

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2021/00206

In the matter between:

065 LIFESTYLE MEDIA GROUP CC

PLAINTIFF

and

JCDECAUX NAMIBIA OUTDOOR ADVERTISING (PTY) LTD

DEFENDANT

Neutral citation: *065 Lifestyle Media Group CC v JCDecaux Namibia Outdoor Advertising (Pty) Ltd* (HC-NLD-CIV-ACT-CON-2021/00206) [2023] NAHCNLD 140 (08 December 2023)

Coram: MUNSU J

Heard: 16 August 2023

Delivered: 08 December 2023

Flynote: Contract – Tacit agreement – Compliance with requirements for contracts – Consensus important – Inference from relevant proven facts and circumstances – Conduct of parties considered.

Summary: The plaintiff sued the defendant for alleged breach of agreement, and loss of income due to alleged unlawful conduct by the defendant. The plaintiff's case in claim 1 was that, it duly performed in terms of the agreement and that the defendant failed to comply with its obligations. The plaintiff further alleged, in claim 2 that the defendant carried adverts on a structure (water tower) leased by it from the town council, thereby causing the plaintiff to suffer loss. The defendant admitted liability to claim 1 and disputed claim 2. The defendant maintained that it had a 'revived' tacit agreement with the town council in respect of the water tower. The defendant filed a counterclaim for alleged breach of several agreements entered into by the parties.

Held, that a lease agreement must comply with the requirements for contracts, including consensus.

Held, that the court, by a process of inference from all the relevant proven facts and circumstances, should be able to conclude that a contract came into existence.

Held, that there was no conduct by the town council that could be seen as reviving the terminated agreement.

Held, that the emails relied on by the defendant do not show that there was consensus between the defendant and the town council in respect of the water tower.

Held, that there was no agreement concluded between the defendant and the town council post 2018. Accordingly, the defendant could not have lawfully entered into an agreement in respect of the water tower, with a third party without a valid agreement with the town council.

Held, that the agreement between the town council and the plaintiff in respect of the water tower, was only entered into on 30 April 2021, which is past the plaintiff's claim period.

Held, that even if the court was to find that the plaintiff suffered damages, there was no causal link between the conduct of the defendant and the damages suffered by the plaintiff.

Held, that the plaintiff did not demand from the defendant to vacate the water tower.

ORDER

1. Claim 1 of the Plaintiff's particulars of claim, for payment in the amount of N\$ 20,708.50 against the Defendant is granted, subject to set-off against the amount due by the plaintiff to the defendant in terms of the counterclaim.
2. Interest at the rate of 20% per annum on the aforesaid amount of N\$ 20,708.50 from 17 December 2021 to the date of final payment.
3. Claim 2 of the Plaintiff's particulars of claim is dismissed.
4. The Plaintiff must pay the Defendant the amount of N\$ 73, 715.23, being the total claimed in counter 3 and 4 of the Defendant's counterclaim.
5. Interest at the rate of 20% per annum on the aforesaid amount of N\$ 73, 715.23 from 17 December 2021 until date of final payment.
6. Counter 5 and 6 of the Defendant's counterclaim are dismissed.
7. Each party to pay its own costs.
8. The matter is removed from the roll: Case Finalised.

JUDGMENT

MUNSU J

Introduction

[1] The parties in this matter, the plaintiff and the defendant, are entities operating in the advertising sector. They entered into several agreements that have become the subject of this matter.

[2] The plaintiff instituted two claims against the defendant. The first claim is for payment of an amount of N\$ 20 708.50, for alleged breach of agreement, while the second claim is for payment of a sum of N\$ 120 000, for alleged loss of income due to the unlawful occupation by the defendant of the plaintiff's alleged leased premises.

[3] The defendant defended the action and filed a counterclaim for alleged breach of six agreements entered into by the parties.

[4] The plaintiff is represented by Mr. Ndana, while the defendant is represented by Ms. Lewies on instructions of Cronje Inc.

The pleadings

In convention

[5] In claim 1, the plaintiff alleges that on 09 September 2020, the parties entered into an oral agreement in the following terms:

- (a) The plaintiff would provide works of flighting of vinyl artworks onto billboards owned by the defendant in various towns in northern Namibia.
- (b) The defendant would pay the plaintiff for its work upon receipt of invoices from the plaintiff.

[6] It is alleged that the plaintiff duly performed in terms of the agreement in that:

- (a) It installed flighting of vinyl artworks onto billboards owned by the defendant in various towns in northern Namibia.
- (b) It provided to the defendant invoices for the work done amounting to N\$ 20 708.50.

[7] It is further alleged that the defendant has failed to pay the invoices provided.

[8] In respect of claim 2, it is alleged that at all relevant times, the plaintiff was the lawful lessee of Okandjengedi Ombuga water tower (the water tower), pursuant to a lease agreement signed between the plaintiff and Oshakati town council (the town council) for the lease of the said water tower.

[9] It is further alleged that between January 2021 and April 2021, the defendant unlawfully and without the consent of the plaintiff being the lawful lessee of the water tower, carried adverts on the said water tower. Additionally, it is alleged that as a result of the defendant's unlawful advertising on the aforesaid water tower, the plaintiff suffered damages in the amount of N\$ 120 000, being the loss suffered from monthly advertising fee of N\$ 30 000 per month.

[10] The defendant admits its indebtedness in respect of claim 1. Nevertheless, the defendant counterclaimed and asserted that it will apply set-off, and that any order granted in favour of the defendant in terms of its counterclaim, will extinguish the plaintiff's claim.

[11] In respect of claim 2, the defendant pleaded that from 01 December 2019 to 21 May 2021, the defendant was the lawful lessee of the water tower in terms of an unsigned lease agreement with the town council, and remained in peaceful and undisturbed possession and enjoyment thereof. For this reason, the defendant maintained that it is not liable to the plaintiff.

[12] In replication, the plaintiff disputed the authenticity and validity of the alleged unsigned lease agreement. It further claimed that there was no lease agreement entered into by the town council and the defendant as pleaded. Additionally, the plaintiff asserted that in December 2020, it entered into a lease agreement with the town council in respect of the water tower.

In reconvension

[13] In terms of the counterclaim, the defendant claims payment in the amount of N\$ 262,078.57, for alleged outstanding invoices in respect of four agreements (counter 3, 4, 5 & 6) entered into between the parties. The defendant acknowledged that the first two agreements (counter 1 and 2) were paid in full.

[14] The plaintiff pleaded in respect of counter 3 and 6 that it duly performed its obligations by paying the amounts due in full in terms of those agreements. In respect of counter 4, the plaintiff pleaded that it withheld payment thereof after the defendant failed to pay the plaintiff's invoice in respect of claim 1. Regarding counter 5, the defendant pleaded that it stopped paying the rental fee after three months upon discovery of the misrepresentation by the defendant in respect of its lease of the water tower.

[15] In replication, the defendant claimed that from 01 December 2019 to 21 May 2021, it was the lawful lessee of the water tower in terms of a tacit agreement with the town council and remained in peaceful and undisturbed possession and enjoyment thereof until 21 May 2021. The defendant denied ever misrepresenting to the plaintiff and asserted that it had a valid lease agreement with the town council.

[16] The defendant further denied that the plaintiff cancelled the agreement (counter 5), and pleaded that the said agreement ran its course and only terminated due to effluxion of time.

[17] In addition, the defendant pleaded that between December 2019 and December 2020, the plaintiff had full exposure at the water tower and enjoyed full payment from its client Namib Mills.

Plaintiff's case

[18] The plaintiff's sole member, Mr. Sakaria Nangula (Mr. Nangula) testified on behalf of the plaintiff. The essence of his testimony was that during 2019, the parties entered into various lease agreements, including one in terms of which the plaintiff would lease from the defendant the water tower.

[20] He testified that upon consultation with the town council, the plaintiff discovered that the water tower was not leased to the defendant and that the defendant had misrepresented to the plaintiff that it was the lawful lessee of the water tower.

[21] It was the witness's further testimony that, as a result of the defendant's misrepresentation, the plaintiff duly cancelled the lease agreement in respect of the water tower, and during December 2019, the plaintiff reached an agreement with the town council for the lease of the water tower for a period of 5 years.

[22] In addition, Mr. Nangula related that, pursuant to the said agreement, the plaintiff was the lawful lessee of the water tower.

[23] Furthermore, the witness narrated that between January 2021 and April 2021, the defendant unlawfully, and without the consent of the plaintiff being the lawful lessee, carried adverts on the water tower. He recounted that, as a result of the defendant's unlawful advertising on the water tower, the plaintiff suffered damages in the amount of N\$ 120 000 being the loss from monthly advertising fees of N\$ 30 000 per month.

[24] In respect to claim 1, Mr Nangula testified that on or about 09 September 2020, the parties entered into an oral agreement in which the plaintiff was to provide flighting of vinyl artworks on billboards owned by the defendants in various towns in northern Namibia. He narrated that in terms of the agreement, the defendant would pay the plaintiff for its work upon receipt of invoices from the plaintiff. It was his testimony that the plaintiff duly performed in terms of the agreement, however, the defendant failed or refused to honour the invoices issued.

Defendant's case

[25] Mr. Douglas Albrightson (Mr. Albrightson) is employed as the country manager of the defendant. He testified that for the period 01 July 2012 to 30 June 2013, the defendant was the lawful lessee of the water tower in terms of a lease agreement, duly concluded with the town council (the first lease agreement). According to Mr. Albrightson, it was specifically agreed that the Oshakati town council, as landlord,

grants to the defendant, as tenant, the sole and exclusive right to supply, erect and maintain structures on which advertisements would be displayed. The agreement was to remain in force for a period of 1 year from the date of signature.

[26] The witness further testified that pursuant to the first lease agreement, the defendant concluded a further lease agreement with the town council for the same site, being the water tower, for the period of 01 December 2012 to 30 November 2013 (the second lease agreement). On expiry of the second lease agreement, on 30 November 2013, the second lease agreement continued on a month-to-month basis, until November 2018, when the defendant cancelled the second lease agreement with the town council due to the fact that at that point in time, the contract was no longer financially viable for the defendant.

[27] Mr. Albrightson related that during November 2019 the defendant decided to revive the second lease agreement in respect of the water tower with the town council since it procured a new client (the plaintiff). He testified that the negotiations were conducted by the defendant's operations manager at the time, one Mr. Erich Muinjo, however, he was copied to all the email correspondences between the defendant and the town council on the subject, and was further briefed regularly by Mr. Muinjo on the discussions and developments. He further informed the court that Mr. Muinjo left the defendant's employ on 12 October 2020.

[28] Mr. Albrightson further narrated that after Mr. Muinjo's departure from the defendant, he followed up with the town council regarding the progress status of the revival of the second lease agreement. He recounted that the defendant took occupation of the site, again, on or about 01 December 2019.

[29] It was his testimony that, before his departure from the defendant, Mr. Muinjo, on 6 February 2020 sent a draft lease agreement to the town council for consideration. He further testified that the contract which was secured with the plaintiff was for a period of 2 months commencing on 01 December 2019 and expiring on 31 January 2020, and subsequently renewed from 01 February 2020 until 31 December 2020.

[30] According to Mr. Albrightson, it was clear to the defendant that the town council accepted the terms of the defendant's offer, and that an agreement had been concluded.

[31] It was his testimony that, although the defendant's request, and offer, was for the renewal of the lease agreement on the same terms and conditions as the previous agreements and specifically for a 12-month period from 01 December 2020 to 30 November 2021, the lease agreement continued on a month-to-month basis thereafter for the period between 01 December 2019 to 21 May 2021.

[32] Mr. Albrightson further testified that on 12 May 2021, he attended a meeting at the town council and was informed that the plaintiff was awarded the contract.

[33] It was his testimony that the defendant denies that the plaintiff had a lease agreement with the town council in respect of the water tower.

[34] As regards the counterclaims, the witness referred to six agreements (counter 1-6) concluded between the parties. It became clear in his evidence that counter 1 and 2 were paid in full, thus, I will not consider those agreements.

[35] Mr. Albrightson testified that on 06 January 2020, the parties entered into a written advertising rental agreement (counter 3), in terms of which the defendant would supply advertising space to the plaintiff for the lighting of a third-party, Hungry Lion's advertising posters. The advertising site was located at the main road, Okahandja. The monthly advertising rate would amount to N\$ 6 930.00, excluding VAT. Furthermore, the agreement would endure for the period 15 January 2020 to 14 April 2020.

[36] He further testified that on 22 April 2019, the parties entered into a written advertising rental agreement (counter 4), in terms of which the defendant would supply advertising space to the plaintiff for the lighting of a third-party, NMT Shipping's advertising posters, and the monthly advertising rate would amount to N\$ 3 610.25, excluding VAT. The advertising site was located 'along the Main Road, (B1) facing taxi

rank at 4 Ways Garage'. The agreement would endure for the period 01 September 2019 to 31 August 2020.

[37] Additionally, he testified that on 09 January 2020, the parties entered into a written advertising rental agreement, (counter 5). The terms of the agreement, *inter alia*, were that the defendant would supply advertising space to the plaintiff for the flighting of a third-party, Namib Mill's advertising posters. The advertising site was the water tower. The monthly advertising rate would amount to N\$ 15 300, excluding VAT and the agreement would endure for the period of eleven (11) months from 01 February 2020 to 31 December 2020.

[38] Furthermore, the witness related that on 25 November 2019, the parties entered into a written advertising rental agreement (counter 6) in terms whereof the defendant would supply advertising space to the plaintiff for the flighting of a third-party, Namib Mill's advertising posters. The advertising site was the water tower. The monthly advertising rate would amount to N\$ 15 300, excluding VAT. The agreement would endure for the period of two (2) months from 01 December 2019 to 31 January 2020.

[39] The witness testified that the defendant duly complied with its obligations in terms of the agreements, and that on 01 December 2020, the plaintiff's account held with the defendant was in arrears in the amount of N\$ 262, 078.57.

[40] Mr. Peter Muranda also testified on behalf of the defendant. I will deal with his testimony later in the judgment. There were also three subpoenaed witnesses, namely Mr. Hendrik Steenkamp, Mr. Fidelis Kabozu and Ms. Lernate Matheus. Their evidence will become relevant later in the judgment.

Did the defendant enter into a lease agreement with the town council in respect of the water tower – post 2018?

[41] It was submitted on behalf of the defendant that just as an offer can be made tacitly, so can an acceptance. Counsel argued that the town council, time and again, communicated its endorsement not ink, but through a series of unquestionable actions.

Reference was made to the renewal of the second lease agreement that endured for the period from 01 December 2012 to 30 November 2013, but was never executed in writing. Upon its expiry on 30 November 2013, the second lease agreement continued on a month-to-month basis, until November 2018, when the defendant cancelled it. According to the defendant, this was a tacit renewal of the agreement as it was not executed in writing. Counsel submitted that:

*'So, in *Garde v Brink*, Garde obtained from Brink a horse on trial, saying "If the horse suits me, I will keep him; if he does not, I'll return him this evening." The Court's simple decision was As the defendant did not return the horse the first evening, he must be taken to have accepted it.'*

[42] The defendant's case is that it had an agreement with the town council in respect of the water tower from the year 2012 to 2018 when the agreement was terminated at the instance of the defendant. Furthermore, it is the defendant's case that from November 2019 to May 2021, a tacit agreement was in place between the defendant and the town council in respect of the water tower. It was on the basis of this alleged agreement that the defendant entered into written advertising rental agreement with the plaintiff (counter 5 and 6).

[43] The plaintiff does not dispute the existence of counter 5 and 6, however, it contends that the agreements are not valid as the defendant misrepresented that it was the lawful lessee of the water tower when in fact there was no agreement between the defendant and the town council.

[44] It becomes necessary to examine the alleged tacit agreement between the defendant and the town council.

[45] According to the defendant it decided to revive the second lease agreement in respect of the water tower. To this end, there were negotiations between the defendant and the town council. The defendant's witness (Mr. Albrightson) is not the one that negotiated with the town council, but one Mr Muinjo. Mr. Albrightson was merely copied and briefed by Mr. Muindjo who is no longer employed by the defendant. Therefore, the

negotiations relied upon by Mr. Albrightson are the emails he was copied in and his subsequent follow up. It is important to make this point as Mr. Muindjo did not testify.

[46] From the emails, it appears that the defendant sent emails to three employees of the town council, namely, Fidelis Kabozu, Hendrik Steenkamp and Dina Shipepe.

[47] According to the defendant, it decided to revive the agreement during November 2019. During the same month, on 25 November 2019, the defendant entered into an advertising agreement with the plaintiff in respect of the water tower. However, few days after that, on 30 November 2019, Mr. Albrightson of the defendant wrote to Mr. Kabozu and Mr. Steenkamp of the town council, requesting their urgent approval, to revive the water tower as they had secured a long term client.

[48] In an email dated 02 December 2019 sent by Mr. Muinjo to the town council¹, he points out that he repeatedly tried to reach Mr. Kabozu to no avail. He requested for his alternative contact number so that they could complete the paperwork in respect of the water tower as they had an interested client for the festive season. Ms. Shipepe's reply² to the email show that she was not on the same page as the defendant. Her email reads in part:

'...To be assisted, send an email with your query / concerns and it will be addressed by the relevant department. At this moment, it is not clear whom you need assistance from now or what exactly it is you need to happen...'

[49] On 04 December 2019, Mr. Muinjo emailed Mr. Kabozu that:

'I am still not reaching you on any of the provided landlines. Please provide me with a cell number where I will be able to reach you directly.

I urgently need the OSHTC VAT registration, for completion of our contract application for the water tower sites...' (My underlining).

¹ Sent to Ms. Dina Shipepe and Mr. Hendrik Steenkamp.

² Email dated 03 December 2019.

[50] On the same day (04 December 2019), Mr. Muinjo wrote to Ms. Shipepe as follows:

'...I will need to talk to you in person with regards to the site, as I need to utilize it immediately. I have already had my contractor confirm the sizes...' (My underlining).

Ms. Shipepe replied:

'...You will need to speak and confirm first with my colleagues who deal with the adverts/billboards in town to see if the site is still available to serve that purpose. To avoid any inconvenience, you will need a signed agreement in place before any signage is put up in town.' (My emphasis).

[51] On 05 December 2019, Mr. Muinjo replied to Ms. Shipepe's email as follows:

'...I do understand, that we have to follow procedure in this regard, but I have been trying, unsuccessfully, since last month to get a hold of the correct people to expedite the process. (My underlining).

Please understand that we have commitments to clients as well, meaning an income for the council as well. It is mutually beneficial to allow the use of the tower, whilst we complete the admin around it. We will commit and pay the council what is due in full...' (My emphasis).

[52] Mr. Albrightson testified that the defendant took occupation of the water tower on 01 December 2019.

[53] A few issues arise from the above emails. Firstly, by December 2019, the defendant had not reached or communicated with the relevant person(s) at the town council since November 2019. Secondly, the defendant took occupation of the water tower on 01 December 2019 before it could communicate with the relevant person(s) at the town council regarding the revival of the agreement that was terminated in 2018. Thirdly, the defendant entered into an agreement with the plaintiff on 25 November 2019 before it could communicate with the town council regarding the revival of the

agreement. Fourthly, while Ms. Shipepe was advising the defendant to first speak and confirm with her colleagues in the relevant department (adverts/billboards) to see if the water tower was still available and also reminding the defendant that a signed agreement had to be in place before any signage could be put up, the defendant had already taken occupation of the site and had already concluded an agreement with a third party (plaintiff).

[54] As pointed out above, three employees of the town council were copied in some of the defendant's emails. From the foregoing, Ms. Shipepe did not revive the agreement with the defendant. What she did was to refer the defendant to the relevant department.

[55] Mr. Steenkamp is a building inspector at the town council. His duties, among others pertain to approval, inspection and scrutinising of building plans. He testified that during the year 2011, he did a submission to council for the defendant in respect of the water tower. Furthermore, he narrated that Mr. Fidelis Kabozu took over from him. Thus, he had no knowledge about the agreement alleged by the defendant.

[56] Mr. Kabozu holds the position of Local Development Officer at the town council since 2010. He is responsible for marketing and advertising. He testified that the defendant was one of the clients of the town council from 2012 to 2018. He confirmed that the defendant cancelled its agreement with the town council in a letter dated 01 December 2018. Mr. Kabozu further testified that after 2018, there was no other agreement between the town council and the defendant. He narrated that the town council did not receive any application for the renewal of the contract. He however, acknowledged that there were some emails sent during 2020 requesting for the 'renewal' of the agreement but it was not done. According to Mr. Kabozu, a formal application must be made rather than one via email. Mr. Kabozu stated that the town council did not attach any weight to the emails. In addition, Mr. Kabozu testified that the unsigned contract is invalid for the very reason that it was not signed by the parties. According to Mr. Kabozu, he was not even aware that the defendant began advertising on the water tower during December 2019.

[57] Despite numerous emails sent by the defendant to the town council, there was no reply from the relevant person in the advertising department of the town council, being Mr. Kabozu. Mr. Steenkamp too, never replied. It is quite clear that there were efforts from the defendant to revive the agreement and there was nothing forthcoming from the town council. At the time the defendant took occupation of the water tower, it was still trying to reach the relevant person at the town council in order to revive the agreement.

[58] On 06 December 2019, Mr. Muinjo wrote to Mr. Kabozu and Mr. Steenkamp as follows:

'We are currently in a situation where we need to flight advertisements on the water tower at Oneshilla wholesaler today. My contractor is currently at the site, ready to proceed with the work. I thus humbly request that you allow our contractor to enter the site to get the flighting done.

[59] There was no reply to the email, however, the defendant's contractor Mr. Peter Muranda still proceeded to the site. He was the contractor referred to in the email. According to him (Peter Muranda), the gate was open when he arrived at the water tower. He testified that he arranged with either Mr. Kabozu or Mr. Steenkamp to allow him to enter the site. He related that he was given the contact number of one of the two by Mr. Albrightson and merely spoke with one of them vial telephone.

[60] Both Mr. Kabozu and Mr. Steenkamp distanced themselves from the issue of the water tower. In cross-examination, Mr. Muranda stated that he did not know Mr. Kabozu or Mr. Steenkamp. He also could not tell who opened the gate. Thus, Mr. Muranda's testimony did not advance the defendant's case. The court cannot speculate on the person who might have spoken to Mr. Muranda on behalf of the town council, as well as who might have opened the gate and when.

[61] As much as the defendant wants the court to believe that it could not have accessed the water tower without being allowed by the town council, its own evidence clouds the issue. For instance, Mr. Muranda's testimony is only relevant to the

defendant's email of 06 December 2019, however, on 04 December 2019, Mr. Muinjo emailed Ms. Shipepe informing her that he wanted to talk to her about the water tower and that he already had his contractor confirm the sizes. In an email by Ms. Shipepe dated 03 December 2019 in which she advised the defendant to communicate with the relevant department, she also copied her colleagues informing them to make time and go and inspect the site to see if the dimensions have changed and assist the client with an agreement if possible. By that time, the defendant had already taken occupation of the water tower.

[62] The plaintiff that was advertising on the water tower pursuant to the agreement between it and the defendant alleged that the defendant misrepresented about its tenancy of the water tower. The defendant made no mention, in rebuttal, of any town council member who had approved it or opened the gate for it. The defendant's own emails show that it had its way to the water tower.

[63] The other issue relied upon by the defendant to show that there was an agreement between it and the town council was that the latter continued to invoice the defendant in respect of the water tower. The testimony of Ms. Lenarte Matheus was that the town council uses an automated system through which it invoices its clients, irrespective of whether the account is paid. Ms. Matheus is employed by the town council as a Debtor's Accountant. She testified that the town council continued to invoice the defendant because the finance department did not receive the 2018 letter cancelling the agreement. She however, related that when the anomaly was discovered, the town council refunded the defendant.

[64] I do not find the issue of the invoices to advance the defendant's case. The reason is that the defendant was not only invoiced during the period it alleges it revived the terminated agreement, but was also invoiced during the period when there was no agreement between it and the town council. When the anomaly was discovered, it was refunded. Furthermore, the defendant can reasonably be expected to have been aware of the issue of the automated system for the reason that it had several agreements with the town council. For instance, on 07 May 2020, Mr. Muinjo wrote Mr. Kabozu, among others that:

'...Furthermore, we have to address the current situation where we are still being invoice for sites that are not existing anymore, making our statement look less than desirable on your end...' (My emphasis).

[65] While the defendant presented proof of the invoices issued, it did not do the same with the proof of payment. Ms. Matheus gave evidence that the defendant's account with the defendant had a credit balance as at the time of the cancellation of the second agreement.

[66] On 29 January 2020, Mr. Muinjo wrote to Mr. Kabozu and Mr. Steenkamp urging them to conclude the matter pertaining to the agreement. Mr. Kabozu replied the same day stating that:

'...I would like to inform you that we have annual tariff increase very July at the beginning of the financial year. So I would suggest that in this agreement we need to consider a 5% annual increase for it to conform with our tariff increase.'

[67] Nothing much can be read into the above email other than that Mr. Kabozu was responding to Mr. Muinjo's email, informing him of what ought to be incorporated in the agreement. Mr. Muinjo replied on 06 February 2020 attaching an 'amended agreement'. He also asked Mr. Kabozu to confirm certain information and requested for certain documents. It is not clear what Mr. Kabozu did next, but on 07 February 2020, Mr. Muinjo sent an email to Mr. Kabozu informing him that he would be in Oshakati on 10 February 2020 and requested to meet with him in order to conclude the agreement. On the same date (07 February 2020, Mr. Muinjo wrote to Mr. Kabozu that:

'...I take note of the Management Committee not being in place at the moment, in order to complete the process of renewing the rental agreement for the site currently active in Oshakati...'

[68] There was no response from the town council regarding the amended agreement. What appears to stand out is that the management committee was not in place to conclude the agreement.

[69] The evidence presented demonstrate that, upon securing a client in respect of the water tower, the defendant took occupation of the water tower, and began negotiating with the town council to revive the agreement. It conveyed to the town council during its negotiations as though an agreement was already in place and just needed to be put on paper. This was not the case as the defendant had terminated the arrangement in 2018. Agreement after termination may bring a new lease into being with, perhaps, the same provisions as the old one, but cannot extend the old lease which has already ended.

[70] A lease is, in the first instance, a contract. The agreement must therefore also comply with the requirements for contracts in general, among others, consensus. The establishment of consensus between the parties is an important requirement which has to be met for the conclusion of a contract. The defendant must demonstrate that it, and the town council reached consensus.

[71] The traditional test for inferring tacit contracts was formulated as follows by Corbett JA in *Standard Bank of South Africa Ltd v Ocean Commodities Inc.*³

'In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.'

[72] So, the court, by a process of inference from all the relevant proven facts and circumstances, should be able to conclude that a contract came into existence.⁴ In this regard, the court considers the conduct of both parties and the circumstances of the case generally.

[73] Between 2019 and 2021, there is no conduct or single correspondence by the town council that could be seen as bringing the agreement back. Strangely, despite

³ *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 292B.

⁴ See *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd* 1984 3 SA 155 (A) 165B-C.

multiple emails being sent to Mr. Kabozu, there were just no emails from him, suggesting that, either he was not answering the emails, or that his responses were omitted during the discovery process.

[74] The discovered emails do not show that there was consensus between the defendant and the town council. Furthermore, it cannot be said that the town council was aware that the defendant had taken over the water tower but did nothing about it. The inaction by the town council on the revival of the agreement cannot constitute approval thereof. Thus, it is impossible to infer a tacit agreement from nothing. Accordingly, I find that there was no agreement concluded between the defendant and the town council post 2018.

[75] The water tower belong to the town council. The defendant could not have lawfully entered into an agreement in respect of the water tower with a third party without a valid agreement with the town council. For that reason, the agreements concluded between the defendant and the plaintiff (counter 5 and 6) in respect of the water tower were invalid. Accordingly, the counterclaim premised on those agreements (counter 5 and 6) fail.

Whether the plaintiff concluded an agreement with the town council

[76] The plaintiff claims that between January and April 2021 when the defendant was in occupation of the water tower, the plaintiff was the lawful possessor and/or lessee of the water tower pursuant to a lease agreement signed between the plaintiff and the town council.

[77] Furthermore, the plaintiff claims that during the aforesaid period, the defendant unlawfully occupied the water tower, thereby causing the plaintiff to lose income in the amount of N\$ 120 000. The defendant disputes the plaintiff's claim.

[78] On 26 October 2020, Mr. Kabozu of the town council wrote a letter to the plaintiff informing it that the Local Economic Development Office, as per the delegation of powers, granted approval to the plaintiff, advertising rights in respect of the water tower

effective 02 November 2020. The first difficulty encountered by the plaintiff is that there was no proof presented of the delegation of powers by council to the Local Economic Development Office.

[79] Furthermore, the ordinary council meeting held on Monday 30 March 2021, resolved to grant approval to the plaintiff to lease the water tower, and further that council would enter into a lease agreement with the plaintiff. Effectively, the approval was made on 30 March 2021, contingent to an agreement between entered into. As a result, before March 2021, the plaintiff did not have an agreement with the town council.

[80] The agreement between the town council and the plaintiff was only entered into on 30 April 2021. This date is past the plaintiff's claim period. Clause 6.1 of the agreement states that the lease shall commence on the commencement date. The commencement date is defined in terms of clause 1.2 to mean, (if a sign has not been erected), the first day of the month following the month of the erection and installation of the sign, or alternatively (if a sign is erected), the date of last signature of the agreement.

[81] It is common cause that the plaintiff did not erect a sign on the water tower during the claim period. The plaintiff only took occupation of the water tower on during May 2021. Relying on *Dantex*⁵, counsel for the defendant made a cogent submission that a lessee who has not received occupation is not entitled to claim damages resulting from unauthorised occupation of the leased premises by a third person.

[82] It was rightly submitted by counsel for the defendant, in my view, that even if the court was to find that the plaintiff suffered damages, there was no causal link between the conduct of the defendant and the damages suffered by the plaintiff. This is so because the plaintiff did not demand from the defendant to vacate the water tower, not even once.

[83] Furthermore, the plaintiff did not present a single agreement concluded with third parties to whom the advertising billboard space were leased to for the period claimed,

⁵ *Dantex Investment Holdings (Pty) Ltd v Brenner NO* [1989] 1 All SA 411.

not even a letter of intent, or an expression of interest from a third party. Thus, the requirements for liability were not established. For these reasons, the plaintiff's claim in respect of claim 2 fails.

Counter 3 and 4

[84] The terms of these agreements were not disputed. It is further not disputed that the defendant rendered the services in terms of the agreement, as claimed by it.

[85] With regard to counter 3, the plaintiff's defence is that the agreement was paid in full. Unlike the plaintiff, the defendant produced a statement of account that depicts the transactions of the plaintiff with the defendant, including the invoices paid and the amount outstanding. In numerous emails, the plaintiff acknowledged its indebtedness to the defendant. I find that the plaintiff is indebted to the defendant in the amount claimed.

[86] Regarding counter 4, the plaintiff claims that it withheld payment in the amount of N\$ 8, 000 due to the amount owed to it by the defendant in claim 1. Neither the liability nor the amount (N\$ 28, 175.00) claimed in terms of counter 4 is disputed and must be accepted as correct. In any event, in terms of the agreement, no set-off or deduction is allowed.

Costs

[87] The general rule is that costs follow the event. That is, the successful party or the party that enjoys substantial success is entitled to costs from the losing party. The plaintiff was successful in respect of claim 1, but unsuccessful in respect of claim 2. On the other hand, the defendant was unsuccessful with regard to counter 5, and 6 but successful with regard to counters 3 and 4. In the exercise of my discretion, I find that it will meet the interests of justice for each party to pay its own costs.

The order:

[88] For these reasons, I make the following order:

1. Claim 1 of the Plaintiff's particulars of claim, for payment in the amount of N\$ 20,708.50 against the Defendant is granted, subject to set-off against the amount due by the plaintiff to the defendant in terms of the counterclaim.
2. Interest at the rate of 20% per annum on the aforesaid amount of N\$ 20,708.50 from 17 December 2021 to the date of final payment.
3. Claim 2 of the Plaintiff's particulars of claim is dismissed.
4. The Plaintiff must pay the Defendant the amount of N\$ 73, 715.23, being the total claimed in counter 3 and 4 of the Defendant's counterclaim.
5. Interest at the rate of 20% per annum on the aforesaid amount of N\$ 73, 715.23 from 17 December 2021 until date of final payment.
6. Counter 5 and 6 of the Defendant's counterclaim are dismissed.
7. Each party to pay its own costs.
8. The matter is removed from the roll: Case Finalised.

D C MUNSU
JUDGE

APPEARANCES

PLAINTIFF:

D Ndana
Of Jacobs Amupolo Lawyers & Conveyancers,
Ongwediva.

FIRST DEFENDANT:

R Lewies
Instructed by Cronje Inc.
Windhoek.