REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 220/2013

In the matter between:

1.1.1.1. **WITVLEI MEAT (PTY) LTD**

APPLICANT

and

THE AGRICULTURAL BANK OF NAMIBIA **FIRST RESPONDENT**

THE DEPUTY SHERIFF OF GOBABIS **SECOND RESPONDENT**

Neutral citation: Witvlei Meat (Pty) Ltd v The Agricultural Bank of Namibia & Another Others (A 220/2012) [2013] NAHCMD 216 (26 July 2013)

Coram: SMUTS, J
Heard: 18 July 2013
Delivered: 26 July 2013

Flynote: The applicant's appeal having lapsed, it applied for a stay of execution, pending the outcome of an application for condonation and reinstatement of the appeal. The first respondent took the point that the court lacked jurisdiction to hear such an application. The obiter dictum in *Ondjava Construction CC v HAW-Retailers* 2010 (1) NR 268 (SC); *Herf v Germani* 1978 (1) SA 440 (T) applied in finding that the court has jurisdiction to grant such relief

where the dictates of real and substantial justice require that. This test would entail weighing the prejudice of the respective parties and the prospects of success on appeal. In this application the applicant had failed to establish that the dictates of real and substantial justice required that such an order be given – application dismissed.

ORDER

That the application is dismissed with costs. The costs in question include the costs of two legal practitioners (counsel).

JUDGMENT

SMUTS, J

(b) In this application, brought as one of urgency, the applicant seeks an order suspending the execution of a judgment handed down by this court on 20 March 2013 and the stay of any warrant pursuant to it, pending the outcome of an application for condonation and reinstatement of the applicant's appeal against that judgment.

(c) This application arises in the following way. This court had, on the application of the first respondent, granted an order evicting the applicant from certain premises (being a portion of a farm in the Witvlei vicinity) upon which the applicant operates an abattoir. That judgment was handed down on 20 March 2013.

(d)

(e) On 11 April 2013, the applicant timeously noted an appeal against it. But the applicant failed to furnish security in accordance with the rules of the Supreme Court. As a consequence, the appeal has lapsed in accordance with

the Supreme Court rules, as was fully explained by that court in *Ondjava Construction CC v HAW Retailers*. [1] As a result of the appeal lapsing, rule 49(11) and the common law rule which suspend the operation of judgments pending an appeal thus no longer apply.

(f)

(g) As a consequence, the applicant has brought this application. It is opposed by the first respondent. It opposes the application on its merits but also raises two preliminary points. In the first instance, the first respondent contends that this court does not have jurisdiction to grant the relief sought. The first respondent secondly contests the urgency with which the application was brought. Before dealing with these points and the merits of this application, it would be appropriate to set out certain of the background facts which had led to it.

Background facts

(h) The applicant makes use of South African attorneys. They instructed their correspondents, the legal practitioner of record, to file a notice of appeal on 11 April 2013 and on 21 May 2013 the local correspondent enquired from the legal practitioner of record for the first respondent as to whether their client required security to be furnished for the appeal and if so, the amount of the security to be filed. This letter was followed up on 3 June 2013.

(i) Of relevance is that the Supreme Court rules require that the record of proceedings is to be lodged with the Registrar of the Supreme Court within three months from the date of the judgment or order appealed against. The rules further provide that, when a record is lodged with the Registrar, the appellant is required to inform the Registrar in writing whether it has entered into security in terms of rule 8 of those rules. The failure to do so results in the appeal lapsing, as I have already pointed out. The applicant would thus have been aware that security was to be finalised on or before 19 or 20 June 2013 in order to comply with the Supreme Court rules.

[1] 2010(1) NR 268 (SC).

(j) The applicant's local legal practitioner addressed a follow-up letter to the respondents' legal practitioner on 3 June 2013. A response was provided on 6 June 2013 requiring security in an amount of N$150 000. The applicant disputed this amount and proceeded to approach the Registrar of the Supreme Court to determine the amount of security. This was finally determined after the due date and only on 8 July 2013. The amount of security was then paid on 10 July 2013. On the same date an application for condonation for non-compliance with the Supreme Court rules and to reinstate the appeal was also lodged.

(k) In the meantime, the first respondent's legal practitioner addressed a letter to the applicant's practitioner of record on 4 July 2013 stating that the first respondent would be entitled to proceed to execute the judgment and order of this court to evict the applicant from the premises seeing that the appeal had lapsed, expressly relying on the *Ondjava Construction* judgment. On 10 July 2013, the second respondent arrived at the premises and presented the applicant with an order of court and sought to evict the applicant from the premises. On the next day, 11 July 2013, this application was launched and set down on 12 July 2013 when it was postponed for hearing on 18 July 2013.

Lack of jurisdiction

(l) The first preliminary point taken by the first respondent is that this court lacks jurisdiction to grant the relief sought by the applicant. It was contended that the only power which this court would have after granting judgment under rule 49(11) where it may, on application, grant or refuse to put the court order into effect pending the finalisation of the appeal. It was contended that the High Court would have no further jurisdiction or powers other than that power granted by rule 49(11) to make an order of that nature, and certainly not to make an order of the kind contemplated in this application. In support of this point, Mr Namandje, who appeared for the first respondent together with Mr Ntinda, relied upon the doctrine of *stare decisis* as recently restated in *Camps Bay Ratepayers' and Residences' Association and another v Harrison and another.* [2]

[2] 2011(4) SA 42 (CC) at par [30].

Mr Namandje also referred to the principle of *res judicata* in arguing that the applicant essentially sought to request this court to decide upon a legal issue which had already been determined and referred to a judgment of this court in *De Wet Esterhuizen v Registrar of the High Court and Supreme Court of Namibia and two others.* [3] He also submitted that this court was *functus officio* after pronouncing its order and could not go into it subsequently, also referring to a judgment of the Supreme Court in *Mukapuli and another v Swabou Investment (Pty) Ltd and another* [4] and also referring to *Firestone South Africa (Pty) Ltd v Genticuro AG.* [5]

(m) Mr Corbett on the other hand, representing the applicant, referred to the *Ondjava Construction* matter where the Supreme Court held (with reference to non-compliance with its rules):

'[2] In addition, the subrule also contains a deeming provision which seeks to inform litigants about the consequences of non-compliance with its provisions: should an appellant fail to so inform the registrar, it would be deemed a failure to lodge the record of appeal in compliance with the requirements of rule 5(5). As noted in numerous judgments dealing with provisions in other jurisdictions worded similarly to rule 5(5), although they may not specifically so state, their language implies that an appeal lapses upon non-compliance with their provisions. This, in essence, is also the construction given by this court to the subrule. The effects thereof are that the appeal is deemed to be discontinued and that it may only be revived upon the appellant applying for - and the court granting - condonation for the non-compliance and reinstatement of the appeal; that the judgment of the High Court, suspended both under the provisions of the rules and at common law by the appeal may be carried into execution unless otherwise ordered upon a substantive application and, if so minded, a respondent who has given notice of a cross-appeal, must notify the registrar of his or her intention to prosecute it and thereupon assume the duties of an appellant in the proceedings, to mention a few.'[6]

(My emphasis)

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[3] Case No A196/2010, unreported, 9 December 2011.

[4] 2013(1) NR 238 (SC).

[5] 1977(4) SA 29 (A) at 306 F.

[6] o*p cit* at 288, par (2).

(n) Mr Corbett submitted that this paragraph, and particularly the underlined portion, is authority for the proposition that this court can by way of a substantive application revive the effect of the suspension of the execution of an order pending an appeal. In footnotes in this quotation, the Supreme Court referred to the cases of *Sabena Belgium World Airlines v Ver Elst and another* [7] and *Herf v Germani.* [8] Whilst the *Sabena* matter may be distinguishable as it entailed an appeal from a magistrate's court to a superior court, the matter of *Herf v Germani* would be more on point. In a matter where an appeal was also deemed to be lapsed – albeit in different circumstances – the court found that, in terms of the provisions of the rules and the common law, the judgment would no longer be suspended. But despite this, the court, in a carefully reasoned judgment, concluded that it is vested with the discretion to grant relief of the kind sought in this application if "the dictates of real and substantial justice require"[9] such an order, having regard "to the special circumstances of the parties". The court stressed that in doing so, its objective would be to avoid doing irreparable damage to either of the parties.

(o) Not only is the judgment in *Herf v Germani* cited with approval by the Supreme Court which would also *obiter* appear to consider that this court would have jurisdiction to grant an application of this nature, but it would in any event seem to me that the approach in *Herf v Germani* is, with respect, correct and that this court would be vested with jurisdiction to grant in its discretion an application of this nature where the dictates of real and substantial justice require that upon special circumstances establishing that.

(p) This approach accords with the discretion vested in a court at common law prior to the enactment of rule 49(11) to grant or to refuse leave to execute a judgment and determine the conditions upon which the right to execute is to be exercised, as was spelt out in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[10] with reference to the old writers and earlier

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[7] 1980(2) SA 238 (W).

[8] 1978(1) SA 440 (T) at 449 G-H.

[9] Op cit at 445 G-H.

[10] 1977 (3) SA 534 (A) at 545 C-D, per Corbett, JA as he then was.

decisions.[11] The South Cape decision has been followed by this court as also reflecting the position in Namibia.[12] In describing the basis for an application to execute a judgment under common law, that court further stated:

'This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments.'[13]

That inherent discretion would in my view vest this court with jurisdiction to grant or refuse the relief sought in this application.

(q) The first respondent's first preliminary point cannot be sustained. I find that this court does have jurisdiction to grant relief of this kind for these reasons.

Urgency

(r) Mr Namandje argued that the application was not properly brought as one of urgency because the applicant did not provide reasons why it could not be afforded substantial redress at a hearing in due course, as is required by rule 6(12)(b). He submitted that, after realising that the appeal had lapsed, the applicant should have approached the Chief Justice in accordance with rule 2(2) of the rules of the Supreme Court to seek the hearing of the appeal as one of urgency or on an expedited basis. He pointed out that the applicant had not done so and had also not explained why it could not have done that. He pointed out that the rule specifically provides for an approach to the Chief Justice for an appeal to be heard on an expedited basis.

(s) Mr Corbett countered that the invocation of the Supreme Court rule in question would not avail the applicant. Even if an expedited hearing could be granted in the Supreme Court, the fact remained that the first respondent would otherwise be entitled to proceed upon a writ in the meantime. He submitted that

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[11]Voet 49. 7. 3, *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* 1961 (2) SA 118 (T) at 127.

[12]*Wal-Mart Stores Inc. v Chairperson, Namibia Competition Commission and Others* Case No. A 61/2011, 15/6/2011 (application to execute - with these principles not criticized or departed from an appeal except in respect of the question of costs. See Namibia Competition Commission and Another v Wal-Mart Stores Inc. 2012 (1) NR 69 (SC) at 92.

[13]Op cit 545 C-D. See also *Fismer v Thornton* 1929 AD 17 at 19.

the invocation of rule 2(2) of the Supreme Court rules for an expedited hearing would not amount to being afforded substantial redress in the circumstances. There is much force in that submission. The first respondent could proceed to execute the order in the intervening period before an expedited Supreme Court hearing date and the outcome after that hearing date. The point thus raised on behalf of the second respondent concerning urgency likewise does not succeed.

(t) I also enquired whether the applicant's urgency was not self-induced by only taking up the question of security on 21 May 2013 which was less than a month before security needed to be determined and finalised. Mr Corbett responded that the applicant could not have brought this application before it was in a position to file its application for condonation and reinstatement to the Supreme Court. He submitted that one of the factors which this court would take into account in this application would be the overall prospects of success of the application for condonation and the appeal and that this court could only consider aspects if the application for condonation were to be before it. This contention cannot be entirely sound because as it would mean that the applicant could not have approached this court prior to bringing its condonation application which, upon Mr Corbett's reasoning, was only capable of being brought after 10 July 2013 when the applicant had complied with its obligation to furnish security. If the applicant had a cause of action for the relief sought, then it would have arisen prior to bringing the condonation application as the first respondent could have proceeded on a writ after 20 June 2013 already. What the applicant would need to do, would be to set out the basis for such its subsequent condonation application or to bring its condonation application already then and amplify it subsequently if need be.

(u) Once the appeal had lapsed, which occurred on 20 or 21 June 2013, and once the applicant was aware that the first respondent intended to proceed to execute the judgment, then the need to bring this application had arisen. But on the facts before me, the applicant only became aware of the attempts to proceed to execute the judgment in early July 2013 and the application was not thereafter unduly delayed.

(v) It would follow that, in the exercise of my discretion, I would grant condonation to the applicant to bring this matter as one of urgency.

Merits of the application

(w) The question arises as to whether the applicant has established that the dictates of real and substantial justice require a stay in execution pending the outcome of the application for condonation and reinstatement of the appeal and the appeal. The applicant would in my view bear the onus to establish that there are grounds for the exercise of the discretion vested in this court in its favour by establishing a proper case for the stay in execution. If at the end of the hearing the court would be in doubt as to the essential facts or whether it was an appropriate case for the grant of a stay, then it would seem that should be refused.[14] As is made clear in the *Germani* matter, special circumstances would need to be established with the overriding principle being that an applicant would need to establish that substantial justice would require a stay so as to avoid doing irreparable damage to either of the parties. This would inevitably give rise to weighing the prejudice and harm to be sustained by the parties if the relief were to be granted or refused together with the prospects of success of the application for condonation and reinstatement of the appeal, the latter being a highly relevant factor in that weighing up process. The prospects of success of the application for condonation and for reinstatement entail two distinct components, namely whether a reasonable and acceptable explanation has been given for the failure to comply with the Supreme Court rule in question and secondly as to the merits of the appeal itself.

(x) In this application, the applicant contends that it would suffer irreparable harm or prejudice if the judgment were to be executed. It states that it runs an abattoir from the premises with an annual turnover of N$120 million and supplies beef for export to Europe in terms of existing supply agreements. It points out that it would be difficult to relocate its business to other premises.

(y)

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[14] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* supra at 546 C-F.

(z) The applicant further points out that a sum of N$25 million has been spent in refurbishing and modernising the abattoir and says that it would not be compensated for this. This point was also raised in the heads of argument. Mr Corbett was however constrained to concede that this would not amount to irreparable harm as the applicant may have an enrichment action in respect of improvements to the premises.

(aa)

(bb) The applicant also points out that it has 160 employees with a wage bill of N$800 000 (presumably per month). It is further stated that if the appeal were to be successful the applicant had been advised that the Supreme Court would be unlikely to hand down a judgment before the lapse of approximately 2 years and that the applicant would thus suffer significant damages. No factual or statistical basis was provided for the statement that the judgment on appeal would likely take approximately 2 years to be handed down. This unfortunate perception stated under oath was also raised in written argument. When I enquired from Mr Corbett as to the basis for this statement and his contention, he stated that the applicant would no longer rely upon this ground. Seeing that this ground is no longer relied upon, it is not necessary for me to further refer to it.

(cc)

(dd) The applicant also says that it would suffer irreparable harm to its international reputation as a producer of quality meat products and could be liable for breaches of supply agreements if evicted. The applicant also states that the execution of the order would be to the detriment of the agricultural industry on the basis that it slaughters 10 000 head of cattle per year.

(ee) Mr Corbett also pointed out that the first respondent had not specified prejudice it would suffer on the other hand, if the relief sought in the application were to be granted. Mr Namandje however referred to the answering affidavit in which the first respondent stated that the applicant is not paying rent but insignificant amounts which were accepted without prejudice and for the purpose of mitigating the first respondent's damages. The answering affidavit further refers to an affidavit attached to it, referring to an action brought by the applicant on 23 May 2013. In this affidavit, it is stated that the amount currently

being paid towards rentals was not the amount agreed upon in terms of the lease agreement and the renewed lease agreement and that the respondent is as a result suffering great financial loss. This aspect is not dealt with in reply, despite the incorporation of the averments contained in the attached affidavit. I must accept for the purpose of this application that the respondent is thus not receiving a market related rental for the premises and is thus prejudiced.

(ff)

(gg) Mr Namandje also referred to the presumption in vindicatory matters referred to in *Prest: The Law and Practice of Interdicts.* [15] The learned author in that work says that it would be factually presumed in cases of vindicatory or *quasi* vindicatory claims that an applicant would suffer irreparable harm if an interdict were not to be granted. This principle would by analogy apply to a matter of this kind and in any event give rise to a presumption of prejudice to a respondent in circumstances such as the present where it had succeeded in vindicatory proceedings against the applicant even though these proceedings, despite the form of the order sought, are not strictly speaking interdicts but rather a discretionary remedy to grant an order where the dictates of substantial justice require it by reason of the inherent jurisdiction of this court to control its own judgment and orders.

(hh) Even though some of the claims of prejudice raised by the applicant would not appear to be substantiated, it is however clear that the applicant would sustain harm if the application were not to be granted. But this harm would need to be weighed up and assessed as against the first respondent's prejudice and further weighed in the context of the prospects of success of the condonation application and of the appeal itself.

(ii) As far as the condonation application is concerned, the applicant does not refer to any steps taken by it with regard to the issue of security until 21 May 2013 which was less than 1 month before the security was due. Clearly an appellant in opposed proceedings, where it would be required to provide security at the risk of an appeal lapsing, should not sit back and wait until the due date approaches before being spurred into action on that score. There is

[15](1st ed, 1996 at p 66-67).

no intimation as to any steps taken even after the notice of appeal was filed on 11 April 2013 until 21 May 2013. Even after the approach had been made on 21 May 2013, there is no reason why the applicant did not take further steps in accordance with the rules when it had not heard from the legal practitioners for the first respondent.

(jj)

(kk) Mr Corbett contended that the first respondent essentially obstructed the applicant in this regard by taking until 6 June 2013 to revert to it. This submission cannot however hold water. It was for the applicant to pursue the issue. There was no evidence of any follow-up telephone calls which I would have expected in pressing for a reply. There was instead a single letter of 3 June 2013. On the contrary, the applicant should have placed the first respondent's legal practitioners on terms for an urgent response to the letter of 21 May 2013, failing which the Registrar would be approached within a few days thereafter. The applicant can in any event hardly complain when the first respondent takes some two weeks to respond in the face of its own prior inaction to have taken up the issue for more than five weeks. Although this is a factor for the Supreme Court to consider in the application for condonation, it is an aspect which this court may consider in assessing whether the explanation is lacking, particularly in view of the more recent trend of the Supreme Court in applications for condonation where it would seem that a stricter approach has, with respect, been correctly adopted. [16]

(ll) Even though the explanation proffered by the applicant may be lacking in its reasonableness or acceptability, it would not in my view appear to amount to flagrant disregard for the rules of the Supreme Court, which would exclude that court from even considering the merits of the appeal.[17] In my view, the Supreme Court would be inclined to consider the merits of the appeal itself which would thus also be a relevant and most pertinent factor in the context of this application

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[16] *Arangies t/a Autotech v Quick Build*, case no. SA 25/2010, unreported 18/06/2013; *Kleinhans v Chairperson of the Council for the Municipality of Walvis Bay* SA 23/20211, unreported 26/6/2013. *Petrus v Roman Catholic Church* 2011 (2) NR 637 (SC).

[17] As was said in *Ferreira v Ntshingila* 1990 (4) SA 271 (A) and followed by the Supreme Court in *Kleynhans v Chairperson*, *Walvis Bay Council* supra.

in considering whether the applicant has established that substantial justice requires that the relief sought should be granted.

(mm)

(nn) I thus turn to the merits of the original application and thus of the appeal. This entails briefly referring to the facts in that application and the basis upon which it was decided.

(oo) It was common cause between the parties that there was an initial lease from 1 August 2006 to 31 July 2008 and a second lease from 1 August 2008 to 31 July 2012. It was further common cause that there was no formal further lease agreement entered into between the parties after 31 July 2010.

(pp)

(qq) In the initial lease agreement, clause 18 provided for an option to purchase and a right of pre-emption. The relevant portions of that clause are these:

'18.1For the duration of periods of 2 years from the date of signature of the agreement, the LESSOR grants the LESSEE an option to purchase the LEASED PREMISS for an amount of N$15 000 00 (FIFTEEN MILLION NAMIBIA DOLLARS).'

18.2 After the expiration of the aforesaid 2 years period, and for the remainder of the duration of the lease agreement, or any renewal or extension thereof, the LESSOR hereby grants a right of pre-emption to the LESSER, subject to the following conditions:

"18.2.1 In the event of the LESSOR receiving a bona fide offer to purchase the PROPERTY and/or the PREMISES from any third during the aforesaid period, defined in 18.2 above the LESSOR shall advise the LESSEE in writing of such offer, and the terms thereof, and shall call upon the LESSEE to make an offer to purchase the PROPERTY and/or PREMISES in writing, on terms not less favourable to the LESSOR, to be delivered to the LESSOR within 14 (fourteen) days of date of the notification by the LESSOR to the LESSEE.

18.2.2 Should the LESSEE fail to make an offer to purchase, as stated in paragraph 18.2.1 hereof, then and in that event, this right of pre-emption shall lapse forthwith, and the LESSOR shall be entitled to sell the PROPERTY and/or PREMISES at a price not less and on terms no less favourable than those conveyed to the LESSE in terms of 18.2.1 above to the said third party, and the LESSEE shall have no claim of any

> nature whatsoever against the LESSOR provided that this lease shall not by reason of such sale terminate."'

(rr) The applicant was entitled to renew the initial lease for a further period of 2 years upon giving the first respondent due notice (of at least 6 months prior notice) of the intention to do so. The applicant gave the first respondent notice 6 months before the termination of the initial lease that it would seek an amendment of the agreement extending the duration of the lease to 3 years and to amend clause 18.1 to provide for the duration of the option to purchase for a duration of 3 years – instead of the 2 year period provided for in clause 18.1.

(ss)

(tt) It was common cause that the first respondent declined that proposal (to amend the agreement), but instead subsequently agreed in January 2009 to a renewal of the lease agreement for a further 2 year period with effect from 1 August 2008 to 31 July 2010. In this further agreement it was stated that subject to the rental and the duration of the agreement, all other terms and conditions of the original lease would continue and operate during the further period of renewal.

(uu)

(vv) In August 2009 the applicant applied in a letter for a loan from the first respondent for the sum of N$15 million in order to obtain ownership of the premises for that amount which it said was set out in the lease. It set out in the letter how it would repay that loan. In the original application, the applicant stated in (its answering affidavit) that it had exercised the option to purchase the premises from the first respondent in December 2009 in a letter dated 11 December 2009 in which it stated:

> 'Following our application, we wish to acquire the plant should the N$15 million loan be approved. In effect Agribank will not part with any cash, as the loan will be applied to the purchase price immediately. The bonded property will ensure Agribank's return with security.

However, we have an alternative source of funding, on condition that the blast freezer design flaw is corrected within the purchase price of N$15 million. The costs to correct is estimated at N$3 million.

Kindly advice if we should proceed with this alternative?'

(ww) The first respondent's board considered that proposal at a meeting on 28 January 2010 and resolved to make a counter offer to sell the property for N$15 million but at a different rate of interest and further that the offer would be subject to the approval of the Minister of Finance and the Minister of Agricultural, Water and Forestry. The first respondent thereafter sought the approval of the Ministers in question for the sale of the property in that sum and informed the applicant of the board resolution and that its counter offer was subject to the approval of the two Ministers.

(xx) Despite the statement in the answering affidavit that an option had been exercised in December 2009 in the less than unequivocal terms of the letter quoted above, when the matter was argued, it was contended on its behalf that the applicant had exercised the option to purchase the property subject to the conditions stipulated in a letter on 26 February 2010.

(yy) In May 2010, the applicant requested the first respondent to arrange a meeting with the Ministers for the purpose of "our application exercising our rights in terms of the lease agreement to purchase the Witvlei plant". The applicant also then made mention that the offer to purchase was in terms of clause 18 of the original lease agreement in that letter.

(zz) The first respondent did not however share the applicant's interpretation of clause 18.1 and the renewal agreement and held the view that the option had lapsed after the expiration of the 2 year period in the initial lease agreement. The parties proceeded to reiterate their respective stances in subsequent correspondence.

(aaa) The first respondent thereafter on or about 30 July 2010 proposed a

second renewal of the lease for a period of 6 months commencing 1 August 2010 to permit time for the necessary approvals from the Ministers for the sale of the premises as proposed by the board. This offer was rejected by the applicant in a letter of 11 August 2010, claiming that the first respondent was in breach of the agreements by failing to sign a purchase agreement pursuant to its purported exercise of the option. The applicant's letter of that date threatened legal action if this was not done within 15 days and also gave notice that a special costs order of attorney and own client would be sought in those proceedings. It thus rejected the proposed extension of the lease but expressed the view that the lease would continue until ownership had been passed to it.

(bbb)

(ccc) The first respondent responded to the applicant on 23 August 2010, making it clear that the failure to renew the lease agreement resulted in it lapsing at the end of July 2010, reiterating its position previously articulated in correspondence. The parties proceeded to debate the issue in subsequent correspondence, reiterating previous positions.

(ddd)

(eee) On 30 May 2011 the Minister of Finance informed the first respondent that the Cabinet of the Government of Namibia had directed that the first respondent should offer the premises at a market related price which had been determined pursuant to a valuation to be in the sum of N$40 494 141. The applicant on 22 July 2011 responded by reiterating its stance and forwarded a signed purchase agreement to the first respondent for the sum of N$15 million.

(fff)

(ggg) The applicant did not however take any legal action in support of its position and it was the first respondent which finally brought the eviction proceedings in May 2012. It was accepted by this court with reference to authority that the point of departure, after the applicant having admitted the first respondent's ownership of the premises, was that it was for the applicant to establish its right to be in occupation of the premises and that if it were unable to establish a right to be on the premises, then an eviction order would follow. [18] It was thus incumbent upon the applicant (as respondent) to establish in those proceedings that the lease agreement was still in place and had not been

[18] *De Villiers v Potgieter and others* 2007(2) SA 311 (SCA).

terminated in the absence of being able to establish its own title to the premises.
(hhh)

(iii) The applicant contended in those proceedings that there had been a tacit relocation of the lease agreement with reference to what had transpired. The applicant relied upon *Golden Fried (Pty) Ltd v Sarad Fast Foods CC and others* [19] in support of this contention. That court found that there had been a tacit relocation after the termination of an initial agreement on the grounds that the parties had conducted themselves in a manner which had given rise to an inescapable inference that both desired the revival of the former contractual relationship on the same terms as before. This court however found that the conduct of the parties to this dispute had in their express external manifestations not created a basis for an inescapable inference that the parties desired the revival of their former contractual relationship on the terms as existed before. Indeed, their conduct was clearly contrary to such a notion at the time of the expiry of the lease and immediately thereafter. The first respondent had after all made a specific offer of a 6 month extension which was expressly rejected within a matter of weeks. Following that rejection, the offer was then expressly withdrawn. In view of the differences in approach, there followed threats of legal action.

(jjj)

(kkk) This court then found that there was no question of a tacit relocation of the lease in these circumstances. This then put paid to the applicant's assertion of a right to occupy the premises. It had simply not established one. For this reason alone, it gave rise to the eviction relief sought against it. The applicant had taken no steps to assert its position of an entitlement to enter an agreement or to occupy the premises on the basis it had asserted and it was the first respondent which several months later brought the application for its ejectment from the premises. The court concluded:

(lll) '[32] It would follow that the respondent has not been able to establish a lease agreement between the parties to entitle it to remain in occupation of the premises. The respondent has also not established any other lawful basis to occupy the premises. It follows in my view that the applicant is entitled to an order in terms of the

[19] 2002(1) SA 822 (SCA).

notice of motion, evicting the respondent from the premises.'

(mmm)

(nnn) Even though the first respondent had established its entitlement to the eviction order because a tacit relocation of the lease had not been established, the court however further and in any event considered the contentions raised concerning the purported option to purchase. The court not only found that the option had expired prior to its purported exercise, but also found that it had in any event not been validly exercised. It also found that the further offer made by the first respondent was subject to a condition of the approval of the Ministers which had not been fulfilled. The court reached these conclusions in the following way:

'[33] Even though the applicant would be entitled to the relief claimed in the notice of motion on this basis, it would in any event appear to me that there was not an exercise of an offer to purchase the premises, as contended for by the respondent.

[34] Applying the well-established canons of construction and interpretation of agreements, it would seem to me that the option to purchase provided for in clause 18.1 of the original agreement had to be exercised within a period of 2 years from the date of signature of that agreement, namely 1 August 2006. That option should thus have been exercised before 31 July 2008. After that 2 year period, the right of pre-emption created in clause 18.2 would come into operation and in fact came into operation.

[35] The term within which the option was to be exercised was time bound being 2 years after date of signature of the original contract. The fact that the parties entered into a renewal agreement in terms of which all of the terms and conditions of the original agreement would apply to the leasing of the premises, would not in my view alter the position. The term relating to the option was contained in the original agreement for a specific period after which a right of pre-emption would come to existence in favour of the respondent. In terms of clause 25, it was expressly provided that the right of pre-emption was to continue in any extended period or if the lease agreement was renewed. There was no similar provision relating to the option to purchase. It would seem to me that the parties intended the usual consequence for

an option by requiring that it would need to be exercised within the specific period provided for. At the end of that period, it would then lapse.

[36] The renewed agreement was furthermore concluded at a time after the option to purchase had already lapsed by virtue of efluxion of time. It was at the time of the renewal agreement no longer a term or condition which could be enforced by the respondent and would not thus apply even if the terms of the lease were made applicable to the renewed lease.

[37] I accordingly do not agree with the interpretation which the respondent seeks to place upon the agreement, namely that by stating in the renewal agreement that all terms and conditions continued to apply, this meant that the option to purchase would be resuscitated and be enforceable.

[38] It is furthermore not clear to me that the conduct of the respondent in its correspondence in December 2009 and February 2010 was an unequivocal exercise of the option. It had been preceded by a letter of 18 August 2009 addressed to the applicant applying for a loan to acquire the premises for N$15 million. The respondent then addressed its letter of 11 December 2009 which it says amounted to the exercise of the option. In response to this enquiry, the applicant's board resolved to agree to sell the premises to the respondent for the sum of N$15 million with the loan financing at a different rate of interest which it stated could be varied, and that its offer was subject to the approval of the Ministers. The applicant's offer to the respondent, setting out this proposal, stated to be subject to the approval by the Ministers, and stated that such approval was being sought.

[39] The response to this proposal in the form of the respondent's letter of 26 February 2010, quoted above, is contended to be the respondent's confirmation of its exercise of its option. But in this letter, the respondent "confirms its right to acquire the plant subject to the conditions" set out in the applicant's letter of 19 February 2010. One such condition was the approval of the sale by the two Ministers. The applicant's letter of 19 February 2010, at best for the respondent, was a conditional counteroffer following its earlier approach. It was subject to the approval of the Ministers. It also contemplated further negotiations in respect of the interest rate. It was also a rejection of the respondent's proposal by making the counter offer. It is not clear to me that the acceptance of the contents of this letter would create an enforceable agreement in the circumstances given the fact that the parties would not have reached consensus on the essential and material terms of the agreement. 4

[40] The condition of ministerial approval was in any event one where non-fulfilment would render any contract void. On the facts, the Minister of Finance had indicated that she would not agree to an offer which was not at market price. A market related valuation of the premises had been obtained by the applicant and was in the amount of approximately N$42 million. This meant that the proposal which the applicant had contemplated in the letter of 19 February 2010, in so far as it was enforceable, was not capable of acceptance because the condition precedent for it had not been fulfilled. The respondent had accepted that the offer was subject to ministerial approval. Once that ministerial approval was not forthcoming, then there was thus no offer capable of acceptance. But the issues relating to the respondent's assertions as to its purported exercise of the option, which in my view are unsustainable, are essentially beside the point. [20]

[41] As I have already indicated, the respondent had failed to establish a right or title to occupy the property after the termination of the lease agreement at the end of July 2010. I further and in any event hold the view that the respondent did not in any event exercise the option to purchase the property in terms of the lease agreement in that the right to do so had lapsed on 31 July 2008. It follows in my view that the respondent would not be entitled to seek specific performance of the purchase agreement it forwarded to the applicant in July 2011 – a step which it had in any event not sought to invoke except by inviting this court to do so in the final paragraph of the answering affidavit deposed to in July 2012. In the circumstances, I decline that invitation.'

(ooo) It follows from the reasoning of the court that the applicant had not only been unable to mount the first hurdle which it faced of establishing an entitlement to be on the premises, but it further found that the option had in any event expired and furthermore that it had not in any event been validly exercised even if it had not expired. It would follow from the analysis of the court that the applicant's defence to the eviction proceedings was entirely without merit. It would thus not in my view enjoy reasonable prospects of success on appeal.
(ppp)

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[20] *Pitout v North Cape Livestock Co-operative Ltd* 1977(4) SA 842 (A) at 850-851.
See also: *Premier of the Free State Provincial Government and others v Firechem Free State (Pty) Ltd* 2000(4) SA 413 (SCA) at 431-432.

(qqq) Taking this into account and weighing the prejudice of the parties, it would seem to me, in the exercise of my discretion, that the applicant has been singularly unsuccessful in establishing that the real dictates of substantial justice would favour the granting of this relief. Indeed, the applicant has remained in occupation of the premises for some 3 years without a right to do so. It would seem in this application that it considers that it should be able to do so for a further 2 years whilst the matter proceeds on appeal. To permit it to do so in the face of such an unmeritorious defence to the eviction proceedings would not in my view accord with substantial justice.

(rrr) As far as the question of costs is concerned, Mr Namandje sought an order for the costs of two legal practitioners in view of the fact that two practitioners within his firm had been engaged in the matter and had appeared in it. Mr Corbett on behalf of the applicant sought an order of one instructed and one instructing counsel and rightly did not oppose the order sought by Mr Namandje, given the complexity of the matter and its importance to the parties.

(sss) In the circumstances I make the following order:

> The application is dismissed with costs. The costs in question include the costs of two legal practitioners (counsel).

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D SMUTS

Judge

APPEARANCES

APPLICANT:	A Corbett Instructed by HD Bossau & Co
FIRST RESPONDENT:	S Namandje and M Ntinda Sisa Namandje & Co Inc