failed to insist on the terms of the contract particularly para 11 and clause 22 and therefore appellant failed to prove that the respondent was unwilling or unable to carry out his obligations under the agreement. On its own version, the appellant never considered to explore any other viable alternative with the respondent. The contention that the terms and conditions of the permanent tower were not negotiated and the appellant had nowhere to go lack substance. The alleged impossibility was



not brought about by *vis major* or *casus fortuitous*, but in my opinion the complaints about the contract appellant relied on should be placed at the door of the appellant. The court below was correct to hold that the appellant was bound to perform in terms of the contract and I can see no reason for interfering with that finding. Performance of appellant's obligation in terms of the contract was not rendered impossible. It follows that the appeal should fail.

[34] The order is then as follows:

1. The appeal is dismissed with costs, such costs to include those occasioned by the employment of one instructing and one instructed counsel.

---

**MAINGA JA**

---

**DAMASEB DCJ**

---

**HOFF JA**

## APPEARANCES:

APPELLANT

P C I Barnard

Instructed by ENSafrica | Namibia

Inc (Lorentz Angula Inc)

RESPONDENT

E M Schimming-Chase

Instructed by Andreas Vaatz &amp; Partners