

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: HC-NLD-CIV-ACT-CON-2021/00218

In the matter between:

LEONARD KONDJASHILI SHIHEPO

PLAINTIFF

and

PROJECT HOPE - NAMIBIA

DEFENDANT

Neutral citation: *Shihepo v Project Hope - Namibia* (HC-NLD-CIV-ACT-CON-2021/00218) [2024] NAHCNLD 01 (16 January 2024)

Coram: MUNSU J

Heard: 22 September 2023

Delivered: 16 January 2024

Flynote: Contract – Breach of lease agreement – Damages allegedly sustained as a consequence of the defendant's failure to give a notice of termination of the agreement, compliant with the express terms of the agreement, as well as the defendant's failure to return the property to the plaintiff in a good, clean and tidy condition, with the exception of fair wear and tear.

Summary: The parties entered into a lease agreement in terms whereof the plaintiff leased to the defendant 'the property'. The plaintiff alleged that the defendant breached the agreement in that it failed to comply with the terms of the agreement is so far as termination of the agreement was concerned. It was further alleged that the defendant failed to return the property to the plaintiff in a good, clean and tidy condition, with the exception of reasonable wear and tear. The defendant denied that it failed to comply with the terms of the agreement.

Held, that there was no doubt that the defendant failed to comply with the notice period of two (02) calendar months stipulated in the agreement.

Held, that in addition to the general duty on the defendant to return the property in a good condition, with the exception of reasonable wear and tear, the parties' agreement required the defendant to return the premises in a good, clean and tidy condition, fair wear and tear excepted.

Held, that considering how short the duration of the lease was, it could not be argued that the damage to the property's interior represented fair wear and tear. Given the stated time frame, the property ought to have been in a reasonable shape.

Held, that the defendant was liable for the damage caused to the interior of the property.

ORDER

Judgment in favour of the Plaintiff against the Defendant in the following terms:

1. Claim 1: Payment in the amount of N\$ 3, 180.
2. Claim 2: Payment in the amount of N\$ 21 390.33.
3. Interest on the total (N\$ 24, 570.33) of the above stated amounts at the rate of 20 % per annum calculated from 31 March 2020 until date of final payment.

4. Costs of suit.
5. The matter is removed from the roll: Case finalised.

JUDGMENT

MUNSU J

Introduction

[1] The plaintiff instituted action against the defendant for alleged breach of a lease agreement entered into by the parties.

Background

[2] The plaintiff is the owner of a home in Omuthiya, Namibia (the property/premises). The parties entered into a lease agreement in terms whereof the defendant leased the property from the plaintiff. The parties agreed at a monthly rental amount of N\$ 9 000 which would increase by no more than six (6) percent yearly.

[3] The plaintiff alleged that the lease was to commence on 01 October 2018 and was to continue for a period of five (5) years ending on 30 September 2023 unless terminated by either party by giving two (2) calendar months written notice of termination.

[4] The plaintiff further alleged that, in terms of the agreement, the defendant would be responsible for the repair of any interior damage to the property; maintain the outside of the premises, and not allow any refuse or wildflowers to accumulate or grow in or around the premises; that upon expiration of the lease period, the defendant would return the premises to the plaintiff in a good, clean and tidy condition, fair wear and tear accepted.

[5] In addition, the plaintiff alleged that the defendant breached the material terms of the lease, firstly, by giving the plaintiff notice of fifty (50) days instead of sixty (60) days to terminate the lease, and secondly, by returning the premises to the plaintiff in a deteriorated condition.

[6] The plaintiff demands, in claim 1, the amount of N\$ 3 180, the equivalent of ten (10) days' notice period that the defendant failed to give to the plaintiff; and in claim 2, the amount of N\$ 28 189.70 for damages in respect of repair costs to the property.

[7] In its plea, the defendant pleaded that it gave the plaintiff two (2) months prior notice to terminate the agreement. The defendant further pleaded that it handed over the property to the plaintiff in a good, clean and tidy condition as per the agreement. Thus, the defendant denied any indebtedness to the plaintiff.

The issues for determination

[8] In terms of the pre-trial order, this court has to determine two issues:

- (a) Whether the defendant gave the plaintiff the specified two (2) calendar months' notice before terminating the lease agreement with the plaintiff. Put differently, whether the defendant is liable to the plaintiff in the amount of N\$ 3 180 in respect of claim 1.
- (b) Whether the defendant is liable to pay the plaintiff the amount of N\$ 28 189.70 for alleged damages caused to the property, in claim 2.

Common cause facts

[9] There is no dispute about the existence of the lease agreement, the terms of which were reduced to writing as appended to the plaintiff's particulars of claim. It is common cause that the plaintiff leased the property to the defendant effective 01 October 2018.

The plaintiff's case

[10] The plaintiff, Mr. Leonard Kondjashili Shihepo (Mr. Shihepo) and two other witnesses testified on behalf of the plaintiff's case. Mr. Shihepo's testimony germane to the dispute was that, the defendant leased the premises from 01 October 2018 until 31 March 2020.

[11] He testified that the defendant was responsible for repairing of any interior damage to the property; maintain the exterior of the premises in a tidy condition and not allow any refuse or weeds to accumulate or grow in or around the premises; that upon the expiration of the lease period, the defendant would return the premises to the plaintiff in a good, clean and tidy condition, fair wear and tear accepted, and should the defendant fail to do so, the plaintiff would be entitled to recover from the defendant, the cost to restore the premises to a good, tidy and clean condition.

[12] Mr. Shihepo further stated that the defendant breached the lease agreement by failing to give the plaintiff the required two (2) months' notice to terminate the agreement as stipulated in clause 2.1. He recounted that the defendant only gave the plaintiff fifty (50) days' notice as opposed to sixty (60). According to the plaintiff, his agent advised the defendant in writing of the non-compliance with the notice period, to which the defendant replied that they needed to vacate the premises because the circumstances were beyond their control.

[13] Furthermore, Mr. Shihepo narrated that, despite the defendant vacating the premises on 31 March 2020, the keys were only returned on 22 May 2020 and the plaintiff was only able to inspect the property on 30 May 2020 and discovered it to be in a filthy state.

[14] In addition, the plaintiff testified that the defendant further breached the agreement by neglecting to maintain the premises in a neat and tidy manner and return same to the plaintiff in a manner in which it was received. He stated that he enlisted the services of one Mr. Andreas Hawala of Shongola Investment CC and requested for a quotation in respect of the necessary repairs. In this regard, the plaintiff presented

photographs of the state in which the premises was found. It was his testimony that the repairs would cost N\$ 28 189.70.

[15] Furthermore, Mr. Shihepo related that he paid an amount of N\$ 3 565 to Shoongola Investment CC for cleaning the yard, which amount he now claims from the defendant.

[16] Ms. Kristofina Kandombo (Ms. Kandombo) is employed as an estate agent at Natango Real Estate. She testified that between the year 2017 and 2018, she was approached by the plaintiff in order to find a tenant in respect of the property. She testified that she managed to secure the defendant.

[17] In her testimony, Ms. Kandombo stated that the defendant was required, in terms of the agreement to give the plaintiff two (2) months' notice of intention to terminate the agreement. She further testified that upon receipt of the notice of termination of the agreement, she informed the defendant to give the required 60 days' notice. To this the defendant replied that they had to vacate due to circumstances beyond their control.

[18] The witness recounted that the defendant vacated the property, and that she did not get the keys until 22 May 2020. According to her, no explanation was given as to why the keys were returned two months after they had vacated the premises. Ms. Kandombo continued by stating that she went to inspect the property a week after and found it in a damaged state. It was her testimony that she contacted the plaintiff.

[19] Furthermore, Ms. Kandombo asserted that when the property was handed over to the defendant, it was not in a damaged state. She pointed out that the defendant failed to maintain the property in a clean and tidy manner.

[20] The third and last witness called on behalf of the plaintiff was Mr. Andreas Hawala (Mr. Hawala). He holds a Degree of Bachelor of Science in Civil Engineering obtained from the University of Namibia. He testified that he is a qualified civil engineer trading under the name and style of Shongola Investment CC, and also employed by China Geo as site manager. He stated that he has sufficient experience in assessing

damage to properties and to express an opinion on the costs of repairs for such damages.

[21] Mr. Hawala further narrated that he attended to the plaintiff's property during June 2021 and assessed the damage to the property, after which he provided the plaintiff with a quotation. He further testified that he cleaned the outside yard and invoiced the plaintiff the amount of N\$ 3 565.00 which the plaintiff paid.

The defendant's case

[22] Mr. Teofelus Indongo (Mr. Indongo) was the only witness to testify on behalf of the defendant. He testified that he is employed by the defendant as a Learning Facilitator. He previously held the position of Program Manager and was based at Omuthiya during the tenancy herein.

[23] Mr. Indongo related that when the defendant took possession of the property, there was no joint inspection. He further narrated that upon the defendant vacating the property, same was left in a good condition just as it was received. It was his testimony that there was also no inspection done at the time the defendant vacated the premises.

Submissions by the parties

[24] Ms. Mugaviri for the plaintiff argued that the evidence presented on behalf of the plaintiff proved both claims on a balance of probabilities, with the defendant's case constituting a mere bare denial. Counsel submitted that, it was not disputed that the property was damaged. It was further contended that the defendant did not disprove the amount claimed by the plaintiff. Additionally, counsel argued that when the property was handed to the defendant, it was inspected and was fit for purpose. Ms. Mugaviri further pointed out that at the time of vacating the premises, the defendant failed to give the required two months' notice and never contacted the plaintiff for an inspection.

[25] In his submissions, Mr. Matheus for the defendant pointed out the contradictions in the plaintiff's case as it relates to the date on which the plaintiff and his agent

attended to the property after the defendant had moved out, and the date when the pictures were taken. He relied on the dates the pictures were allegedly taken to argue that the damage to the property could not have been caused by the defendant as by the time, the defendant had long vacated the premises.

[26] According to Mr. Matheus the defendant gave a two months' notice on 10 February 2020 covering the months of February and March 2020. He added that, the defendant, in any event paid rent for the month of February and March 2020.

[27] Regarding claim 2, counsel argued that the plaintiff's claim is premature as he would only be entitled to claim damages in respect of the damages caused to the property upon the expiry of the lease on 30 September 2023. In the instant matter, counsel argued that the lease did not reach expiry date.

[28] Furthermore, Mr. Matheus submitted that, given the contradictions in the plaintiff's case, claim 2 for damages was not proved. He stressed that the materials quoted by Mr. Hawala were not purchased and further that Mr. Hawala failed to prove that the materials in the quotation represent the items damaged. Similarly, counsel pointed out that the quotation provided does not specify how the amounts quoted for labour were computed. Mr. Matheus further stressed that the court should not rely on the evidence of Mr. Hawala as he is not registered with the Engineering Council of Namibia.

[29] It was counsel's submission that a quotation is not conclusive evidence of quantum of damages.

Discussion

[30] It is common cause that the parties entered into a lease agreement, the terms of which were reduced to writing.

[31] Two issues arise for determination, namely whether the defendant complied with the notice period when terminating the agreement between the parties, and whether the defendant is liable for the alleged damages to the property.

[32] Clause 2.1 of the lease agreement reads:

'This lease shall commence on the 01st October 2018 and will endure for a period of 05 (five) years until 30 September 2023 (hereinafter referred to as "the expiry date") and shall continue for the five year period unless terminated by either party giving the other 02 (two) calendar month written notice of termination.'

[33] For the sake of completeness, clause 2.3 stipulates that:

'The LANDLORD is prepared to let the leased premises to the TENANT for a further 05 (five) year period after the expiry date of this lease, provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease at least 02 (two) month before such expiry date. If the TENANT is interested in extending the lease as aforesaid, it must notify the LANDLORD of its intention to do so in writing at least 2 (two) months before the expiry date of this lease, failing which it shall be deemed that the TENANT does not wish to renew the lease.'

[34] The defendant's notice to terminate the lease was given on 10 February 2020, and it stipulated that the defendant was to give vacant possession of the premises on 31 March 2020. The plaintiff is not aware of the exact date the defendant vacated the premises. The defendant's only witness testified that the property was vacated before the 20th of March 2020. At the hearing of the matter, counsel for the defendant submitted that the defendant vacated the premises on 31 March 2020.

[35] The period 10 February to 31 March 2020 does not constitute 02 (two) calendar months. There is no doubt that the defendant failed to comply with the notice period stipulated in the agreement. The claim that the defendant paid rent for the month of February and March has no bearing on the notice of termination. In any event, the rent issue was not part of the defendant's pleaded case as it was only raised at the stage of closing arguments. Thus, claim 1 of the plaintiff's particulars of claim succeeds. There

was no qualm raised regarding the calculation of the pro rata amount for the 10 days short notice.

[36] Clause 8.7 of the agreement reads:

'Upon the expiration of this lease, the TENANT shall return the premises to the LANDLORD in a good, clean and tidy condition, fair wear and tear accepted. If the TENANT fails to return the premises to the LANDLORD in such condition, the LANDLORD shall be entitled to recover the costs to restore the premises to a good, clean and tidy condition from the TENANT. The TENANT shall be liable to pay any such costs on demand, irrespective whether the LANDLORD has already effected any restoration work to the premises.'

[37] In the notice of termination of the lease, the defendant stated that they would keep in touch with the plaintiff until the date to vacate the premises, and would arrange a time for both parties to inspect the premises as well as complete a condition report and for the defendant to return the keys. It is common cause that the defendant never contacted the plaintiff in order to inspect the premises. Whereas the defendant vacated the premises during the month of March 2020, the keys were only returned to the plaintiff during the month of May 2020.

[38] The plaintiff made allegations about the property being returned in a deteriorated state and contrary to the proviso of clause 8.7. In the face of such allegations, the defendant called a witness who, firstly, was not present and aware of the state in which the property was, at the time it was handed to the defendant, and secondly, was not present when the property was returned to the plaintiff.

[39] The defendant's witness testified that at the time of vacating the property, he gave the key to his manager one Ms. Frieda Katuta. He acknowledged in cross-examination that the latter was in possession of the key from March until May when it was handed back to the agent Ms. Kandombo. Ms. Frieda Katuta did not testify to explain what happened from the time she was given the key by Mr. Indongo in March to the time she returned them to the plaintiff's agent in May.

[40] The plaintiff's case was that there was no tenant who took occupation of the property after the defendant left. The plaintiff, his agent Ms. Kandombo and the engineer Mr. Hawala testified about the damage to the interior of the property. The defendant's witness was surprised to see photos depicting the property in a dilapidated state. He stated in his testimony that the property was not in such bad shape at the time of vacating it.

[41] However, the defendant's case fails to rebut the plaintiff's claim that the property was returned to the plaintiff in a deteriorated condition. This is so because the defendant did not call a witness who was present when the property was returned to the plaintiff. It is important to note that, as this case's facts show, vacating the premises is not synonymous with returning the premises. Thus, there is no genuine dispute about the damage to the property. I find that the plaintiff managed to show that the property was damaged in the manner alleged.

[42] The next issue is whether the defendant is liable for the damages. According to our common law, the landlord is obliged to maintain at his own cost the leased property during the currency of the lease in a condition reasonably fit for the purpose for which it was let, unless the parties expressly or tacitly agree otherwise. There is a general obligation on the lessee, on termination of the lease, to restore the property in the same good order and condition as it was in when it was received, reasonable wear and tear excepted.¹ Additionally, the parties are at liberty to agree expressly or tacitly on maintenance issues, and that residual provisions are only incorporated into a contract in the absence of express or tacit agreement.²

[43] It was argued on behalf of the defendant that clause 8.7 above would only find application on the expiry date of the lease agreement, being 30 September 2023.

[44] It is common to find clauses that state that the lessee is liable for specified repairs, "fair wear and tear excepted". In *Radloff v Kaplan*³ it was stated that the phrase "fair wear and tear" refers to "dilapidation or depreciation which comes by reason of

¹ See AJ Kerr (2014) *Kerr's Law of Sale and Lease*, 4th ed at 416, 476, 492.

² *Ibid* at 387.

³ *Radloff v Kaplan* 1914 EDL 357 at 361.

lapse of time, action of weather, etc., and normal use”. In the said matter, the clause read:

The lessee shall keep in good repair, both inside and outside all buildings leased to him, and shall deliver them at the expiration of the lease in good order and in a state of cleanliness, reasonable wear and tear excepted.

[45] McGregor J said:

‘It appears to me that the construction which best harmonises with the actual meaning of the sum total of the words used would be one that saves the tenant from repairing dilapidation or depreciation which comes by reason of lapse of time, action of weather, etc., and normal use during the time when the paint ...might be taken to serve during the “life” thereof; but if the person who is under the duty to repair lets time run on unduly without doing anything towards the upkeep and keeping in order of the place, he cannot rely on the exception of wear and tear. His use then becomes unreasonable. If within reasonable time he has the painting, etc., attended to, then the deterioration or depreciation that next ensues within the ambit of a reasonable time after such repairing or doing up can be taken to be covered by “reasonable wear and tear”.’

[46] In *Sarkin v Koren (I)*⁴ the court held that, where a lessee had undertaken to “maintain” a building which had a thatched roof “...in a proper state of repair both inside and outside”, he was obliged to renew from time to time those parts of the thatch which disintegrated.

[47] A lessor is not obliged by the residual provisions to make repairs if the tenant or those for whom he is responsible brought about the state of disrepair.⁵ If the lessee fails to make repairs which he has undertaken to make in the contract, the lessor has an action for damages. Thus if, on restoration, the property is not in the condition required by the contract and the lessor wishes to have it put into that condition and desires to see to it himself rather than to ask for specific performance by the lessee, he is entitled to claim the sum of money necessary to put it into that condition as damages.⁶

⁴ *Sarkin v Koren (I)* 1948 4 SA 438 (C).

⁵ *Brand v Kotze* 1948 3 SA 769 (C).

⁶ *Kerr (op cit)* at 492.

[48] Not only was there a general duty on the defendant to return the property to its original state, with the exception of reasonable wear and tear, but also the parties' agreement required the defendant to return the premises in a good, clean and tidy condition, fair wear and tear excepted.

[49] Even though the defendant had a five-year contract, it only leased the property for more than a year before terminating it. It cannot be argued that the damage to the property's interior represents fair wear and tear given the stated time frame. Considering how short the duration of the lease was, the property ought to have been in reasonable shape. In my opinion, the defendant is liable for the damage caused to the interior of the property.

[50] The same clause 8.7 stipulates that if the tenant fails to return the premises to the landlord in such condition, the landlord shall be entitled to recover the costs to restore the premises to a good, clean and tidy condition from the tenant. In addition, the provision states that the tenant shall be liable to pay any such costs on demand, irrespective whether the landlord has already effected any restoration work to the premises.

[51] Of the damages claimed by the plaintiff, is an amount of N\$ 7 728.30 for materials. The amount is informed by a quotation obtained from Build it. Mr. Hawala was able to explain to the court why the materials quoted are necessary. There were damages to the inside walls, ceiling, locks, cupboards, and toilet pots.

[52] There was no genuine dispute regarding the amount claimed for labour. Thus, the amounts claimed in respect of repairing of the locks, cupboards, toilet pots and ceiling stands. However, some items are to be excluded as their maintenance, according to the agreement, is not the defendant's responsibility. This includes painting of the external of the premises. The plaintiff is only entitled to half the amount quoted for painting, which will be towards painting of the inside of the property.

[53] There is no sound reason why the court should award costs in respect of cleaning of the yard as same was only done a year after the defendant vacated the premises. By then, wildflowers would naturally have grown, and in the absence of a tenant, as in the case, the plaintiff would be expected to maintain his property in a clean condition.

Costs

[54] 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. There is no reason why the defendant should not be ordered to pay the plaintiff's costs.

The order:

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

Judgment in favour of the Plaintiff against the Defendant in the following terms:

1. Claim 1: Payment in the amount of N\$ 3, 180.
2. Claim 2: Payment in the amount of N\$ 21 390.33.
3. Interest on the total (N\$ 24, 570.33) of the above stated amounts at the rate of 20 % per annum calculated from 31 March 2020 until date of final payment.
4. Costs of suit.
5. The matter is removed from the roll: Case finalised.

D C MUNSU
JUDGE

APPEARANCES

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