REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 98/2012

In the matter between:

1.1.1.1. **AGRICULTURAL BANK OF NAMIBIA APPLICANT**

and

WITVLEI MEAT (PTY) LTD RESPONDENT

Neutral Citation: *Agricultural Bank of Namibia v Witvlei Meat (Pty) Ltd (A 98/2012) [2013] NAHCMD75 (20 March 2013)*

Coram: SMUTS, J

Heard: 7 March 2013

Delivered: 20 March 2013

Flynote: Application for ejectment from premises by owner of the premises, Principles applicable to such applications restated. The respondent asserted that it had exercised an option to purchase the premises. But its lease had expired and it was unable to show a basis for its further occupations of the premises. The court in any event found that the option had lapsed and furthermore that

the steps to exercise the options were not effective.

ORDER

(a) The respondent or any person claiming occupation through or under it is hereby ordered to forthwith vacate the immovable property owned by the applicant, comprising abattoir facilities situated on Portion 38 of Farm Okatjirute, No 155 in the village of Witvlei;

(b) The respondent is hereby ordered to restore the vacant position of the property to the applicant;

(c) In the event that the respondent or any other person claiming occupation of the premises through or under it refuses to vacate the premises as ordered by this Court to do so, the sheriff or her deputy is authorised and directed to effect an eviction and hand possession of the premises to the applicant; and

(d) The respondent is ordered to pay the costs of this application, including the costs of one instructed and one instructing counsel.

JUDGMENT

SMUTS, J

(b) This is an application for the eviction of the respondent from premises upon which the respondent conducts an abattoir in Witvlei. This application is opposed by the respondent. It contends that it exercised an option to purchase the premises and remains on the premises pursuant to a tacit relocation of a lease pending the transfer of the property to it. The respondent relies upon an interpretation to be given to terms of the lease agreement between the parties.

At issue between the parties is the effect of its renewal and whether the option was capable of being exercised when the respondent alleges that it did so and whether it in any event unequivocally exercised that option. These issues arise in determining whether the respondent has a right or title to continue to occupy the premises which are owned by the applicant. If not, it would follow that the eviction order sought by the applicant should be granted.

Background facts

(c) It is common cause that the applicant, a state-owned enterprise established in terms of s 3 of the Agricultural Bank of Namibia, 5 of 2003, is the owner of Portion 38 of the Farm Okatjirute, No 55, in the village of Witvlei ("the premises"). It is also not disputed that the respondent operates an abattoir from those premises and is in occupation of the premises.

(d) The applicant first leased the premises to the respondent in terms of a written lease agreement from 1 August 2006 to 31 July 2008. A second lease agreement commenced on 1 August 2008 and ran until 31 July 2010. It is common cause that no formal further lease agreement has been entered into between the parties.

(e)

(f) Certain of the terms of the first lease agreement are of relevance and importance in these proceedings. The duration of the agreement was from 1 August 2006 to 31 July 2008. The rental for the premises was set in the amount of N$62,500.00 per month. It was further stated that the respondent would improve and recommission the abattoir at its cost and would expend not less than N$500,000.00 in doing so.

(g) The lease agreement further embodied an option to purchase and a right of pre-emption to be enjoyed by the respondent. These rights are embodied in sub-clauses 18.1 and 18.2 respectively which provide:

'18.1For the duration of a 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$15,000,000-00 (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.'

Clause 18.2.3 is not relevant for present purposes and is not quoted.

(h) The respondent was in terms of the lease agreement entitled to renew it for a further period of 2 years upon giving the applicant due notice of its intention to renew, at least 6 months prior to the termination of the agreement or extension thereof. This right of renewal is embodied in clause 25. It further provides:

"The Lessee shall be entitled to renew this lease for further periods of 2 (TWO) years upon having given the LESSOR notice of its intention so to renew this lease at least 6 (SIX) months prior to termination of this agreement or any extension thereof. The terms and conditions of such renewed agreement shall be the same as those contained in this agreement, save however that a total annual rental in the amount of N$1,500,000.00 shall take effect in respect of any renewal of this lease from the commencement of such renewal period. ….. The lessor however reserving the right to accept or reject the said renewal of the lease, by written notice to the lessee to be

provided by not less than three months prior to the expiry of the then current lease term."

(i) The agreement also provided that it constituted the whole agreement between the parties and that no warranties or representations not stated in the lease agreement would be binding upon the parties. It also provided that no amendment or variation of the agreement would be binding on the parties unless reduced to a written agreement signed by or on behalf of them. It further provided that no relaxation or indulgence granted by the applicant and no omission by timeously or diligently to enforce its rights under the agreement would be deemed to amount to a waiver of that right or any other right.

(j)

(k) On 25 January 2006, being 6 months before the agreement was to expire the respondent approached the applicant by letter seeking an amendment of the agreement which would extend the duration of the agreement 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 and that clause 18.3 be changed to provide for "after the expiration of the period of 3 years" (for the coming into operation of the right to pre-emption embodied in clause 18.2).

(l) The applicant declined the proposal to amend the existing agreement in this way but instead subsequently and on 23 December 2008 offered to renew the lease agreement for a further 2 year period with effect from 1 August 2008 and terminating on 31 July 2010 at the increased rental of N$125,000.00 per month. A further lease was then concluded between the parties on 26 January 2009 to that effect. Its terms are brief and, after some recitals, provide as follows:

(e) "1. **RENEWAL**

The existing lease is hereby renewed with effect from 1 August 2008 for a further period of 2 years, to the 31st of July 2010.

2. VARIATION OF RENT

In terms of clause 25 of the existing Deed of Lease the parties hereby agree that the annual rental shall increase to N$1,500,000.00 per annum for the 2 years renewal and that: -

2.1 the annual rental as from 1 August 2008 to 31 July 2010 shall be N$1,500,000.00, being N$125,000.00 per month, payable in arrears by the last day of each and every month for the aforesaid period;

3. Other provisions of the existing deed of lease to continue

Subject to the provisions of clause 2 hereof all the terms and conditions of the existing Deed of Lease dated 1 August 2006 shall continue and operate during the said further period of renewal."

(m) Shortly after the renewal agreement was signed, the respondent raised in an email that the rental amount should only have been raised to N$68,750.00 (and not N$125,000.00) per month and sought a rectification of the renewal agreement. Subsequently, the renewal agreement was then formally changed to read N$68,750.00 per month.

(n) A further portion of the respondent's email of 28 January 2009 – after dealing with the rental amount stated:

"I trust the interpretation of the renewal is in order in that ownership will pass to Witvlei Meat any time during the renewal period once the purchase price of N$15 mil is paid to Agribank."

(o) This further statement in this letter was not addressed by the applicant in the months which followed.

(p) On 18 August 2009 the respondent applied by way of a letter for a loan from the applicant in order to obtain ownership of the premises in the amount of N$15 million which it said was set out in the lease. The respondent in the letter

set out an offer as to how it proposed to repay a loan amount of N$15 million to acquire the premises. The respondent states in its answering affidavit that it exercised its option to purchase the premises in December 2009 in a letter dated 11 December 2009. This letter stated:

(q) '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.

(r)

(s) 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.

(t)

(u) Kindly advice if we should proceed with this alternative?'

(v) The applicant's board considered the respondent's proposal at its meeting on 28 January 2010. It was resolved to make a counteroffer to sell the property to the respondent for N$15 million at a different rate of interest and monthly payments and further resolved that its offer to sell the property would be subject to the approval by the Minister of Finance and the Minister of Agriculture, Water and Forestry (the Ministers).

(w) The applicant thereafter on 15 February 2010 addressed the Ministers in order to obtain their approval to sell the property as resolved by the board. The applicant thereafter on 19 February 2010 informed the respondent of the board's resolution and that its offer was subject to the approval of the two Ministers in question.

(x) On 26 February 2010 the respondent then addressed the applicant. It was argued by Mr Corbett, who appeared for the respondent (the heads of argument having been prepared by Mr Frank, SC together with Mr Corbett) that the respondent's letter of 26 February 2010 constituted the exercise of the option to purchase the property subject to the conditions stipulated in it. This submission is however different to what is stated in the answering affidavit with

reference to this letter. The terms of this letter stated under the heading "Purchase of Witvlei plant" are as follows:

'Witvlei hereby confirms to exercise it right to acquire the plant subject to conditions between the Agribank and Witvlei as per the letter dated 19 February 2010.

Witvlei will communicate in due course when to engage the Bank with its own funding arrangements or to opt for the funding proposal from Agribank of Namibia.

We trust that this transaction can be finalised in due course.

Trust you find the above in order.' (sic)

(y) In the respondent's answering affidavit it is stated that Mr Martin confirmed that the respondent had exercised its option subject to the conditions referred to in the applicant's letter of 19 February 2010 but further stated:

'The conditions referred to in the letter aforesaid was merely conditions in discussion in respect of funding of the purchase price by applicant should applicant decide to provide respondent with funding to purchase the abattoir at the agreed price of N$15 million and <u>not</u> a variation of the terms and conditions of the lease agreement <u>or</u> that the agreement be subject to the approval of the Ministers.' (sic)

(z)

(aa) On 19 May 2010 the respondent then addressed the applicant and requested it to arrange a meeting with the Ministers for the purposes of "our application exercising our rights in terms of the lease agreement to purchase the Witvlei plant". The respondent also then made it clear that it relied upon the offer to purchase in clause 18.1 of the original lease agreement in this letter. It further stated that the lease agreement had been extended with all terms and conditions continuing to operate for the further period of renewal. It asserted that this meant its application to purchase was not based on a valuation to be done to determine a selling price, but rather that it had exercised its right under clause 18.1 which had continued to operate by virtue of the terms of a second lease agreement which stated that all the terms and conditions of the previous lease continue to apply during the further period of renewal. The respondent further stated that the applicant would not fund the purchase it would secure

alternative sources for the funding of that purchase.

(bb)

(cc) The applicant did not however share the respondent'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 of the initial lease agreement. The parties reiterated their respective positions in subsequent correspondence.

(dd) The applicant on about 30 July 2010 proposed a second renewal of the lease for a period of 6 months commencing 1 August 2010 and terminating on 31 January 2011 to allow time for the necessary approvals from the Ministers for the proposed sale of the premises as proposed by the board. This offer was rejected by the respondent in a letter of 11 August 2010. In that letter the respondent claimed that the applicant was in breach of the agreements between them by failing to sign a purchase agreement pursuant to the exercise of the respondent's option and threatened legal action if this was not done within 15 days and gave notice that a special order of costs on attorney and own client scale would be sought against the applicant in those proceedings. It rejected the terms of the applicant's proposed extension of the lease but stated that the current lease would continue until ownership has been passed to the respondent.

(ee)

(ff) The applicant responded to this approach on 23 August 2010. It stated that the failure to renew the lease agreement in the proposed terms resulted in it lapsing at the end of July 2010. The applicant further referred to the board resolution of 28 January 2010 that the respondent may purchase the premises for N$15 million subject to the approval of the Ministers and stated that this condition had been accepted by the respondent. It pointed out that their approval was being awaited. The applicant denied that the right to purchase as contended by the respondent was in terms of the lease agreement. The applicant then withdrew its proposal to extend the lease for a further period of 6 months while awaiting the decisions of the Ministers and stated that the respondent's occupation of the premises would as a consequence be unlawful and that it would accept rental paid in lieu of damages for such unlawful occupation of the premises. It further indicated that the legal proceedings

threatened by the respondent would be opposed.

(gg) The parties subsequently debated the issue with each other in subsequent correspondence, reiterating their respective positions.

(hh)

(ii) On 30 May 2011 the Minister of Finance informed the applicant that the Cabinet of the Government of the Republic of Namibia had directed that the applicant should offer the premises at a market related price which had been determined pursuant to a valuation in the amount of N$40,494,141.00.

(jj) On 22 July 2011 the respondent, pursuant to its stance that the option was duly exercised, forwarded a signed purchase agreement to the applicant (for N$15 million) and tendered to continue with the sale agreement as set out in those terms.

(kk) The respondent however took no steps in support of its position. The applicant then brought this application in May 2012 to evict the respondent from the premises and the further ancillary relief contained in the notice of motion.

(ll) Mr Bokaba, SC who appeared for the applicant correctly submitted with reference to authority[1] that the point of departure is that the applicant's ownership being admitted as well as the respondent's continued occupation, it would then be for the respondent to establish its right to be in occupation of the premises. If the respondent is unable to establish a right to be on the premises, then an eviction order should follow. [2] He further submitted that, in accordance with this approach, the applicant would need to establish a currently valid lease agreement which entitled it to continue to occupy the premises and show that the lease agreement which commenced on 1 August 2006 was still in place and had not been terminated. He submitted that the alternative which the respondent would need to show for its right to occupy the premises would be that it had validly exercised the option and that the property had been transferred to it and thus show title. It is common cause that no transfer has

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[1]

[2] De Villiers v Potgieter and others NO 2007(2) SA 311 (SCA).

taken place and that the exercise of the option is in dispute between the parties.

(mm) Mr Bokaba submitted that the lease agreement, as renewed, came to an end on 31 July 2010 and that beyond that period there was no lease agreement between the parties. He referred to the refusal on the part of the respondent to extend the lease beyond that date on the terms proposed by the applicant.

(nn)

(oo) Mr Corbett for the respondent on the other hand submitted that there had been a tacit relocation of the lease agreement which had applied prior to its termination which would continue until transfer had been effected pursuant to the exercise of the option contended for. He referred to what had occurred following the expiry of the initial term of the first lease agreement. The written renewal of that agreement was only signed in January 2009, nearly 5 months after the previous term that expired. In support of his contention, Mr Corbett referred to Golden Fried (Pty) Ltd v Sirad Fast Foods CC and others.[3] In that matter, Harms JA found that certain facts established a tacit relocation of a franchise agreement. He referred to the fact that after the termination of the initial agreement and prior to a letter addressed some 10 months later, 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, he concluded, established a tacit relocation of that agreement. He pointed out that it was a new agreement and not a continuation of the old agreement and that a court would have regard to the external manifestations and not the subjective working of minds in determining that a tacit contract had been concluded.

(pp) In this instance, the applicant had made it clear to the respondent on July 2010 that the lease agreement would come to an end and offered the respondent a six month lease agreement. This the respondent rejected. It instead threatened legal action to claim the enforcement of the exercise of an option to purchase. The applicant shortly thereafter and on 23 August 2010 withdrew its offer to renew the lease. By rejecting the respondent's offer for a continuation of the lease for a period of 6 months in this manner and the

[3] 2002(1) SA 822 (SCA).

subsequent withdrawal of the applicant's offer to lease the premises and pointing out that future payments would be received as damages and not as rental, there would not in my view be a basis for an inescapable inference that both parties desired the revival of their former contractual relationship on the terms as existed before. Their conduct in their express external manifestations was plainly to the contrary of the time of the expiry of the renewed lease agreement and immediately thereafter. Prior to that expiry, the applicant had after all made a specific offer of a 6 month agreement which was rejected within weeks. Following that rejection, the offer had been withdrawn and the statement made that amounts tendered as rental would be received as damages. There can thus in my view, on the basis of the sound authority relied upon by the respondent, be no question of a tacit relocation of the lease agreement in the circumstances.

(qq)

(rr) The respondent furthermore took no steps to enforce the exercise of the option to purchase which it had claimed. It was the applicant which several months later in May 2012 brought this application for the ejectment of the respondent from the premises.

(ss)

(tt) In argument, Mr Bokaba also referred to the non-variation clause contained in the lease agreement, as renewed which would require any variation of the terms of the original agreement to be in writing and signed by both parties. This is plainly an indication that the parties contemplated that any further lease of the premises would be in writing. This was also reflected in the conduct of the applicant in forwarding a written draft to the respondent for a lease of a further 6 months following the expiration of the extended term of the lease agreement. Mr Bokaba submitted that a lease agreement between the parties would thus be in writing and that the respondent, having failed to produce a written agreement, meant that it had not established a valid and binding lease agreement between the parties and thus its right to be in occupation.

(uu) 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 notice of motion, evicting the respondent from the premises.

(vv) 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.

(ww) 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.

(xx) 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.

(yy)

(zz) 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.

(aaa) 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.

(bbb) 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.

(ccc)

(ddd) 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]

(eee)

(fff) 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.

(ggg) 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.

(hhh) I accordingly make the following order:

(f) The respondent or any person claiming occupation through or under it is hereby ordered to forthwith vacate the immovable property owned

[4] 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.

by the applicant, comprising abattoir facilities situated on Portion 38 of Farm Okatjirute, No 155 in the village of Witvlei;

(g) The respondent is hereby ordered to restore the vacant position of the property to the applicant;

(h) In the event that the respondent or any other person claiming occupation of the premises through or under it refuses to vacate the premises as ordered by this Court to do so, the sheriff or her deputy is authorised and directed to effect an eviction and hand possession of the premises to the applicant; and

(i) The respondent is ordered to pay the costs of this application, including the costs of one instructed and one instructing counsel.

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DF SMUTS

Judge

APPEARANCES

APPLICANT:	Mr T.J.B Bokaba, SC Instructed by Sisa Namandje & Co. Inc.
RESPONDENT:	A Corbett Instructed by HD Bossau & Co.