



## Background

[1] On or about 11 November 2006, the applicant/plaintiff entered into a written lease agreement with the respondent/defendant in terms of which the applicant leased to the respondent a certain property known as TransNamib Main Sports Club which included offices, rooms, a hall and tennis courts situated at erf 194, TransNamib building, Bahnhof Street in Windhoek. The initial lease agreement was for a period of nine years and on 20 November 2013 the lease agreement was extended for a further five years, the agreement to come to an end on 31 December 2020. On 24 August 2016 the agreement was however extended with another five years and is set to come to an end on 30 November 2025. This extension was however not explained in the Particulars of Claim as the Particulars of Claim only deals with the running out of the lease at 31 December 2020, neither was a copy of such extension uploaded. A copy of this addendum was however attached to the opposing affidavit of the respondent.

[2] On 31 May 2019 the applicant gave the respondent notice that the lease agreement of buildings on portion of erf 194 Windhoek is to terminate on 31 May 2020 and such notice was in terms of section 32(1) of Rents Ordinance<sup>1</sup>. The applicant alleges that the respondent is in breach of the lease agreement as they are in arrears of municipal fees to the amount of N\$182 508.81. The applicant therefore seeks for the termination of the lease agreement and ejectment of the respondent in light of the fact that the agreement was breached, alternatively because the respondent was given a year's notice under the Rents Ordinance.

## The arguments

[3] Numerous points in limine were raised on behalf of the respondent. These were: That the original contract signed during November 2006 under sub-clause 16.1 contains a non-optional arbitration clause in that it reads 'should the parties be unable to resolve the dispute in this manner, the dispute shall be referred to a single arbitrator for arbitration.'

- i. Mr Johnny Smith in his Founding Affidavit alleges that he is 'duly authorized to make this affidavit' but he does allege that he is authorised to bring the Application

---

<sup>1</sup> 13 of 1977.

for Summary Judgement and the application is therefore not properly before court.

- ii. The third point in limine is that the particulars of claim is vague and embarrassing and therefore excipiable. In that under paragraph 4 of the Particulars of claim it is alleged by the applicant that the parties entered into a written lease agreement on or about 20 November 2013 whilst this is in fact incorrect as the agreement was entered into on 7 November 2006. Paragraph 5 further claims that the applicant was at all times represented by its Acting Chief Executive Officer, Mr. Struggle Ihuhua and this is not true as the applicant was represented by Mr. John Mueneni Shaetonhodi at the conclusion of the principle lease agreement. That Dr. Zechariah Ochola Bolo represented the respondent during the signing of the original lease agreement and later the addendum was signed by Lucy Bolo. The allegations made in the Particulars of Claim are therefore manifestly incorrect and confusing. The respondent then proceeded to point out a number of other excipiable allegations in the Particulars of Claim.
- iii. The non-compliance with the Stamp Duties Act, 15 of 1993 in that although the principle lease agreement was stamped, the two addendums were not stamped and the principle lease agreement was only stamped for the initial nine year period of lease and not for the subsequent two five year periods.
- iv. The next issue raised was the non-compliance of the applicant with the case plan order indicating that the summary judgement application was to be filed by 7 December 2020 and the duly commissioned Founding Affidavit in support of the Summary Judgement Application was only filed on 8 December 2020 and the applicant did not seek condonation for the late filing of the application.

[4] On behalf of the respondent the legal practitioner then proceeded and argued that the respondent did not breach the agreement as they asked for a break-down in how the arrear amount was calculated, as they are not the only tenants receiving services from the municipality and there is only one water meter for all the tenants. In terms of sub-clause 15.11 of the Principal Lease Agreement they are only responsible for 'municipal services proportional to the extent of the property charged by the Local Authority' and they share these premises with various other entities like the applicant itself, TransNamib Bowling

Club, a cosmetics shop, a beauty shop and a car dealership.

[5] It was further argued that the lease agreement was extended for a further period which was not dealt with at all in the Particulars of Claim of the applicant but which is set to run out on 30 November 2025 and that they have complied with all its obligations under the said lease agreement.

[6] On behalf of the applicant the following was argued regarding the points in limine raised:

- i. Ad the Arbitration clause: the applicant argued that the arbitration clause is not applicable in this case because it is a question of default in rental payments as opposed to a dispute and in terms of clause 12.1 which provided that ' should the LESSEE fail to pay any rental due by it on the due date' the LESSOR shall be entitled to cancel this Agreement, claim damages and/or repossess the Property' and it therefore follows that the arbitration clause does not in any way justify the defendant withholding possession of the leased property from the applicant.
- ii. Ad the locus standi of Mr. Johny Smith: In his affidavit he clearly alleged that he was authorised to depose to the affidavit in support of the summary judgement application and in doing so, it is implied that he is also authorised to bring the application for summary judgement.
- iii. Ad the point in limine that the particulars of claim is vague and embarrassing: At the time that the summons wer issued the applicant relied on the 2013 agreement that extended the lease period for five years and that during the conclusion of this specific agreement the applicant was represented by Struggle Ihuhua and the defendant by Lucy Bolo. The respondent was further focusing on the wrong agreement.
- iv. Ad non-compliance with the Stamp Duties Act: The argument put forward on behalf of the applicant is that in terms of clause 15.9 of the principal lease agreement, it is the obligation of the Lessee to pay for stamp duty in terms of the Stamp Duties Act 15 of 1993.

- v. Ad non-compliance with a court order: The applicant filed its application for summary judgement on 7 December 2020 together with an uncommissioned affidavit in support of the application. The commissioned affidavit was only filed on 8 December 2020. The respondent did not suffer any prejudice as the uncommissioned and commissioned affidavits are the same word for word.

[7] On the merit of the application it was argued on behalf of the applicant that the reason why the respondent is in breach of the lease agreement, is because they are in arrears of the amount of N\$182 508.81 although the respondent alleges that all rental and other obligations were timeously paid no proof was attached of the payment of the rental arrears. The respondent contended that the applicant was overcharging it for municipal services since the inception of the Principal Lease Agreement and relied on an email addressed to the applicant's legal practitioner in which it was communicated that the 2018 case was stayed until a detailed reconciliation of payments and outstanding payments for rentals and water bills is finalized and this has been done and still no payment of the amount of N\$182 508.81 was made.

Considering the arguments.

[8] Van Niekerk, Geyer and Mundell in Summary Judgement – A practical guide<sup>2</sup> said the following:

'Departing from the premise that the remedy is drastic, our courts have laid down three rules for summary judgement applications. Firstly, that there is a numerous clausus of instances in which a plaintiff may apply for summary judgement in the sense that no application is possible which falls outside the strict ambit of rule 32(1); secondly, that, before a court will entertain an application for summary judgement, a plaintiff must present a clear case on technically correct papers while complying strictly with the rule and thirdly, that, in cases which are doubtful, summary judgement must be refused. (See *Art Printing Works Ltd v Citizen (Pty) Ltd* 1957 2 SA 95 (SR) 97H; *Davis v Terry* 1957 4 SA 98 (SR) 100 in fin 101A; and others)

The drastic nature of the remedy has also prompted the courts to draw the conclusion that the plaintiff's compliance with rule 32(2) must be judged more strictly than the defendant's compliance with rule 32(3). (See *JNOG Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd* 1968 (4) SA 371 and others).'

---

<sup>2</sup> LexisNexis, Durban 1998, at page 5-4.

[9] In the current matter two points in limine were raised against the correctness of the papers, being the allegation that the Particulars of Claim is vague and embarrassing and that the documents relied upon, the lease agreement and the addendums were not stamped in accordance with the requirements of the Stamp Duties Act, 15 of 1993. The court further noted that the copy of the lease agreement that was uploaded does not contain a page 12 as it goes from page 11 to page 13. The clause relied upon regarding the first point in limine dealing with non-optional arbitration clause is therefore not before court.

[10] For the purpose of this application, the court will first determine the point in limine dealing with the stamps which was not affixed to the addendums of the lease which extended the original lease period. Section 22 of the Stamp Duties Act<sup>3</sup> deals specifically with the duty payable on leases of immovable property. It reads as follows:

'22. (1) In this section "lease" means a lease or agreement of lease contemplated in Item 10 of Schedule 1.

(2) The period for which a lease shall be stamped shall be -

(a) .....

(b) .....

(c) in the case of a lease for a definite period (hereinafter referred to as the original period), with provision for the continuance, renewal or extension thereof beyond the original period or any subsequent period during which the lease may be in force, a period equal to the aggregate of the following periods, namely -

(i) the original period; and

(ii) any definite periods of continuance, renewal or extension provided for in the lease; and

(iii) if the lease is to continue in force or may be continued, renewed or extended for an indefinite period following the original period or the definite periods referred to in subparagraph (ii), a period of two years.

(3) Where any lease may be continued, renewed or extended only in writing, duty may in the first instance be paid only in respect of the original period of the lease and, in respect of any continuance, renewal or extension, the provisions of subsection (4) shall apply, but if such lease is tendered for registration it shall before the registration be stamped for the period for stamping

---

<sup>3</sup> 15 of 1993.

provided in subsection (2)(c).

(4) (a) Any instrument whereby a lease (including any lease or agreement of lease chargeable with stamp duty under any previous law of Namibia) is continued, renewed or extended beyond the period for which such lease (or any previous continuance, renewal or extension thereof) was required to be stamped, shall be chargeable with the duty payable in respect of a lease for a period equal to the entire period of the aforesaid lease (including any periods for which it has been continued, renewed or extended), less the sum of the amounts of stamp duty previously payable in respect of such lease and any earlier continuations, renewals or extensions thereof, whether under this Act or any previous law of Namibia.

(b) Where any lease referred to in paragraph (a) for a definite period is continued, renewed or extended for an indefinite period, the entire period of the lease shall for the purposes of the said paragraph be deemed to be the total period covered by the original period of such lease and any definite periods for which the lease has previously been continued, renewed or extended, and a further period of two years. ‘

[12] In light of the above it is clear that the 2013 adendum to the lease, which is relied upon by the applicant is subject to duty being paid on the said lease and should have been stamped to that effect. The document on which the applicant therefore relies is not properly before court and the party who wish to rely on such a document bears the duty to have it stamped. The applicant therefore had the duty, if it relies on the said agreement, to pay for the stamps and to affix them to the document in order for it to form part of the bundle of documents upon which this matter is based. It can therefore not be said that the Summary Judgement application is before court on technically correct papers and it should be struck from the roll for that reason.

[13] The court did not deal with any of the other points in limine which might also have an impact on the question whether the summary judgement application is properly before court as the point in limine raised regarding the unpaid stamp duties went to the basis on which the application was brought.

[14] The court considered the application for a cost order on attorney client scale as requested by the respondent but came to the conclusion that because this application for summary judgement is struck from the roll for a technical reason, it would not be appropriate to grant such a cost order in the current circumstances. The respondent is

however awarded a normal cost order, capped in terms of rule 32(11).

[15] I therefore make the following order:

1. The point in limine that the papers do not meet the technical standard needed is upheld and therefor the summary judgement application is struck from the roll.
2. Cost of this application is awarded to the defendants, of which costs are limited in terms of the provisions of Rule 32(11).
3. The parties are ordered to file a joint case plan by no later than 25 March 2021 at 15h00.
4. The case is postponed to 30 March 2021 at 15h30 for a case planning conference.

<b>Judge's signature</b>	<b>Note to the parties:</b>
Rakow, J	Not applicable.
<b>Counsel:</b>	
<b>Applicants</b>	<b>Respondent</b>
F Bangamwabo Of FB Law Chambers Windhoek	K Morland Of Michelle Saaiman Incorporated Windhoek