REPUBLIC OF NAMIBIA NOT REPOTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: I 920/2012

In the matter between:

SIEGFRIED ECKLEBEN **PLAINTIFF**

And

MOBILE TELECOMMUNICATIONS LIMITED **DEFENDANT**

Neutral citation: *Eckleben v Mobile Telecommunications Limited* (I 920/2012) [2016] NAHCMD 46 (09 March 2016)

Coram: UEITELE, J

Heard on: **18 July 2014**

Delivered on: **09 March 2016**

Flynote: ***Landlord and tenant*** - Written lease - Validity of - one of the *essentialia* of a lease agreement is that the property, which is the subject matter of the agreement, must be clearly identified or identifiable.

Contract -Repudiation - What constitutes - Test for repudiation not subjective but objective - Repudiation not a matter of intention, but of perception of reasonable person placed in position of aggrieved party - Test is whether such notional reasonable person would conclude that proper performance will not be forthcoming - Whether innocent party entitled to resile from agreement ultimately depending on nature and degree of impending non-or malperformance-Conduct from which inference of impending non-or malperformance to be drawn must be clear cut and unequivocal - Repudiation requires anxious consideration and not lightly to be presumed.

Summary: During April 2010 the plaintiff purchased a property, from a deceased's estate, at a public auction. It was a condition of the sale that the purchaser of the property will have to take over a lease agreement in respect of the property. The lease agreement was first concluded, orally, between the deceased and the defendant on 01 August 2006 and reduced to writing on 05 July 2007. In terms of the lease agreement the owner of the property let to the defendant a 'small room in tower' for the purposes of erecting and installing equipment and antennas. The lease agreement would expire on 31 July 2016.

On 25 January 2011 the defendant gave the plaintiff two months written notice of its intention to terminate the lease agreement. On 17 April 2012 the plaintiff issued summons claiming payment in the sum of N$ 326 644, 73 from the defendant as damages for alleged breach of contract.

The defendant filed a notice to defend the claim and the plaintiff responded by filling an application for summary judgment. The defendant opposed the application for summary judgment on the basis that the lease agreement was invalid and unenforceable because, so the affidavit read; the leased premises were not identified or identifiable from the lease agreement. In the light of the defense disclosed by the defendant the plaintiff gave notice in terms of Rule 28(1) of his intention to amend his particulars of claim. The defendant objected to the proposed amendments, necessitating a formal application in terms of Rule 28(4). The plaintiff was granted leave to amend his

particulars of claim. After the plaintiff was granted leave to amend his particulars of claim the defendant pleaded to the plaintiff's amended particulars of claim.

In its plea the defendant admitted the conclusion of the lease agreement as well as its terms, but pleaded that the lease agreement is not valid because the "premises" which formed the subject matter of the lease agreement is not identified or identifiable. In the alternative the defendant pleaded that, should the court find that the agreement is valid and enforceable, the plaintiff repudiated the agreement. The defendant pleaded in the further alternative that the agreement became voidable because of a supervening impossibility, namely as a result of the radiation and consequent health risk, the performance by the plaintiff in terms of the lease agreement and the use of the premises by the defendant had become impossible.

Held 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.

Held furthermore that, 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.

Held further that, 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.

ORDER

1. The defendant is ordered to pay to the plaintiff the sum of N$ 326 644, 73.

2. The defendant is ordered to pay the plaintiff interest on the amount of N$ 326 644, 73 at the rate of 20% per annum calculated from date of judgment to date of payment.

3. The defendant is ordered to pay the plaintiff's costs of suit the costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

UEITELE, J

Introduction

[1] The plaintiff claims payment from the defendant together with interest on the amount claimed from date of judgment to date of payment and costs. The claim arises from a lease agreement. The plaintiff is the owner of certain immovable property (which I will, in this judgment, refer to as the 'Plot') being:

CERTAIN: Portion 91 (a Portion of Portion 71) of the Farm No 163.

SITUATE: In the Municipality of Swakopmund
Registration Division "G"
Erongo Region

EXTENT 24, 2937 (Twenty Four Comma Two Nine Three Seven) hectares as will more fully from General Plan No. 444/2000

HELD BY Certificate of Consolidated Title 335A/2002.

[2] The plaintiff purchased the Plot at a public auction during April 2010. When he purchased the Plot, it was a condition of the sale that the plaintiff would continue with a written lease agreement (which was initially concluded as an oral agreement on 01 August 2006 but reduced to writing on 5 July 2007) between the erstwhile owner of the Plot (the late Mr. Thilo Neumann) and the defendant.

[3] In the lease agreement which was attached to the plaintiff's particulars of claim as Annexure "A" the leased property was described as follows:

> '1.1.2 the property means the Lessor's property upon which the premises are situated as described in the schedule;
>
> 1.1.3 'the premises' means the portion of the property selected by the Lessee for purposes of the Agreement.'

In the Schedule the premises are described as follows:

> '1. DESCRIPTION OF PREMISES Small Room in Tower
> [areas (m²) municipal/farm description,
> Address].'

[4] In terms of the lease agreement the agreement would expire on 31 July 2016, but on 25 January 2011 the defendant gave the plaintiff two months written notice of its intention to terminate the lease agreement. It is this notice of termination which aggrieved the plaintiff and led the plaintiff to, on 17 April 2012, issue summons out of this court claiming payment in the sum of N$ 326 644, 73 from the defendant as damages for alleged breach of contract.

[5] The defendant gave notice of its intention to oppose the plaintiff's claim. After the defended had signified its intention to oppose the claim the plaintiff applied for summary judgment. The application for summary judgment was dismissed and the defendant was granted leave to file its plea.[1] After the defendant was granted leave to defend the claim and to file its plea the plaintiff gave notice, in terms of Rule 28(1)[2], of his intention to amend his particulars of claim. The defendant objected to the proposed amendments, necessitating a formal application in terms of Rule 28(4). The plaintiff was thereafter granted leave to amend his particulars of claim.[3] After the plaintiff was granted leave to amend his particulars of claim the defendant pleaded to the plaintiff's amended particulars of claim.

[6] The defendant's defense to the plaintiff's claim is three fold. Firstly the defendant pleads that the written lease agreement upon which the plaintiff basis his claim is not a valid and enforceable contract as the premises leased are not ascertained or ascertainable from the terms of the written lease agreement. Secondly it pleads in the alternative that if the court finds that the leased premises are ascertained or ascertainable from the terms of the agreement, then and in that event the plaintiff repudiated the agreement which repudiation the defendant accepted. The plea relating to the plaintiff's alleged repudiation of the agreement was stated follows:

> '14.1 In terms of the lease agreement the defendant installed aerials on a standalone tower on the property of the plaintiff.
>
> 14.2 The aerials so installed emit radiation which radiation is dangerous to the health of humans in close proximity.
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> 14.3 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.

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1 The judgment dismissing the application for summary judgment was delivered on 15 October 2015, is as yet unreported and is cited as *Eckleben v Mobile Telecommunications Limited (I 920/2012) [2012] NAHCMD 27 (15 October 2012).*

2 Of the now repealed High Court Rules.

3 The judgement granting the plaintiff leave to amend his particulars of claim was delivered on 9 October 2013 is as yet unreported and is cited as *Eckleben v Mobile Telecommunications Limited* (I 920/2012) [2013] NAHCMD 277 (9 October 2013).

14.4 Due to the health risk caused by radiation to public and staff of the plaintiff accessing the sundeck the plaintiff can no longer make use of the premises for the aerials.

14.5 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.

14.6 This breach by the plaintiff constitutes a repudiation of the agreement entitling the defendant to cancel the agreement.'

[7] Thirdly the defendant pleaded in the further alternative that, if the court finds that the leased premises are ascertained or ascertainable from the terms of the agreement and that the plaintiff did not repudiate the lease agreement then and in that event the defendant pleads that performance in terms of the contract became impossible. The defendant pleaded this defense as follows:

'15.1 As a result of the radiation and consequent health risk referred to above the performance by plaintiff in terms of the lease agreement and the use of the premises by the defendant have become impossible.

15.2 Due to the impossibility the lease agreement has terminated.'

Is the premises ascertained or ascertainable?

[8] Mr. Barnard, on behalf of the defendant, criticized the lease agreement by arguing that the lease agreement on which the plaintiff relies simply describes the leased premises as the 'small room in the tower' he argued that no photos or diagrams or plans identifying the "premises" are attached to the lease agreement and that the lease agreement contains no other description of the premises sufficient to identify the actual premises from the written lease agreement itself. Mr. Barnard furthermore criticizes the lease agreement as being wholly inadequate in its description of the premises leased to enable identification of the premises from the terms of the written agreement itself. He argued that from the terms of the agreement the tower cannot be

identified. He furthermore criticizes the lease agreement as not being specific as to which room in the tower it is referring to. He argued that it will not serve any purpose to refer to the prior oral agreement of the parties or to the factual position on the ground, i.e. to where the equipment are in fact installed because resort to the prior oral agreement or to the factual position on the ground will be extraneous the written lease agreement and that amounts to parole evidence which is not admissible.

[9] Ms. Schimming-Chase, on behalf of the plaintiff, argued that as regards the identifiability or ascertainability of the leased property, the rule that the parties must agree upon the use and enjoyment of the property involves the proposition that the property must be identified or identifiable.[4] She submitted that as regards to identifiability, evidence of an identificatory nature can always be led to clarify the contract as is recourse to extrinsic evidence.

[10] In the matter of *Estate du Toit v Coronation Syndicate Ltd. and Others*[5] Stratford, J.A said the following:

> 'Thus the object of the formality of a written contract is to have such certainty as a written document affords as will avoid subsequent disputes as to what was really agreed upon. And if that object is to be attained it follows that the subject-matter must be defined or described with a degree of precision which will enable it to be identified without recourse to the evidence of the parties concerned. For if the evidence of the parties can be introduced on one term it could be invoked on every term and the written instrument would lose all the evidentiary value the Legislature intended it to have. It may be that the rule as to adequacy of description should be more stringently stated so as to exclude the invoking of any evidence *dehors* the document, but for the purpose of

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[4] Ms Schimming –Chase referred me to A J Kerr '*The Law of Sale and Lease'*, second edition at pp 229-230 where the learned author said:

> "As it is clear that the rent need only be ascertainable it appears that by 'ascertained' Grotius means 'ascertained or ascertainable'. For example, there seems to be no doubt that A may let to B 'the farm I have just bought from C' even though neither he nor B has seen it and he has forgotten the precise description in the deed of sale. If, however, it is desired that a lease of land be registered against the title deeds, the property will need to be identified before registration with the precision required by the Registrar of Deeds. If, having been oral, it is later reduced to writing for this purpose, or if, having been written in imprecise language in, say, an exchange of letters, it is later embodied in a precise document, the date of origin of the contract remains what it was: there is no new contract."

[5] 1929 AD 219 at p 224.

> this case it is not necessary to say more than that the description must *ex facie* the document be such as from a reading of it will enable the subject-matter to be identified, and that description must not consist of a reference to and depend upon the evidence of the parties themselves.'

[11] I am of the view that the question to be answered here is whether the premises which is the subject matter of the lease agreement was defined or described with a degree of precision (in the lease agreement) which will enable it to be identified without recourse to the evidence of the parties concerned. In the matter of *Stellmacher v Christians and Others*[6] this court declined to declare a lease agreement valid because one of the *essentialia* of a lease agreement [i.e. the requirement that the property must be must ascertained or ascertainable] was absent. Muller J said:

> 'Only a portion of Groendraai [the farm] was leased. There is no indication whether the border between the two farms is on a straight line or not, or which part of the western border of Groendraai the leased portion borders the applicant's farm. Do the farms share the entire border or not? There is no accompanying map or any indication of points which could indicate where the other borders of the leased portion of Groendraai are. There is no indication whether it is triangular, longitudinal or a rectangle. If, for example, a dispute should ensue in respect of a water point somewhere on the leased property, it would be impossible to pinpoint where that point is situated without a better description of the property.'

[12] Now, in the present matter, the phrase 'small room in tower' in the context of the lease agreement can only mean a physical building which is situated in the tower on the Plot. There is only one building on the Plot and the tower is attached to that building and there is a small room in the tower. In my opinion it needs no further description, in its context it is sufficiently precise. I am of the further view that the 'small room in the tower' was in the context of the lease agreement selected and identified by the lessee[7]. The small room in the tower can be located without recourse to the evidence of the parties. I am therefore of the view that this matter is, on its facts, distinguishable from the *Stellmacher v Christians and Others* case. The lease agreement is in my view valid and

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6 2008 (1) NR 285 (HC)

7 See the definition of premises in clause 1.1.3 of the lease agreement.

the first defense raised by the defendant must accordingly fail.

Did the plaintiff repudiate the lease agreement?

[13] I have above set out the basis on which the defendant alleges that the plaintiff repudiated the lease agreement. Mr. Barnard argued that the plaintiff was under a contractual obligation to ensure that the premises was and remained fit for the purposes of the business of the defendant. He further submitted that the plaintiff allowed access by personnel and public to the sundeck exposing these people to a serious health risk. When the health risk became apparent, instead of preventing access to the sundeck and the health risk, the plaintiff demanded that the installation be changed, that the premises be changed. Instead of ceasing his own breach, the plaintiff demanded that the premises be changed in order that he, the plaintiff, could continue using the sundeck. Mr. Barnard thus submitted that an attempt by a party to enforce an agreement contrary to its terms amounts to a repudiation of that agreement.

[14] The evidence with respect to the allegation of repudiation may be summarized as follows. 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 antennae.

[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 contract with Erongo Red. He testified that the difficulty 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 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 others, 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 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:
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> 1 The lease agreement does not provide for termination before the expiry date of 31st July 2016.
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> 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.
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> 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.

[19] In my view the question is, has the plaintiff acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract and not what Mr. Schmidt –Dumont thought. I am of the further view that the further question to be answered is whether the plaintiff on the evidence (as summarized above) repudiated the lease agreement? If he did then the defendant was justified to

terminate the lease agreement, if he did not then the defendant's termination of the agreement amounts to breach of contract. In law the word 'repudiation' has a number of meanings. It is commonly used to refer to a refusal by a party to perform a contract acknowledged to be binding, or of a declaration of inability to perform in terms of that contract or other declarations of a similar nature. In the matter of *Nash v Golden Dumps (Pty) Ltd* [8]' Corbett JA said:

> 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract…Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiate.'

[20] In the matter of *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*[9]:

> 'It is probably correct to say that respondent was *bona fide* in its interpretation of the agreement and that subjectively it intended to be bound by the agreement and not to repudiate it. This fact does not, however, preclude the conclusion that its conduct constituted repudiation in law. Respondent was not manifesting any intention to conduct its relations with appellant and to discharge its duties to appellant in accordance with what it was obliged to do on an objective interpretation of the agreement. In effect, it was insisting on a different contract, however *bona fide* it might have been in its belief that it was not.'

[21] After reviewing the authorities on the subject Nienaber JA[10] opined that it could therefore happen that one party, in truth intending to repudiate (as he later confesses), expressed himself so inconclusively that he is afterwards held not to have done so; conversely, that his conduct may justify the inference that he did not propose to perform even though he can afterwards demonstrate his good faith and his best intentions at the time. The emphasis is not on the repudiating party's state of mind, on what he

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8 1985 (3) SA 1 (A) at 22D - F.
9 1994 (3) SA 673 (A) at 684I - 685B.
10 In the matter of *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA).

subjectively intended, but on what someone in the position of the innocent party would think he intended to do. He continued and said:

> '[16] …repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.
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> [17] As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.
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> [18] The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is 'a serious matter'…requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.'

[22] The *onus* of proving that the one party had repudiated the contract is on the other party who asserts it[11]. In *Culverwell and Another v Brown*[12] Friedman J said:

> 'Just as the onus of proving that the one party has repudiated the contract is on the other party who asserts it. … so also is the onus of proving that a breach is material on the party asserting it.'

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11 1947 (2) SA 900 (E) at 919.

12 1988 (2) SA 468 (C) at 475A.

The test is objective. In *Tuckers Land & Development Corporation (Edms) Bpk, v Bonicasa Ontwikkelings (Edms) Bpk* [13] Jansen JA said :

> 'What the proper test is to be applied to the promisor's conduct is not obvious, as there are, what appear to be, conflicting *dicta* in this regard. This Court, however, seems to have gravitated in the direction of an objective test based upon the reasonable expectation of the promisee. …In *Ponisamy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387B the following passage from the judgment of Devlin J in *Universal Cargo Carriers Corporation v Citati* (1957) 2 QB 401 at 436 is cited with approval:
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> > 'A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating 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 renunciating 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.'
>
> The test here propounded is both practicable and fair, and this is the test which I propose to apply in the present case'

[23] I am of the view that the question to be answered here is whether or not, objectively viewed, the plaintiff has without lawful grounds, indicated to the defendant in words or by conduct a deliberate and unequivocal intention no longer to be bound by the terms of the lease agreement. I do not agree with defendant's allegations that the plaintiff's action to construct the sundeck adjacent to the tower (which he defendant alleges) was a standalone tower at the time the lease agreement was concluded amounted to a breach of the terms of the lease agreement. My disagreement is based on the following reasons. Firstly two employees (a certain Haihambo and a certain Nghishoongele) of the plaintiff who were both employees of the late Neumann, and who had been residing on the premises since 2003 and 2004 respectively, testified that at the time that the defendant installed the antennas, the tower was not standalone.

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[13] 1981 (3) SA 922 (T).

[24] Haihambo and Nghishoongele further testified that the structure on which the antennas had been installed contained the stairs as well as the first floor except that the sundeck had not yet been finalised. What was missing from the sundeck was plaster and at the time, according to the employees of the defendant, the structure on which the antennas was located was almost completely built. The tower had been fully constructed already. The steps were fully constructed. The walls of the building touching the tower were up but not yet plastered. The roof (sundeck) was under construction. There were brick supports underneath iron rails and wood planks so that people could walk on top. All that needed to be added was the concrete and plaster. They also testified that they were involved in the plastering of the sundeck.

[25] The second reason for my disagreement is the fact that Mr Schmidt-Dumont testified that at the time when lease agreement was concluded the affixing of the antennas to the tower was a temporary arrangement. He furthermore testified that the late Mr Neumann had informed him of his plans to erect a permanent standalone tower and that once such a standalone tower was constructed the antennas and the equipment would be relocated to that tower at the defendant's cost. The agreement appears to make provision for such an eventuality. In the schedule to the lease agreement there is a provision to the following effect:

> '11. Special conditions: initial installation done in temporary allocated room and tower. MTC to relocate equipment and antennas to permanent tower and equipment room as it becomes available at no cost to lessor.'

[26] I am therefore of the view that, at the time of concluding the lease agreement the parties foresaw the fact that the antennas and the equipment would be relocated. Thirdly in my opinion, the demands by the plaintiff, viewed against the background of the fact that the affixing of the antennas to the tower was a temporary measure, would not convey to the reasonable person that the plaintiff was indifferent to, and did not propose to comply with, the terms of the lease agreement. As such the plaintiff did not in my view attempt to enforce an agreement contrary to its terms and thus did not repudiate the lease agreement.

Supervening impossibility

[27] Mr. Barnard argued that in the written lease agreement the plaintiff warranted that the premises leased were fit for purposes of a telecommunications base station, and that it was common cause that the premises were not fit for the purpose let. He argued that in the pre-trial order the parties agreed "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." He furthermore submitted that it was the plaintiff who afforded his personnel and members of the public access to the sundeck. The plaintiff continued to do so and did not want to stop the access. According to the plaintiff the only solution was that the installation by defendant be relocated. Continued performance by the defendant in the form of use of the premises for the purposes let became impossible. He said:

> 'It would be immoral and unlawful in the delictual sense for the defendant to continue making use of the premises if it knowingly causes a health risk to third parties. From the time the radiation exposure and consequent health risk to people using the sundeck were pointed out to the defendant it would have been unlawful and immoral for the defendant to continue using the premises for a telecommunications base station. Performance was impossible the agreement is rendered void *ab initio.*'

[28] The law relating to supervening impossibility was stated as follows by Kerr[14]

> 'The basic principle is that if during the currency of a contract the conditions necessary for its operation cease to exist, the change not being due to the fault of either party or to a factor for which either party bears the risk, the contract ceases to exist. ...there is no objection to the traditional phrase 'supervening impossibility of performance' if performance becomes impossible in fact. However, as in the case of initial impossibility of performance, there is difficulty with the word 'impossible'. Performance precisely as contemplated at the time the contract was entered into may no longer be possible but the result intended may be able to be achieved in some other way. The party bound to perform remains bound if the departure from the norm of the particular

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14 *The Principles of the Law of Contract,* 6th Ed at 545

> contract in question is minor; he is not bound if it is major, i.e. if the kind of performance which is possible in fact is 'vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.'

[29] The question is therefore: has the circumstances which prevailed at the time when the parties concluded the lease agreement changed to such an extent that performance by the parties was impossible or has the circumstances become so different from the circumstances which prevailed at the time when the parties concluded the agreement so that performance which is possible is vitally different from what would reasonably have been in the contemplation of both parties. In my view, there is no marked change in the circumstances which prevailed at the time when the parties concluded the lease agreement. I say so for the following reasons. At the time 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. I am accordingly of the view that defendant was bound to perform under the agreement and the third defense raised by the defendant also fails.

[30] Christie[15] argues that the termination of a contract is a process started off by breach or repudiation ... and the choice whether to terminate an agreement or not lies with the innocent party. In the South African case of *Myers v Abramson*[16] Van Winsen J held that:

> 'As a general rule a contract cannot be rescinded except by consent of both parties thereto or by order of a competent Court, on a ground recognized by law as one on which rescission can be claimed. See Wessels, *Contract*, vol. 1, paras. 1991 -1996, vol. 2, para. 2917; *Bacon v Hartshorne*, 16 S.C. 230; *Delany v Medefindt,* 1908 E.D.C. 200 at p. 205. Where one party to the contract had unjustifiably repudiated it the injured party has as a general rule, the right to elect to accept the repudiation -and so by consent to put an end to the contract and sue for damages, or he is entitled to ignore the repudiation and hold the other party to the contract and claim specific performance.'

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15 R H Christie: *The Law of Contract in South Africa:* 5th Ed LexisNexis at page 539

16 1952 (3) SA 121 (C) at page 123

I therefore find that the defendant by the letter dated 31 January 2011 repudiated the lease agreement and therefore breached that agreement entitling the plaintiff to sue for damages. The defendant did not dispute the damages which the plaintiff alleges he has suffered.

[31] As a result I make the following order:

1. The defendant is ordered to pay the plaintiff the sum of N$ 326 644, 73.

2. The defendant is ordered to pay the plaintiff interest on the amount of N$ 326 644, 73 at the rate of 20% per annum calculated from date of judgment to date of payment.

3. The defendant is ordered to pay the plaintiff's costs of suit the costs to include the costs of one instructing and one instructed counsel.

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Judge

APPEARANCES

APPLICANT/PLAINTIFF:	E Schimming-Chase Instructed by Andreas Vaatz & Partners
RESPONDENT/DEFENDANT:	P C I Barnard Instructed by Lorentz Angula Inc.