**REPORTABLE**

**CASE NO: A 428/2009**

# IN THE HIGH COURT OF NAMIBIA

In the matter between:

**THE COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND** **APPLICANT**

And

**SWAKOPMUND AIRFIELD CC** **RESPONDENT**

**CORAM:** **UEITELE, AJ**

Heard on: 20 SEPTEMBER 2010

Delivered on: 15 March 2011

**JUDGMENT**

**UEITELE, AJ:**

**A. INTRODUCTION:**

[1] In this matter application is made, on notice of motion, by the applicant in which application the applicant prayed for an order in the following terms:

"1 Respondent is evicted from the Swakopmund Aerodrome (also known as the Swakopmund Airport) with immediate effect;

2. Leave is granted to the applicant to institute further legal proceedings against respondent to recover damages from the respondent;

3. Respondent is ordered to pay applicant's costs of suit on a scale as between attorney and own client."

[2] The respondent opposed the application. In its opposition the respondent raised three preliminary objections:

a) The first preliminary objection is that of *lis pendens* it argued there is another matter which is exactly similar as the current application which is still pending in this court.

The second preliminary objection is that on 25 November 2009 this Court struck an urgent application brought by the applicant from the roll and ordered the applicant to pay the cost of that application. The cost of the application has not been paid and the respondent accordingly prayed that the current application be stayed pending the payment of the cost.

The third preliminary objection is that there is a dispute of fact between the applicant and the respondent, which dispute is incapable of being resolved on paper. The respondent alleges that the dispute is apparent from the affidavits filed in the urgent application and which the applicant failed to attach to the current application.

[3] I find it appropriate to, before I deal with the preliminary objections and the merits or demerits of the application, give a brief background as I could gather from the affidavits filed of record, which led to the applicant approaching this Court for the relief it is seeking.

## B BACKGROUND

[4] The background to the applicant's application can briefly be summarised as

follows:

4.1. On 28 January 2000 the applicant and respondent concluded a written lease agreement for the lease of the Swakopmund Aerodrome. The written lease agreement was annexed as annexure "S1" to the Notice of Motion.

4.2. In terms of paragraph 2.2 of the lease agreement, the lease agreement would commence on 1 December 1999 and run for a period of nine years an eleven months terminating automatically by effluxion of time on 31 October 2009.

4.3. The lease agreement was amended from time to time (the dates that I could gather from the affidavits are 19 June 2000, 22 February 2005 and 29 July 2008). All these amendments were reduced to writing and signed by the parties.

4.4. On 22 October 2004 by letter, (a copy of which was annexed as Annexure "S4" to the founding affidavit filed on behalf of applicant) the respondent, (at the time represented by Mr van der Merwe and Mr. Agenbach of PF Koep & Company (respondent's legal representatives at the time) requested permission from the applicant to upgrade the airfield "by tarring the main runaway and installing a system of runaway approach and lighting as well as side markers".

4.5. In the same letter, the respondent also applied to applicant for applicant to consider granting the respondent a new lease agreement on the same terms and conditions as contained in the existing agreement but with the period of duration commencing on 1 December 2004 and terminating by effluxion of time nine years and eleven months later, (i.e. on 30 November 2013) and subject to a right of renewal for a further period of nine years and eleven months.

4.6. After the letter of 22 October 2004 was received by the applicant, the

applicant and the respondent engaged in further negotiations resulting in the applicant taking the following resolution on 27 January 2005:

"**UPGRADING OF SWAKOPMUND AIRFIELD AND EXTENSION OF LEASE**

**RESOLVED:**

(a) That the relocation of the airfield from its current position be deleted as an item from the Long Term Strategic Plan.

(b) That Messrs Swakopmund Airfield (Pty) Ltd be informed that Council approves the upgrading of the airfield to include tarring of the main runway, installing a system of runway approach and end lighting as well as side markers, at applicant's costs.

(c) That Council enter into a new lease agreement with Messrs Swakopmund Airport (Pty) Ltd on the same terms and conditions as the existing lease agreement, subject to the successful completion of all statutory disciplines and the following further conditions:"...

(i) That the new lease agreement commence upon the completion of the upgrading of the airfield and terminate by effluxion of time after nine years and eleven months.

(ii) That Messrs Swakopmund Airfield (Pty) Ltd is granted the option to negotiate the right to renew the new agreement of lease prior to termination.

(iii) That, should the lease at any stage not be renewed, the improvements are transferred to Council at a purchase price to be agreed on between the parties, should Council be interested in acquiring the facility.

(d) That should any upgrading of Municipal services be required, it be for the account of the applicant.

(e) That all costs relating to the completion of statutory disciplines, including legal costs which may arise from this application, be for the account of the applicant.

(g) That the applicant indemnifies Council against any claims arising from the upgrading of the airfield."

The above resolution was communicated to the respondent by letter dated 10 February 2005. (A copy of that letter was annexed as Annexure "S5(1)" to the founding affidavit filed on behalf of applicant)

4.7 On 16 March 2005 by letter, (a copy of which was annexed as Annexure "S6"

to the founding affidavit filed on behalf of applicant), applicant informed Mr van der Merwe (at the time the sole shareholder of respondent) that "the intention to enter into a new lease agreement" must be advertised in terms of s 63(2) of the Local Authorities Act, 1992 (Act 23 of 1992) as amended. In the letter Mr van der Merwe was further informed that at a cheque in the amount of N$1,500-00 is required for the costs of the advertisement.

4.8 The respondent on 01 April 2005 paid the advertising costs of N$1,500-00.

4.9. On 18 August 2005 PF Koep & Company, acting on behalf of the respondent, advised the applicant that the respondent has completed the upgrading of the airfield including the tarring of the main runaway and installation of a system of runaway approach and end lighting as well as side markers. In the letter the respondent also requested the applicant to furnish it with a new lease agreement for a further period of nine years and eleven months. (A copy of that letter was annexed as Annexure "S7" to the founding affidavit filed on behalf of applicant).

4.10. On 25 August 2005 and in response to the request of 18 August 2005 the applicant advised the respondent that it will place the advertisement with respect to the extension of the lease in the local newspapers and if no valid objections were received by applicant, the applicant will forward a new lease agreement to the respondent to facilitate signature by the respondent.

4.11. During December 2005 the notice was subsequently published. The notice informed the public that the Municipality of Swakopmund "intends to lease the Swakopmund airfield to Messrs Swakopmund Airfield (Pty) Ltd for a period of

nine years an eleven months" and called for objections to the proposed transaction.

4.12. On 19 December 2005 a certain H.C Coetzee objected to the lease of the Swakopmund Airfield to respondent.

4.13. On 26 January 2006 the applicant considered the objection lodged by Mr Coetzee and resolved that the objection be rejected and that the objection together with applicant's comments be referred to the Minister of Regional, Local Government and Housing and Rural Development for the approval as contemplated, under the provisions of section 63 of the Local Authorities Act, 1992.

4.14. On 06 February 2006 the applicant addressed a letter to the Minister through the Permanent Secretary: Ministry of Regional and Local Government, Housing and Rural Development, informing the Minister of the objection it has received and requesting the Minister to disregard the objection and to approve the extension of the lease of the respondent for a further a period of nine years an eleven months.

4.15. On 29 March 2006 the Minister replied to applicant's letter of 06

February 2006 as follows:

> "In terms of section 63(2)(c) of the Local Authorities Act, 1992 (Act 23 of 1992) the Minister wishes to advise your Council to consider calling for a public tender to enable all prospective lessees to participate and subsequently ensure transparency in this transaction."

4.16 On 7 June 2006 the applicant addressed a letter to respondent's former legal practitioners informing them of the Minister's response and invited the legal practitioners to respond or comment or both respond and comment to the matter. On 13 July 2006 applicant wrote a further letter requesting the

respondent to reply to the letter of 07 June 2006.

4.17. On 23 August 2006 the respondent (through Van der Merwe Greeff Legal Practitioners) informed the applicant that the contents of the applicant's letter dated 13 July 2006 was conveyed to Mr Erasmus of Erasmus & Associates who will as from then act on behalf of the respondent.

4.18. On 28 August 2006 the applicant requested the respondent to respond to the contents of the letter of 13 July 2006 and the e-mail address to Mr Erasmus. The respondent was again requested to respond to the recommendation of the Minister of Regional and Local Government, Housing and Rural Development, who did not favour the extension of the lease. Mr Erasmus was informed that applicant is bound by the Minister's decision, which has consequences for the respondent and, should respondent fail to respond, the matter will be regarded as closed.

4.19. On 19 October 2006 the applicant send another letter to the respondent's legal practitioners requesting reply to the letters of 23 August 2006 and 13 July 2006. In both the letters of 23 August 2006 and 19 October 2006 respondent was informed that should it fail to respond, the applicant will regard the matter as closed and execute the Minister's decision.

4.20 It appears that the respondent did not respond to the communications (i.e. the letters written between June 2006 and October 2006) referred to in paragraphs 4.16 to 4.19 of this judgment. It, however, appears that between November 2006 and 24 June 2008 some meetings or discussions took place between the applicant and the respondent with regard to the lease of the aerodrome. As I could gather from the affidavits the meetings took place as follows:

4.20.1. On 07 November 2006 a meeting/discussions took place

between the applicant's officials and the respondent. At that/those meeting/discussions Mr. Erasmus advised the officials of applicant that he regarded the Minister's letter as insignificant and that in his opinion a valid and binding lease agreement was concluded between the applicant and the respondent.

4.20.2. On 21 February 2008 a meeting with one of the applicant's officials took place. From the affidavits, it is not clear what was decided at that meeting.

4.20.3. On 06 May 2008 a meeting or discussions took place between Messrs Swarts and Plaatjie for the applicant and Messrs Erasmus and Roos for the respondent, with respect to certain problems pertaining to the aerodrome. At that meeting or those discussions Mr Swarts decided to call a 'public meeting' with all those who had interest in the aerodrome. 4.20.4 The 'public meeting' was called on 24 June 2008. At that meeting Mr. Roos (for the respondent) informed those present that a dispute existed with regard to the tenure of the lease agreement of the aerodrome.

4.21 On 10 February 2009 the respondent (through its legal representative) addressed a letter to the applicant in which letter it informed the applicant that "in terms of the second lease agreement a new lease had commenced upon the completion of the 'upgrading of the airfield'," which commenced on 01 September 2005 and is valid until 31 August 2015. These assertions were repeated in another letter addressed to the applicant by the respondent's legal representative and dated 03 April 2009.

4.22 On 18 May 2009 the applicant through its legal representative addressed

a response to the respondent by letter dated 18 May 2009. In its response the applicant deny the existence of any lease agreement other than the lease agreement concluded between the applicant and the respondent on 28 January 2000.The applicant further requested the respondent to provide it with its proposal
regarding the extension of the lease agreement by latest 01 June 2009.

4.23. On 03 June 2009 the respondent replied (again through its legal representative) to the applicant's letter of 18 May 2009 indicating that it wishes to enter into negotiations and that it was unable to present its proposal to the applicant by 01 June 2009.

4.24. On 12 June 2009 the applicant replied (again through its legal representative) to the respondent's letter of 03 June 2009 in which letter it advised the respondent that it had not yet received the respondent's proposal and impressed upon the respondent the urgency of the matter as the lease agreement was due to expire on 31 August 2009 (I take it that the date of 31 August is wrong as the expiry date is 31 October 2009).

4.25. On 23 June 2009 Erasmus & Associates advised the applicant that its client (i.e. the respondent) was in Kenya and that it would forward the proposal for the extension as soon as the client was back in the country. By 14 July 2009 the applicant had not yet received the proposal for the extension and it accordingly reminded the respondent and proposed a meeting for 29 July 2009 on the condition that the respondent had submitted a proposal by 12 noon on 24 July 2009.

4.26. On 24 July 2009 the respondent, by email, sent the points that it wanted to discuss to the applicant. The meeting between the applicant and the respondent thus proceeded on 30 July 2009. At the meeting of 30 July 2009, the parties'

approaches were diametrically opposed. The applicant was of the view that the lease agreement would terminate on 31 August 2009 and that they had to negotiate the terms and conditions under which the agreement would be extended to 2015. The respondent on the other hand, was of the view that an agreement was already in place and that they had to negotiate an extension beyond 2015. It is therefore, not surprising that the parties did not reach any agreement during the meeting of 30 July 2009.

4.27. On 31 August 2009 the applicant took a resolution to terminate the lease agreement dated 28 January 2000 concluded between it and the respondent. The resolution to terminate the lease agreement was communicated to the respondent by letter dated 08 September 2009.

4.28. On 02 October 2009 the respondent (through its legal practitioners) addressed a letter to the applicant, in which letter it amongst others denied that the lease agreement would terminate on 31 October 2009. On 10 October 2009 the applicant (through its legal practitioners) responded to the letter of 02 October 2009 and indicated that they will take occupation of the aerodrome on 01 November 2009.

4.29. On 26 October 2006 the respondent (through its legal practitioners) addressed a letter to the applicant (also through its legal practitioners) in which letter it amongst others informed the applicant that it (respondent) is of the view that when the applicant took the resolution on 27 January 2005, a new lease agreement came into place and that lease agreement will only expire during August 2015. It also informed the applicant that it will not vacate the aerodrome before August 2015.

4.30 On 01 November 2009 the applicant's chief executive officer attended at the aerodrome to receive occupation of the aerodrome from the respondent. The

respondent refused to hand over the aerodrome. Some correspondence, which I do not regard as relevant to the matter at hand, took place between the applicant and the respondent during November 2009.

4.31. In that same month (i.e. November 2009) the applicant launched an urgent application with this Court in which it sought an urgent eviction order against the respondent. The Court however, struck the application from the roll with costs on 25 November 2009 on the basis that applicant failed to disclose sufficient grounds for the matter to be heard on an urgent basis. After the urgent application was struck from the roll, the current application was instituted.

4.32. I will, in the next paragraphs, examine the preliminary objections raised by the respondent.

**C THE POINTS *IN LIMINE***

[5] ***First Point in Limine***

5.1. The first preliminary objection raised by the respondent is that "It is unjust that a litigant should bring a party into court, cause him to incur cost, refuse to pay them and still be allowed to continue the litigation ad *in finitum*". The respondent thus submitted that the current proceedings must be stayed pending the payment by the applicant of the cost of the 'abortive' urgent application.

5.2. It is true that the courts have adopted *a general rule* that 'a plaintiff who has been unsuccessful in an action will not be permitted to harass the defendant with further proceedings concerning the same cause of action without having paid the costs of the unsuccessful action." See ***Michealson v Kent*** 1913 TPD 48 at page 50 and also Herbstein & Van Winsen: ***The Civil Practice of the High Courts of South Africa:*** 5th Ed Volume 1 at page 316.

5.3. In the case of ***Executors Estate Smith v Smith*** 1940 CPD 387 at page 391 De Villiers J said:

> "It is perfectly true that the Court has an inherent right to control its procedure and to stay an action which it is satisfied is ***vexatious*** or ***an abuse of the procedure*** of the Court." {My Emphasis}

5.4 After stating the general rule the learned authors (Herbstein & Van Winsen *supra* at page 317) comment that "a Court will be slow to exclude a litigant from proceedings because the costs of previous litigation remain unpaid. Some element of ***vexatiousness*** is usually required though not, it would seem, invariably". {My Emphasis}. In the ***Executors Estate Smith*** De Villiers J said at page 395:

> "...Naturally where the merits have not been dealt with at all no inference of vexatiousness can be drawn from the mere bringing of further proceedings."

5.5. In the matter before me the applicant's application (which was struck from the Roll during November 2009) failed not on the merits but simply on the ground that the application was not urgent. In the circumstances the respondents have not proven that the applicant acted vexatiously when it instituted the current proceedings.

5.6. I am thus of the view that a respondent who fails to prove that the institution of the action was vexatious - failed to show the existence of an essential precondition for the exercise by the Court of its discretion, namely, that the applicant's action is vexatious. Our courts accept that, failing any of the recognised grounds, they do not have a discretion to stay proceedings. I accordingly dismiss the first point *in limine.*

***[6] Second Point in Limine***

6.1. The second point *in limine* taken by the respondent is that of *lis pendens.* Mr. Wepener who appeared on behalf of the respondent submitted that "It is settled law that if there is action pending between the parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter whether in the same or different court, it is open to the defendant to take an objection of *lis pendens.* He quotes as authority for this submission the work Herbstein & Van Winsen *supra.*

6.2 I have no doubt that this is a correct statement of the law. I, however, hasten to add that the fact that it is open for a defendant to take an objection of *lis pendens* does not mean that he has right to a stay of action. The question whether an action should be stayed or not is a matter within the Court's discretion. See ***Ex Parte Momentum Group Ltd and Another*** 2007 (2) NR 453 (HC) where Van Niekerk J said

> "The defence of *lis pendens* is not an absolute bar. It is within the court's discretion to decide whether proceedings before it should be stayed pending the decision of the first-brought proceedings, or whether it is more just and equitable that the proceedings before it should be allowed to proceed. ***(Michaelson v Lowenstein*** 1905 TS 324 at 328; ***Westphal v Schlemmer*** 1925 SWA 127; ***Loader v Dursot Bros (Pty) Ltd*** 1948 (3) SA 136 (T).) *Considerations of convenience and fairness are decisive in determining this issue* . {My Emphasis}.

6.3. Also see the South African case of ***Friedrich Kling Gmbh*** v ***Continental Jewellery Manufacturers; Guthmann and Wittenauer Gmbh v Continental Jewellery Manufacturers*** 1993 (3) SA 76 (C) where it was held that

> "Where the defence of *lis alibi pendens* is raised, the *onus* is on the plaintiff to satisfy the Court that the second proceedings are not vexatious. The defendant, however, has no right to a stay of action. The Court has a discretion to stay the second proceedings or to allow them to continue. The exercise of this discretion will depend on grounds of ***convenience and fairness.*** {My Emphasis}.

6.4 In ***Yekelo v Bodlani*** 1990 (3) SA 970 at 973 the Court held that, whilst the institution of two actions is *prima facie* vexatious, 'it is within the court's discretion to allow an action to continue should this be considered just and equitable despite the earlier institution of the same action'.

6.5. The learned authors Herbstein & Van Winsen *supra* at page 310 argue that 'a plea of *lis pendens* will not succeed when the previous action has been withdrawn, even though the costs of that action have not yet been paid'.

6.6. Mr. Wepener who appeared on behalf of the respondent submitted that: "The purported withdrawal of the urgent application is of no force or effect. The Applicant did not obtain the consent of the Respondent nor the leave of the Court". He cites as authority for that submission Rule 42(1).

6.7. Rule 42(1) of the High Court Rules reads as follows:

> "42(1) (a) A person instituting any proceedings ***may at any time before the matter has been set down*** and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party." {My Emphasis}.

6.8 I hold the view that the meaning of Rule 42 (1) is that the consent of the other party to proceedings, to withdraw an action or application is only needed if the matter has been set down in accordance with the Rules of Court, if the matter has not been set down, the applicant can at any time withdraw the action.

6.9. In the present matter it is common cause that the urgent application initiated by the applicant was struck from the roll. I have not been advised or informed that

it was again set down in accordance with Rule 39 of this Court. I thus find that the objection by the respondent that 'its consent or the consent of the Court has not been obtained' to be without merit.

6.10. I have thus come to the conclusion that the applicant's application is not vexatious and I consider it to be just and equitable to allow the current matter to proceed. The second point *in limine* is accordingly also dismissed.

[7] **Third *Point in Limine***

7.1. The third point *in limine* taken by the respondent is that there is a dispute of fact which the Applicant should have foreseen and which is incapable of being resolved on paper.

7.2. It is true that in motion proceedings a dispute of facts may arise on the papers. The legal position on how to resolve a dispute of facts which arises in motion proceedings has been set out as follows in the case ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** 1949 (3) SA 1155 (T) at page 1162 which case has been approved by the Supreme Court of Namibia :

> "It is obvious that a claimant who elects to proceed by motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated *infra)* the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way, either on the affidavits as constituting the pleadings, or with a direction that pleadings are to be filed. Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to

> what is essentially the subject of an ordinary trial action.

7.3 From the above statement of the law, the crucial question is always whether there is a **real dispute of fact.** How does a genuine dispute of fact arise? In the ***Room Hire Co case,*** supra at 1163, Murray AJP stated thus:

> "It may be desirable to indicate the principal ways in which a dispute of fact arises. The clearest instance is, of course, (a) when the respondent denies all the material allegations made by the various deponents on the applicant's behalf, and produces or will produce, positive evidence by deponents or witnesses to the contrary. He may have witnesses who are not presently available or who, though adverse to making an affidavit, would give evidence *viva voce* if subpoenaed. There are however other cases to consider. The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Or (c) he may concede that he has no knowledge of the main facts stated by the applicant, but may deny them, putting the applicant to the proof ..."

7.4 I have in Part B of this judgement in detail set out the background to the dispute between the parties for the purposes of assisting me in answering the question whether a real dispute of facts exist between the parties. My understanding (and this understanding was during the hearing of the application confirmed with both Counsels appearing for the applicant and respondent respectively) of the dispute between the applicant and the respondent is whether the lease agreement concluded on 28 January 2000, between the applicant and the respondent was renewed on 10 February 2005 extending its life to 31 August 2015.

7.5. There is no dispute between the applicant and the respondent as regards the events which gave rise to the divergent opinions of the applicant and the respondent as to whether the lease agreement was extended or not. I am of the view that the dispute between the applicant and the respondent is whether an amended lease agreement has come in to being or not and that question is a

legal one. The court can, having regard to the factual averments by the applicant and the respondent, make a determination as to whether or not a valid amended lease agreement came into being. I thus hold that there is no real, genuine or *bona fide* dispute of fact between the applicant and the respondent. I accordingly also dismiss the third point in limine raised by the respondent.

**D AD THE MERITS OF THE DIPUTE.**

[8] The issue for determination by this court is, whether the parties validly amended the agreement which they concluded on 28 January 2000 to extend the lease to August 2015. To do so, of necessity, will require a brief survey of the legal principles governing the validity of contracts with a view to determining whether, based on the facts which are not in dispute a valid extension was agreed to by the parties.

[9] A contract is often defined merely as an agreement made with the intention of creating an obligation or obligations. (See ***LAWSA*** Vol 5 at paragraph 124. Lubbe Gerhardt and Christina Murray **"*Contract Cases and Material Commentary*"** 3rd Edition observes that: "A contract is a type of agreement. For a contract to be valid, therefore, the parties should intend to establish a mutual obligation and express this occurrence of intention in an outwardly perceptible form by means of declaration of will".

[10] Van der Merwe, van Huyssteen, Reinecke; and Lubbe; ***Contract: General Principles*** 2nd Edition, argue that "one must then assume that an agreement will be a contract if the parties intend to create an obligation or obligations *and if in addition, the agreement complies with all other requirements which the law*

*sets for the creation of obligations by agreement (such as contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities)*'.{ My Emphasis}

[11] In the present case the common cause facts are that:

- On 28 January 2000 the parties concluded a lease agreement which would terminate on 31 October 2009.
- On 22 October 2004 the respondent, applied to applicant for applicant to consider granting the respondent a new lease agreement on the same terms and conditions as contained in the existing agreement.
- On 27 January 2005 the applicant amongst others resolved that it enters into a new lease agreement with the respondent on the same terms and conditions as the existing lease agreement, subject to the successful completion of all statutory disciplines. This resolution was conveyed to the respondent in writing on 10 February 2005.

[12] The resolution of 27 January 2005 appears to be the source of dispute between the parties. The respondent maintains that this resolution clearly established a *tacit* contract of lease. The respondent further argues that "a *new lease agreement commenced on 18 August 2005 as per the advice of the applicant on 10 February 2005 and that this new lease was not subject to it being reduced to writing*".

[13] The applicant on the other hand is of the view that the entering into a new lease agreement with the respondent in terms of the aforesaid resolution was expressly subject to the successful completion of all **"statutory disciplines"**

and had to be reduced to writing and signed by both parties.

[14] The lease agreement between the parties amongst others contains the following clauses:

14.1 Clause 8.1 which reads as follows:

"This agreement constitutes the whole agreement between the parties relating to the subject matter hereof. No amendment or consensual cancellation of this agreement or any provision or term thereof or of any agreement, any other document issued or executed pursuant to or in terms of this and no settlement of dispute s arising under this agreement and no extension of time , waiver or relaxation or suspension of any of the provision or terms and conditions of this agreement or of any agreement, document issued pursuant to or in terms of this agreement shall be binding unless recorded in a written document signed by the parties."

14.2 Clause 9 which reads as follows:

"EXTENSION OF LEASE:

9.1. Should, at the termination of the lease through effluxion of time, the lessee wish to extend the lease it shall notify the lessor in writing accordingly, such notice to reach the lessor not later than 28 February 2009.

9.2. After receipt of such notice by the lessor the parties shall enter into negotiations with the aim of reaching agreement regarding the terms which shall govern the extension of the lease.

9.3. Failing agreement to the contrary, should the parties not have entered into a written extension of the lease, alternatively a fresh lease agreement (as the case may be) on or before 31 August 2009 it shall be deemed that the parties are unable to reach agreement regarding the terms to govern the extension of the lease and in which event the lease shall terminate by effluxion of time on 31 October 2009 as stipulated in clause 2.2 *supra.*

9.4. The lessee's entitlement to extend the lease (in accordance with and subject to the preceding sub-clauses) shall be entirely conditional upon it having meticulously observed and complied with each and every term of this lease to the entire satisfaction of the lessor."

[15] In ***Goldblatt v Freemantle*** 1920 AD 123 at pages 128-129 Innes CJ

held that:

> "Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (Grotius 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (se Voet 5.1.73; Van Leeuwen 4.2, Decker's note);and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case, one of construction."

[16] In ***Woods v Walters*** 1921 AD 303 at 305, **Innes CJ** referred to the above passage and added:

> "It follows of course that where the parties are shown to have been ad idem as to the material conditions of the contract, the *onus* of proving an agreement that legal validity should be postponed until due execution of a written document lies upon the party who alleges it."

[17] My understanding of the ***Goldblatt's*** case is that that case lays down three types of writing. The learned Judge (Innes CJ) talks about a memorandum which facilitates proof of a verbal agreement. Secondly, there can be a writing which embodies the agreement of the parties, although not signed. And finally he says if the parties intend the agreement itself to be in writing, in other words, that the written document is to be the agreement, then that written agreement must be signed by the parties. As to which of these three is intended by the parties to the agreement, says the learned Judge, is a matter of construction. I take that to be the law and I am going to act on that basis.

[18] The applicant submitted a document (Annexure "S1") headed 'LEASE

AGREEMENT' and that the agreement was concluded at Swakopmund and there is obviously provision next to the words 'lessor and lessee' for signature by the lessor and next to the word 'lessee' for a signature by the lessee. Opposite each of these there is provision for two witnesses.

[19] As I have said already in the terms of conditions of lease there is a paragraph 8.1 which reads: *This agreement constitutes the whole agreement between the parties relating to the subject matter hereof* ***no amendment*** *or consensual cancellation of this agreement... shall be binding unless recorded in a written document signed by the parties.*' It seems to me that these words 'the whole agreement between the parties hereto', are really quite decisive. It means that this printed, written and signed document constitutes the only agreement between the parties, in other words there is no question of a verbal agreement, or of a memorandum facilitating proof, or of a document merely containing in writing the terms of the agreement. I am further supported in this view, if support is needed, by the way in which provision is made for the signature and the witnessing of the signature of the parties.

[20] It true that the applicant and the respondent had intended or agreed to create an obligation or obligations between them, they also agreed to the formalities which they must comply with for the agreement to be valid. I therefore find the assertion by the respondent that "*a new lease agreement commenced on 18 August 2005 as per the advice of the applicant on 10 February 2005 and that this new lease was not subject to it being reduced to writing*" to be disingenuous and baseless.

[21] I find, therefore, that the applicant has discharged the *onus* resting on it and proven that the parties intended that the agreement or an amendment of that agreement had to be a written agreement and, in consequence of the authorities

whom I have quoted, I find further that this agreement had to be signed to be binding. If it is not, then it follows that there is no agreement.

[22] In view of my finding that any amendment to the agreement of 28 January 2000 had to be in writing and had to be signed by both parties and of the fact that no amendment was reduced to writing or signed by the parties, I am satisfied that the lease agreement between the applicant and the respondent terminated by effluxion of time on 31 October 2009. I will therefore, not deal with all the other arguments raised by the applicant and the respondent.

[23] The respondent resisted the eviction on another ground. It argued that it has expanded large sums of money with the consent of the applicant and is therefore, entitled to an improvement lien over the aerodrome until it has been compensated for the "improvements" effected to the leased premises.

[24] The applicant on the other hand disputes the respondents claim to an improvement lien or creditor/debtor's lien. I am not sure whether motion proceedings are suited to resolve the dispute as to whether the respondent has a lien (improvement lien or creditor/debtor lien). I will however, without deciding the matter assume that the respondent has *jus retentionis.*

[25] The respondent's claim has, however, been rather sketchily set out in the papers. It is not clear from the papers before me what the amount of the respondent's claim enforceable against the applicant is.

[26] In the case of ***Ford v Reed Bros*** 1922 TPD 266, at 272-3, Mason J

said the following in regard to the continuation of a lien:

> 'The apparent hardship of giving a lien for continuous keep in such cases as these is much mitigated, if not obviated, by the rule that the owner can obtain his property upon giving security according to the discretion of the court, which is to see that the owner is not kept unreasonably out of his property, nor the claimant for expenses harassed by prolonged and unnecessary litigation. (Voet 16.2.21; Van Leeuwen Cens For 4.37.13.)'

[27] In the same case Gregorowski J stated the principle as follows:

> '. . . (T)he thing held as a lien can be released by giving security for the claim for which it is detained, and this course will especially be directed by the Judge when it is a matter of complicated accounts which it would take time to unravel, so as not to keep the owner out of his property'.

[28] The applicant tendered a guarantee against the eviction of the respondent from the aerodrome. The respondent has not objected to the form of the guarantee tendered. I am of the view that there is no lease between the applicant and the respondent as the lease agreement between the parties terminated by effluxion of time. The only basis on which the respondent would be entitled to remain in possession of the aerodrome is the right of retention which I have assumed to exist in its favour.

[29] I am of the further view that, it is just fair and equitable, that I should exercise my discretion in the applicants' favour to eject the respondent from the aerodrome against delivery of the guarantee which applicant has tendered.

[30] Prayer 1 of the notice of motion simply asks for an ejectment of the respondent with immediate effect, it does not specify a time or date for the

eviction to take effect. I will grant the respondent seven days from the date of my order to vacate the aerodrome.

[31] In prayer 2 of the notice of motion the applicant asks for leave to institute proceedings to recover damages from the respondent. I am of the view that I do not need to give such leave it is for the applicant to decide whether it will or will not claim any damages that it believes it has suffered.

[32] No reference is made to the guarantee in applicants' prayers. I will adapt the prayers to make provision therefor.

[33] I accordingly grant the following order:

(a) Ejecting the respondent from the Swakopmund Aerodrome (also known as the Swakopmund Airport).

(b) The order set out in paragraph 33(a) hereof will take effect seven days after this order is given.

(c) The said ejectment must take place against delivery by the applicant to the respondent of the guarantee as tendered by the applicant

(d)The respondents are ordered to pay the applicant's costs which cost includes the cost of one instructing and one instructed counsel.

**UEITELE, AJ**

**ON BEHALF OF THE APPLICANT:** Ms. Susan Vivier

**INSTRUCTED BY:** Fisher, Quambry & Pfeifer

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|---|---|
| **ON BEHALF OF THE RESPONDENT** | Mr. Lotter Wepner |
| **INSTRUCTED BY:** | Erasmus & Associates |