



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 4273 /2013

In the matter between:

ESTIE KWENANI (BORN EBERENZ)

PLAINTIFF

And

KRUCOR INVESTMENT HOLDINGS (PTY) LTD

T/A PROFESSIONAL FARMING

DEFENDANT

Coram: E ANGULA AJ

Heard: 22 FEBRUARY 2017 (we need all the dates that the matter was heard)

Delivered: 9 March 2020

Neutral Citation: *Kwenani v Krucor Investment Holdings (Pty) Ltd* (I 4273/2013) [2020] NAHCMD 110 (9 March 2020)

Flynote: Landlord and Tenant- Lease — Option to renew lease — clause in the lease providing that the lessee has the option to renew the lease for a further period of 9 years and 11 months on the same conditions as contained in the lease agreement subject thereto that the rent amount payable by the Lessee in respect of the further period shall

be renegotiated — Lessee gave notice to the Lessor to renew the lease agreement and made an offer in respect of the rental for the further period. — Lessor rejecting the offer made by the Lessee and made a counter offer — Lessee did not accept the counter offer made by the Lessor when Lessor withdrew counter offer and made a further counter offer, which was equally not accepted by the Lessee resulting in the parties not reaching an agreement on the rental amount for the further period — Lessor seeking an eviction on the basis that lease expired by effluxion of time.

Landlord and Tenant: Option to renew lease— No rental amount was agreed upon between the parties for the further period. The lease agreement providing that the rental for the further period is subject to renegotiation — Common law position — No valid and enforceable option to renew lease as one of the material terms of the offer was undetermined and was subjected to negotiation between the parties.

Landlord and Tenant — Implied terms of the lease agreement — Negotiation of the rent amount — the Lessee contending that it is an implied term of the agreement that the parties are obliged to negotiate the rental amount in good faith with view to reach an agreement — The determination of the rental amount is always subject to negotiation between the parties before the agreement of lease is concluded. The Lessor usually makes an offer which is open to the Lessee to accept, reject or counter offer. The law does not impose any obligation on the parties in respect of such negotiations. The parties have an absolute discretion to agree or disagree.

Court held that there was no valid and enforceable option contained in the original agreement of lease concluded by the parties. Furthermore, defendant's purported exercise of the option did not create a valid and binding contract.

Held that the defendant did not have a valid option, could not have exercised same and the lease agreement accordingly lapsed.

Held that first offer, after being withdrawn could not be accepted as it was replaced with the second counter offer. On this basis, the lease agreement expired on the 30 April 2013 by effluxion of time as it was not renewed by agreement as provided for in clause 1.2 of the lease agreement.

Court held further that on the totality of the evidence presented and the submissions made by respective counsel, it was unable to conclude that the defendant proved on the balance of probabilities the alleged tacit terms of the lease agreement as pleaded. The court held in favour of the plaintiff.

Summary: This is an action to evict the defendant from the two farms leased by the plaintiff to the defendant. On 3 May 2003 the plaintiff and the defendant entered into a written agreement of lease whereby the former let to the latter the farms of Rooiwal-Oos and Teenspoed ("the lease agreement"). The material expressed provisions of the lease contract are that the lease is for a period from 1 May 2003 to 30 April 2013 for the rental amount of N\$33 000 for the first three year and N\$14 000 for the remaining seven years. The further expressed provisions of the lease agreement in that the lease may be renewable for a further period of 9 years and 11months on notice given in writing by the defendant to the plaintiff three calendar month prior to 30 April 2013. In the event of the defendant election to renew the lease, the rent for the renewal period shall be renegotiated. The defendant gave notice to renew the lease for the period as agreed offering the plaintiff the rent amount of N\$168 000 for the period of 9 years and 11 months. This offer was rejected by the plaintiff who counter offered the plaintiff a rental amount of N\$8 500 per month or N\$102 000 per year. Prior to defendant accepting plaintiff's offer, plaintiff withdrew her offer and mad a further counter offers of N\$ 20 000 per month of N\$240 000 per year, which offer defendant refused to consider because it was allegedly unreasonable, not market related and made in bad faith with the view to frustrate the negotiations between the parties. As a result, the parties could not reach an agreement on the rental amount for the period. The initial lease period expired on 30 April 2013, and by effluxion of time the lease agreement ended.

The plaintiff claims eviction of the defendant from the farms alleging that the lease expired on 30 April 2013 and damages of N\$20 000 per month occupational rent from May 2013 to date of eviction. The defendant defends the matter alleging that lease agreement tacitly provides that the parties would negotiate the rental amount in good faith and should the parties fail to agree to the rent amount as a result of one party failing to negotiate in good faith, then the rent amount should be the amount the parties would have agreed upon had the breach of the lease agreement had not occurred. The

defendant pleads in the alternative that court should develop the common law to make it consistent with normative constitutional values of dignity, freedom, justice, equity, reasonable and or fairness to the extent that the common law does not import these values into the lease agreement implied provisions. The plaintiff breached her duty to negotiate in good faith by withdrawing her offer of a rent of N\$102 000 per year when the defendant was considering accepting it.

ORDER

1. It is hereby declared that the option contained in the lease agreement (annexure A to the particulars of claim) is null and void.
2. The Defendant is ejected from the premises or the aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares as set out in paragraph 5.1 hereof;
3. The Defendant is ordered to vacate the premises being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares within 21 days from date of this court's order;
4. In the event that the Defendant does not vacate the aforesaid premises or aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares in compliance with this Court's order as set out in prayer 2 hereof, The Deputy sheriff or the Magisterial District of Rehoboth is hereby ordered to immediately evict the defendant from the aforesaid premises
5. The Defendant is ordered to the Plaintiff occupational rent in the amount of N\$ 20 000.00 per month or N\$204 000 per year computed from 1 May 2013 to a date the defendant vacate the premises.

6. The Defendant is ordered to pay interest on the aforesaid amount at the rate of 20% per annum calculated from date of judgment to date of final payment.

7. The Defendant is ordered to pay the Plaintiff's costs, such costs to include costs of one instructing counsel and one instructed counsel.

JUDGMENT

E ANGULA AJ:

Background

[1] In May 2003, the plaintiff and the defendant concluded a written agreement of lease. In terms of this lease agreement, the plaintiff is the lessor and the defendant is the lessee of the two farms. At all relevant times before and after the conclusion of the aforesaid lease agreement, the plaintiff acted in person and the defendant was duly represented by Mr Hendrik Kruger. Mr Hendrik Kruger is a legal practitioner of the high court of Namibia. In terms of the agreement the plaintiff let two farms to the defendant namely farm Rooiwal-Oos, measuring 1127 hectares and farm Teenspoed, measuring 1784 hectares. The agreement expressly provided that the lease agreement shall commence on 1 May 2003 and terminate on 30 April 2013.

[2] The agreement also expressly provided that, subject to the terms as set out in clause 1.2 of the lease agreement, the lessee has the option to renew the lease for a further period of 9 years and 11 months on the same conditions as contained in the lease agreement. Notice to exercise such option must be given in writing by the Lessee to the Lessor three (3) calendar month(s) prior to the expiration of the initial period of this lease. The lease agreement further provides:

'The LESSEE has the option to renew this lease thereafter for a further period of 9 years and 11 months on the same conditions as contained in the agreement, subject however to paragraph 1.2 of this agreement.

1.2 In the event of the LESSEE'S election to renew this lease for a further period after expiration of the initial period, the rent amount payable by the LESSEE in respect of such further period shall be renegotiated'.

[3] On the 29th of January 2013, the defendant gave notice to the plaintiff that it intends to renew the lease agreement for a further period as follows:

“RENEWAL OF A LEASE AGREEMENT IN RESPECT OF FARMS ROOIWAL-OOS AND TEENSPOED

The lease agreement entered into by and between you and KRUCOR Investment Holdings (Pty) Ltd on 01 May 2003 has reference.

In terms of this agreement the initial period of the lease terminated on 30 April 2013, subject to the Lessee's option of renewal for a further period of 9 years and 11 months on the same terms and conditions as contained in the initial agreement.

We hereby wish to formally inform you of our decision to exercise our option to renew this agreement as provided for in the agreement. We further wish to propose a 20% increase to the rent payable. If you find our proposal acceptable we further undertake to pay the rent for the whole period upfront in two equal payments. The first payment of **N\$84,000.00 (Eighty Four Thousand Namibia Dollars)** shall be payable on/or before 01 May 2013 and the second payment of **N\$84,000.00 (Eighty Four Thousand Namibia Dollars)** on/or before 01 May 2014.'

[4] I refer to the above notice as the “first offer”. On 30 January 2013 the plaintiff replied to the defendant's letter of 29 January 2013, as follows:

“Firstly I would like to thank you for your letter regarding the aforementioned.

After careful consideration of your proposal, I have no other option but to regrettably decline the proposed offer.

Thank you”.

[5] On 4 February 2013 the plaintiff addressed a further letter to the defendant in which she made a new counter offer on the following terms:

“After careful consideration of your proposal, I have no other option but to regrettably decline the propose offer. I communicated my correspondence via text message yesterday to you with an alternative offer, which I would like to offer again via e-mail.

The new offer is thus: N\$8,500.00 per month, or N\$102,000.00 per year.

Kind regards”.

[6] I refer to this above counter offer as the “first counter offer”. Apparently and while defendant was in the process of considering the counter offer, the plaintiff addressed a further letter to the defendant dated 27 February 2013 in which the following was conveyed:

“I refer to my initial offer to you dated 31 January 2013. That offer was accordingly not accepted by yourselves and has consequently lapsed.

In pursuant to the terms of clause 1.2 of the lease agreement, I once again offer you the rent amount of N\$20,000.00 per month, which is equivalent to N\$240,000.00 per year. This offer is valid for 30 days effective from the above-mentioned date.

Waiting for your urgent attendance and reply herein”.

[7] I refer to this offer as the “second counter offer”. The defendant did not agree to the second counter offer made by the plaintiff and proceeded to address a letter dated 04 March 2013 to the plaintiff, the content of which reads as follows:

“Your letter dated 27 February 2013 received by writer on 04 March 2013 has reference.

We wish to place the following on record in pursuance to your above letter.

1. You advised writer during the end of 2012 that you are not interested in renewing the lease agreement entered into by and between the parties, alternatively that you would only renew part of the agreement in respect of one of the two farms.

2. Writer was discontent with your indication mainly on account of two distinct facts, *firstly* that you have at the time of signing the initial agreement indicated to writer that you have no intention of returning to the farm and as such would renew the lease *in toto* and, *secondly*, that on your demand (and in the light of the renewal) substantial capital investments had been made on the farm, mainly departing from the initial understanding that rent would be fair and mindful of our continuous investments and maintenance.
3. In terms of this agreement the initial period of the lease terminated on 30 April 2013, and we have duly exercised our option to renew the agreement and proposed to you a 20% increase in rent. You obviously did not agree and proposed on 30 January 2013 rent which equals a 728.6% increase.
4. In our reply we have indicated to you that it was a substantial increase which reflects unfairly on our continuous commitments envisaged in the agreement *vis-à-vis* the carrying capacity of the farms. We have also stressed our concern pertaining to the current and passed droughts experienced on the farms.
5. However, in an attempt to properly consider your proposals we have requested you to advise us in writing as to how you propose we deal with the improvements done on the farms, in the event of us not being able to agree on fair and just rent for purposes of the renewal.
6. To our surprise, and what appears to be a *malicious* attempt to handicap the *bona fide* consideration and acceptance of your offer of 30 January 2013, you elected to ignore our above request and decided to unilaterally retract your earlier offer and replace same with a substantial higher offer, based on your obvious incorrect assumption that your earlier offer was not accepted and has lapsed.
7. Your first offer constitutes, in relation to the carrying capacity of the farm, rent equal to N\$71.00 per head of cattle and your second offer N\$166.00 per head of cattle. Both offers are exceeding benchmark (market related) rents when due consideration is taken of the maintenance duty and investments made and to be made by us. We presume that your malicious conduct relates to your unwillingness (earlier indicated) to renew the agreement with us, something which is repulsive.
8. Be that as it may, we wish to state the following categorically clear for the record:
 - a. The option to renew the lease had been duly executed. The renegotiation of a fair and reasonable lease amount is currently in process. In this regard we have made an offer, which you have rejected and in your reply on 30 January

- 2013, you have made a counter offer, which offer stands to be accepted or rejected by us.
- b. We did not reject your offer of 30 January 2013, nor was it subject to any timelines, and as such the offer has most definitely not lapsed.
 - c. We did however request to you to advise us, in writing, how you, in principal, intent to deal with the improvements and investments made by us on the respective farms, in the event that we are unable to successfully renegotiate the lease amount.
 - d. We are obviously entitled to weigh the continuous use and benefit of our investments and future maintenance responsibilities *vis-à-vis* the rent amount proposed to you. Only once we know how our investments are affected will we be able to accept, counter-offer or reject your offer of 30 January 2013.
 - e. The assumptions made by you as well as your subsequent “new offer” is nonsensical, not acceptable and done in extremely bad faith.
9. In the light of the above we kindly request that you urgently furnish us on or before close of business 18 March 2013, and in writing, how you intent to deal with the improvements made by us on the respective farms, in the event that we fail to successfully renegotiate the lease amount.
10. We undertake to provide you with our reply to your offer dated 30 January 2013 on or before close of business 25 March 2013”.

[8] The first counter offer was not responded to by the defendant for close to a month, when the second counter offer was made. The aforesaid letter was replied to by the plaintiff with a letter dated 16 March 2013, as follows:

“I acknowledge receipt and refer to your letter dated 4 March 2013.

I have already communicated to you my proposed lease amounts in my letters dated 30 January and 27 February 2013 respectively. I therefore do not comprehend what you insinuate by suggesting that, I do not want to renew the lease agreement. Had that been the case, I would not have offered you the proposed lease amounts and consequently your presumption and suggestion of malicious conduct and unwillingness on my part has no basis. Furthermore, in as far as this subject matter is concerned, I have dealt with you in a bona fide and cordial manner and

consequently, I do not take kindly your unfounded characterization of my conduct as malicious and request you to desist from such utterances.

You did not accept my proposed offer of the 30th January 2013 and yet in your letter of the 4th March 2013 you still made reference to that offer while you are fully aware of the fact that, that offer lapsed and I subsequently thereafter tendered another offer dated 27 February 2013. I reiterate what I stated in my letter of the 27th of February 2013 and further invite you to consider the proposed lease amount contained in my letter dated 27th February 2013 and advise me whether you accept it or not as stated in that letter.

In your letter dated 4 March 2013, you have requested me to give you a proposal of how the parties should deal with the alleged investments that had allegedly been made on the farms. I cannot give you a proposal in that regard because you are the one that claims to have made the alleged investments. In my view, you are the one that should propose to me how you intend dealing with the alleged investments if any”.

[9] After numerous engagements between the parties, the defendant replied to the plaintiff's letter of 16 March 2013 by letter dated 29 April 2013. Significantly this was the last day upon which the parties could agree on the rent in order for the offer to renew the lease to become effective. In the letter of 29 April 2013, the respondent wrote *inter alia*:

“1. In terms of the lease agreement signed by and between us on 01 and 03 May 2003 respectively the initial period of the lease terminates on 30 April 2013, and we have duly exercised our option to renew the agreement and as a consequence entered into negotiations with you to renegotiate the lease as provided for in paragraph 1.2 and the signed lease agreement.

1. In this regard we have made an offer, which you have rejected and in your reply on 30 January 2013, you have made a counter offer, which offer stands to be accepted or rejected by us.
2. On 30 January 2013, whilst in the process of renegotiating the rent amount payable for the renewed period you decided to unilaterally retract your earlier offer and replaced same with a substantial higher offer, based on your obvious incorrect assumption that your earlier offer was not accepted and has lapsed.

3. The option to renew the lease had been duly executed by us as prescribed in the preamble of the lease agreement.
4. The parties, subsequent to the execution of the renewal option entered into renegotiations to determine a fair and reasonable lease amount as provided for by clause 1.2.
5. In the light of your refusal to advise us as to how our investments on the farms will be dealt with if the agreement is not renewed, we have little choice but to protect our investments and renew the agreement as stipulated.
6. As a result we hereby formally inform you that we accept your offer of N\$8,500.00 (Eight Thousand Five Hundred Namibia Dollars) per month and consider the lease hereby officially renewed for the next nine years and eleven months.
7. We shall subsequently deliver to your office the new agreement for signature by you and once returned and signed by us we shall deliver to you a certified copy of the original". (The underlining is my own emphasis)

Facts in dispute

[10] The defendant maintained its position that it had exercised the option and by virtue thereof the lease agreement was renewed at an amount of N\$8,500.00 per month. It is clear that the defendant was under the impression that the option could be exercised purely by giving notice of its intention to renew the lease despite the fact that the parties did not agree to a rental amount for the further period. On the other hand, the plaintiff took a position that the agreement had expired by effluxion of time because the defendant did not accept her second counter offer of N\$20,000.00 per month and her first counter offer of N\$8,500.00 per month was revoked or withdrawn prior to acceptance.

[11] The plaintiff on 2 May 2013 informed the defendant that her second counter-offer was tendered genuinely and in good faith. To avoid unnecessarily legal action, the plaintiff offered the defendant for the last time, a rental amount of N\$20,000.00 per month, which offer was made valid for 7 days effective from 2 May 2013. In her letter of 2 May 2013, the plaintiff *inter alia* states as follows:

"I specifically deny that your unfounded presumptions that I have refused to take part in any renegotiation process as alleged in your letter, had that been the case, you would not have made references to my communications with you in this regard. It is

evident to me that you are cherry picking facts that suit you and ignore other facts that are applicable in this matter. Please note that, there is no basis for you at this belated stage to purport to accept an offer that does not exist. The offer was given to you and you did not accept it and another offer of N\$20,000.00 per month was given to you which had also lapsed or you have declined it. Your purported reference and acceptance to an offer of N\$8,500.00 that does not exist is baseless, invalid and of no consequence and I am not bound by it at all. Consequently there is no lease agreement that has been renewed as alleged or at all. In fact, as of 30 April 2013, the lease agreement has naturally lapsed. Despite this, I believe we can amicably resolve this matter and for this reason, I again offer you for the last time an offer for a rental amount of N\$20,000.00 per month, which is equivalent to N\$240,000.00 per year pay in advance. This offer is valid for 7 days effective from the above-mentioned date.

The offers that I have tendered so far were and are still tendered genuinely and in good faith, but despite this, I am aware of your tenacity and insistence on a position that may potentially prompt unnecessary litigation and unnecessary costs as you threaten me with, when we had our last meeting. I wish to put in on record as well that, I do not wish to unnecessarily take or defend unwarranted legal action on a matter such as this, as I believed that you are well aware that there is no offer of N\$8,500.00 that you can accept at this point in time and should there be any litigation that emanates from this clear position, I shall defend that action and all my rights are reserved in this regards”.

[12] The above communication was followed up by the plaintiff with a letter dated 19 June 2013, the content of which is *inter alia* reads as follows:

“This notice serves to inform you that, you should vacate the farms and in doing so, I grant you a period of one month within which you should vacate the farms. The one month period shall begin to run as from the above mentioned date and you should ensure that by the 1st of July 2013 you no longer occupy the farms. Please note that, should you fail to vacate the farms as aforesaid, I shall be compelled to take legal action against you and you will be liable for occupational rent of N\$20,000.00 (Twenty Thousand Namibian Dollars) per month for the duration that you will still be occupying the farms”.

[13] Subsequent thereto, plaintiff addressed a further letter to the defendant on 4 July 2013 in which she claims:

“This serves to inform you that, you should vacate the farms and in doing so, I grant you a period from the above date till 30th July 2013, you should ensure that by the 30th of June 2013 you no longer occupy the farms. In addition you should restore the fences that you removed at both entrances of Rooiwal-Oos, Repair and restore the house and restore the Windmill near the dwelling to its working order”.

[14] The defendant responded to the plaintiff’s letter of 6 August 2013 claiming that the option to renew the period of the lease belonged to defendant as a right and the right was duly and timeously exercised. The defendant further claimed that the lease amount was to be renegotiated but the plaintiff refused to accept its offer. The following is extracted from the defendant’s letter:

“You appear to be under the wrong impression that the agreement has lapsed in its totality and are not renewed on the same terms and conditions. You purportedly depart from the basis that, because the rent amount has to be renegotiated, which amount of N\$8,500.00 you refused to accept, the agreement has lapsed in its totality. You are obviously wrong in your assumption. All the terms of the agreement have been renewed by our notice for renewal, except the renegotiated rent amount, which was in our view concluded with our acceptance of your first offer. It appears that you contest both the renewal of the agreement and the rent amount. It is however by now obvious that your claim is nothing but a disguised attempt to cancel the agreement, which places your conduct squarely within the provisions of clause 11 of the agreement.

Clause 11 of the lease agreement provides amongst others”

“Should the LESSOR cancel this lease and the LESSEE dispute the LESSOR’S right to do so and remain in occupation of the lease premises, then the LESSEE shall continue to pay all amounts due to the LESSOR in terms of the lease on the due dates of the same and the acceptance of such payments shall be without prejudice to and shall not in any manner whatsoever effect the LESSOR’S claim to cancellation of this lease or his claim of any nature whatsoever. Should such dispute between the LESSOR and the LESSEE take time to become resolved, then the payments made to the LESSOR in terms of this paragraph shall be regarded as amounts paid by the LESSEE on account of the loss sustained by the LESSOR as a result of the holding over by the LESSEE of the leased premises”.

[15] After negotiation between the parties failed in respect of the rental amount, the plaintiff instituted summons to evict the defendant and claimed occupational rent and other consequential relief. The plaintiff has advanced two claims. The first claim is based on the allegations that the parties have failed to reach an agreement on the new rent amount, and by effluxion of time, the initial lease agreement lapsed on 30 April 2013 as provided for in the lease agreement. The Second claim is based on the allegations that there was no option capable of being accepted, and such, the option created in the lease agreement is void ab initio and has no legal consequences. Consequently, so it is submitted, the defendant is in unlawful occupation of the property and should accordingly be evicted.

[16] Defendant pleads that the offer of N\$20,000.00 per month made by the plaintiff did not represent a reasonable and/or market related rent for the farms and as a result, the counter offers were solely made for purpose of defeating the defendant's right to renew the lease. The defendant further pleaded in paragraph 4 of its plea that:

“4.2 The lease agreement, in addition, tacitly provided:

4.2.1 The parties would in good faith negotiate the rent payable in respect of the renewed period contemplated in clause 1.2 thereof.

4.2.2 Should the parties fail to agree the rent mentioned in the preceding paragraph due to the breach of one of the parties to negotiate in good faith as mentioned above, the rent for the further period would be the rent the parties would have agreed upon but for such breach.

4.3 Alternatively to paragraphs 4.2.1 and 4.2.2 above, should the Court decline to hold that the lease agreement tacitly provided as mentioned therein, then and in such event the defendant pleads:

4.3.1 The common law is inconsistent with the normative constitutional values of dignity, freedom, justice, equity, reasonableness, and/or fairness to the extent that it does not import into the lease agreement implied provisions according to paragraph 4.2 and 4.2.2 above with the necessary changes required by the context.

4.3.2 The public interest as informed by the normative constitutional values of dignity, freedom, justice, equity, reasonableness and/or fairness demands that the common law be developed to import into the lease agreement implied provisions as mentioned above.

4.4 The plaintiff breached her duty to negotiate in good faith by withdrawing her offer of a rent of N\$102 000.00 per year in respect of the renewed period when the defendant indicated that it seriously considered accepting it, which offer the defendant accepted, alternatively would have accepted if it was not withdrawn”.

Is there a valid Option?

[17] It is common cause between the parties that the defendant accepted that the option provided for in the lease agreement did not constitute a valid option. This is based on the admission made by counsel at the hearing of this matter. This is also equally evident from the defendant’s plea. In the case of *Wasmuth v Jacobs*¹, the court held as follows:

“Where there is an ‘offer’ which provides that certain terms are to be ‘reviewed’ or to be ‘negotiated’ or ‘to stand over’ for decision at a later stage, then pending agreement on such outstanding terms neither party has any rights against the other. *OK Bazaars v Bloch* 1929 WLD 37; *Wilson Bros Garage v Texas Co (SA) Ltd* 1936 NPD 386; *Scheepers v Vermeulen* 1948 (4) SA 884 (O); *Potchefstroom Municipality Council v Bouwer* NO 1958 (4) SA 283 (T).

Similarly in *Hattingh v Van Rensburg* 1964 (1) SA 578 (T), a provision in a lease, which provided that the lessee had the right and option to purchase certain premises at such price as the parties may agree upon, was held to be of no force or effect until a price had been agreed upon. ‘There was a similar decision in *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736, where the provision for the Court’s consideration was ‘upon terms to be arranged’ while in *South African Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 1987 (3) SA p 634 (C) the Court held that an agreement which purported to give the tenant an option ‘at a rental to be mutually agreed upon’, in fact did not give the tenant a ‘valid and subsisting option’ which he could exercise. In the *South African Reserve Bank* case (at 613H) Steyn J added:

¹1987 (3) SA 629 (SWA) at 633G-634E

'Neither, in my opinion, was there any obligation on applicant "to negotiate" with respondent in order to determine a rental for any further period. It seems to me to be quite irrelevant that this provision is contained in an existing contract providing for a possible renewal in terms of certain respects should the parties agree on a rental'.

I respectfully agree the aforementioned. In the present case, there was no obligation on appellant to engage in any negotiations (review proceedings) in order to arrive at a rental whether such rental was to be fair and reasonable, or not. (See also *Trook t/a Trook's Tea Room v Shaik and Another* 1983 (3) SA 935 (N); *Aronson v Sternberg Brothers (Pty) Ltd* 1985 (1) SA 613 (A).)

For these reasons I have conclude that there was no valid and enforceable option contained in the original agreement of lease concluded by the parties. Furthermore, respondent's purported exercise of the option did not create a valid and binding contract."

[18] The Wasmuth judgment crystallises the common law position that an agreement to agree is invalid and not binding between the parties. At common law the plaintiff was not obliged to renegotiate the rental amount in the first place, let alone renegotiate with the view to reach an agreement. On the basis, the defendant did not have a valid option and could not have exercised same and the lease agreement accordingly expired by effluxion of time on 30 April 2013.

Was the lease agreement renewed?

[19] It is common cause that the first counter-offer was withdrawn before it could be accepted. The defendant contents that the first counter-offer could not be withdrawn before it was accepted. However, it is clear from the facts that the first counter-offer was revoked or withdrawn by the plaintiff. Plaintiff made a second counter-offer on 27 February 2013 to replace the first counter-offer of 30 January 2013. The first counter-offer was therefore no longer available to the defendant. The defendant was therefore only bound to accept or reject the second counter-offer.

[20] An offer can be withdrawn at any time before it is accepted. The defendant did not accept the second counter-offer and rejected it as having been made in bad faith and with the intention to frustrate the negotiation between the parties. The acceptance by the

defendant of the first counter-offer is therefore not enforceable because the offer no longer existed at the time that it was allegedly 'accepted'. There was no such an offer to accept. I am of the view that such an offer could not be accepted after it was replaced with the second counter-offer. On this basis, the lease agreement expired on the 30 April 2013 by effluxion of time as it was not renewed by agreement between the parties as provided for in clause 1.2 of the lease agreement.

[21] The renewal of the lease agreement would have taken place only if, after the negotiation, the parties were agreeable to a new rental amount. This did not happen and consequently, the claims of the plaintiff should succeed unless the defendant set up defence(s) to extinguish the plaintiff's claims.

Are there legally valid defences to the Plaintiff's claims?

Negotiation in good faith

[22] The defendant pleads that the lease agreement tacitly provides that the parties would in good faith negotiate the rent payable in respect of the renewed period contemplated in clause 1.2 of the lease agreement.

[23] The defendant further pleads that the parties participated in negotiation of the rent, but the plaintiff did not negotiate in good faith. The defendant contends that the plaintiff negotiated in bad faith when she withdrew, prior to acceptance, the first counter-offer and replaced it with the second counter-offer. The plea reads as follows:

"The defendant further pleads that rent in the amount of N\$240 000.00 does not represent a reasonable and or market related rent for the properties as contained in Annexure "A" to the plaintiff's Particulars of Claim. Evidence in this regard will be led during the trial by Defendant. Defendant further pleads that the increased lease amount of N\$240 000.00 demanded by Plaintiff was solely for the purpose of not entering into a further lease agreement."

The law on Good faith Negotiations.

[24] The absolute discretion vests in the parties to agree or disagree.² If the contractual relationship between the parties breaks down at a later date and one-party refuses to continue with negotiations, can the other seek redress for this breach of the preliminary agreement. In *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd*³, the court refused to supply a reasonable price.

[25] The matter at hand involves the enforcement of a duty to negotiate open terms, this is analogous to creating a right of first refusal. In those cases, the grantor of the right of first refusal may wish to make an offer to the grantee and the grantee may enforce the right against the grantor. It is trite that the determination of this issue falls squarely within the realm of negotiating in good faith on open terms.

[26] Where a clause in a lease agreement creates a right of first refusal in favour of the lessee to renew the lease for a further period upon such terms and conditions and upon such rental amount as may be mutually agreed upon, the court held that the Lessor was not free to fix any rental amount it pleases and must act *bona fide*.⁴ Open terms may give rise to a valid power, where it create an ability to unilaterally determine a rental amount or interest rate, provided the exercise of such power is objectively reasonable.

[27] In *South African Forestry Co Ltd v York Timber Ltd*⁵, it was held that such a duty to act in good faith did not exist, based on the prevailing views of fairness in contracting.

[28] Freedom of contract remains a foundational value in the South African legal system and its protection is in the interests of commercial growth. The ability of a party to drive a hard bargain- and to threaten to withdraw from negotiations prior to their reaching an agreement to achieve this end, leads to sound business practice and is attractive to potential investors. This freedom should remain in commercial dealings and should not be unnecessarily fettered.⁶

² Southern Development (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 SCA para 11 and 16

³ 1996 (2) SA 225 (A)

⁴ Soteriou v Retco Poyntons (Pty) Ltd 1985 (2) SA 922 (A)

⁵ 2005 (3) SA 323(SCA) para 26

⁶ Andrew Hutchison " Agreement to agree: Can there ever be an enforceable duty to negotiate in good faith?" p 273

[29] It is evident that if the preliminary arrangement in which a duty to negotiate in good faith is said to exist, it does not constitute a binding contract, no obligation to negotiate in good faith exists. A duty to negotiate in good faith should be enforced if expressly or impliedly included as a term in a preliminary agreement.⁷ (my emphasis).

Application of the law to the facts

[30] It is on the aforementioned premise that unless the agreement expressly provides for negotiation in good faith, such a duty cannot be imported into an agreement. The lease agreement entered into between the parties is not a preliminary agreement, like a memorandum of understanding. It is a final agreement between the parties. It is evident from the lease agreement that there is no such expressed term. In that respect, no obligation to negotiate in good faith is expressly provided for in the lease agreement. I cannot impose a duty to negotiate on good faith to the plaintiff in circumstances where there is no valid option and lease agreement is silent on the nature of the negotiation.

Does the agreement tacitly provide for good faith negotiation?

[31] In order to establish a tacit term, it is necessary to prove, on a preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied beyond a reasonable doubt that they agreed on the tacit term. If the court is satisfied on the balance of probabilities that the parties reached an agreement in that manner it may find that a tacit term is established⁸.

The law on tacit agreement.

[32] It was held in *Techni-Pak Sales (Pty) Ltd v Hall*⁹

“That does not mean in my view, that the parties must consciously have visualised the situation in which the term would come into operation. *In Broome and another v Pardes Co-operative Society [1940] 1 All ER 603 KacKinnon LJ*, applying the test I have quoted, referred to the hypothetical asker of the question as ‘a more imaginative friend’. It does not matter, therefore, if the negotiating parties fail to think of the situation in which the term

⁷ Andrew Hutchison supra, p295

⁸Christie The Law of Contract in South Africa second edition p 198

⁹1968 3 SA 231 (W) 236-7

would be required, provided that their common intention was such that a reference to such a possible situation would have evoked from them a prompt and unanimous assertion of the term which was to govern it”.

[33] In *Wilkins NO v Voges*¹⁰, the court held that:

“A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.”

[34] It has been frequently stated that a court is slow to import a tacit term into a written contract.¹¹ One reason, no doubt, is that the parties who choose to commit themselves to paper can be expected to cover all the aspects of that matter.

[35] In *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd*¹², the Court held that a tacit term cannot be inferred in conflict with an express provision. The Court in this matter

¹⁰ 1994 (3) SA 130 (A),

¹¹ *Union Government (Minister of Railways and Harbours) v Faux Ltd* 1916 AD 105.

¹² 2005 (3) SA 54 (W)

further laid down the principles for the interpretation of words and phrases in a contract as it emerged from the judgment in *Coopers & Lybrand and Others v Bryant*.¹³

1. “(a) Give the word or the phrase to be interpreted ‘its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument’;
2. (b) have regard to ‘the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract’;
3. (c) have regard to ‘the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted’;
4. (d) have regard to the extrinsic evidence regarding the surrounding circumstances ‘when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions’.

[36] In *Namibian Association of Medical Aid Funds and Others v Namibia Competition Commission and Another*¹⁴, the Court stated that:

[39] This Court in *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC* recently referred to the approach to be followed in the construction of text and cited the lucid articulation by Wallis JA of the approach to interpretation in South Africa in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its

¹³ 1995(3) SA 761 (A) at 767E-768E.

¹⁴ 2017 (3) NR 853 (SC)

production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.'

[40] *In the Total matter, this court also referred to the approach in England and concluded: 'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether language is ambiguous or not.' (My Emphasis)*

[37] The Court, in *Namibia Minerals Corporation Limited v Benguela Concessions Limited* stated that in order to determine whether an agreement is fatally vague or not:

"it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf Pezzutto v Dreyer and Other 1992 (3) SA 379 (A)); that many agreements contain tacit terms (such as those regulating reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation, and that the court should strive to uphold – and not destroy – bargains."

[38] It is therefore necessary to investigate not only the expressed terms of the contract but also the context at the time when the contract was entered into. Subsequent circumstances will obviously not be relevant but in cases of doubt the subsequent actions of the parties to the contract may be relevant in drawing an inference of the intention of parties at the time the contract was entered into.

[39] Under common law, a tacit term of a contract is a term to be implied from the facts. This often referred to as unexpected provision of the agreement. A tacit term is derived from the common intention of the parties, as inferred by the court from the express terms of the agreement, and the surrounding circumstances.¹⁵ It is sensible to examine the express terms of the agreement, in order to determine whether a tacit term is to be imported into the lease agreement.

Application of the law to the facts

[40] It is essential to consider whether on the facts as presented in evidence, the lease agreement tacitly provides:

‘23.1 that the parties would in good faith negotiate the rent for the further period; and

23.2 that the rent for the further period, in the absence of the agreement between the parties, is the rent the parties would have agreed upon had either party not breached the tacit terms of the agreement.’

[41] On a proper construction of clause 1.2 of the agreement, it is clear that the parties agreed to renegotiate the rent for the further period. The parties agreed that there was a need to inject extra capital, during the initial period, into the farm in order to rehabilitate a few things that were not functional.

[42] The rental amount agreed to by the parties at that time was illustrative of the parties’ desire to improve the condition of the farms. The plaintiff settled for a low rental amount in lieu of the improvement to be made on the farm. On the other hand, the defendant would benefit from paying a low rental amount over a longer period of lease in lieu of its investment into the farms. The background facts as articulated by the defendant are that:

“That was extremely low, in fact it was not for the time, it was very low. But my lady it was low because the improvement and the upgrading there was no water, the fences, water was not in a running condition, the houses was dilapidated.....

¹⁵ Christie, The law of Contract in South Africa, 6 edition p174

You have to bore a new hole or you have to try and recover that whatever, there was a big issue about the condition of the farm and that was what we then agreed it would be cheaper, I maintain, I upgrade, I install new waters, I install new systems, I uplift the whole farm, develop the properties and that I have done. So that is why the rent is fairly low.....”

[43] Furthermore, clause 14 of the lease agreement reads as follows:

“The Lessee will affect the reparations and maintenance to the existing dwelling and fencing as well as preparing water in the middle camp within two years of this lease.”

[44] The parties’ initial desire was not to profit from the farms but to invest in it. They both contemplated that the rental payable during the further period would be negotiated at rate commensurate with the investments made by both parties in the initial period. Accordingly, it will be correct to conclude that the parties intended to negotiate the rent for the further period and bargain for their respective interests. They suppose that each party were to bargain hard and get the best deal out of the farms.

[45] My contention is confirmed by the defendant’s testimony:¹⁶

“MR KHAMA: Was the offer of 20 percent market related in your view?

H KRUGER: I will be honest My Lady, it was cheap, it was a low offer. I came in at a low level because I expected from her to get another offer. Knowing her by the point in time I was expecting, I expected a much higher offer. That I started low, I made that offer, I made my calculations, I would normally from I want to make, normally you make in the (indistinct) between 20, 25 percent profit. So if I could make 30, 35 percent, I was actually looking at a higher profit for me and I expected this is a negotiation process so I will make an offer, she will make an offer and then we must agree somewhere in the middle, this is how I expected it to run. That is why that offer sir honestly was not market related, it was a cheap offer, it was a low offer I agree”. (My own emphasis)

¹⁶Transcribed record p 85, par 26 to 30

[46] The defendant bargained hard and made an offer that was not market related and expected the plaintiff to come in at a higher price. It is evident from the conduct of the parties, and the circumstances surrounding the initial negotiation during the initial period, and the express terms of the agreement that it cannot be implied that the parties tacitly agreed to negotiate in good faith for the rental amount for a further period. In lieu of the sacrifices they had made during the initial period, each party intended to make a good deal out of the extension of the lease.

[47] Similarly, the defendant's real issue with the plaintiff is essentially that her second counter-offer was unreasonably high, not market related and made to frustrate negotiations. The defendant pleaded that the plaintiff breached her duty to negotiate in good faith by withdrawing her offer of N\$102,000.00 per year in respect of the renewal period. The breach is alleged to have been committed by the plaintiff when she withdrew her first counter-offer at the time when defendant indicated to her that it is seriously considering accepting it.

[48] To the contrary, the parties tacitly agreed to drive a hard bargain when the rental amount is negotiated for the further period. This is evident from the surrounding circumstances when the initial agreement was reached and the conduct of the parties during the negotiation. The express provisions of the agreement bind the parties to negotiate with the view to reach suitable commercial terms. One reason, no doubt, is that the parties who choose to commit themselves to paper can be expected to cover all the aspects of that matter and the plaintiff and defendant did so. The defendant, being the author of the lease agreement is more constrained to be bound to the terms of the agreement. It is telling that the lease agreement uses the word 're-negotiate' instead of the word 'negotiate'. The impression is given that the parties would disregard the initial rental amount and negotiate the rental amount anew.

[49] Perhaps I should consider the conduct of the plaintiff to determine whether she negotiated in bad faith. Is the plaintiff's action in withdrawing her first offer and replacing it with the second offer made in bad faith? The plaintiff withdrew her offer of 30 January 2013 prior to it being accepted. The defendant does not contend that the plaintiff's withdrawal of the offer is unlawful or unjustified. On the contrary the defendant

maintained that the withdrawal of the offer was accentuated by *mala fide* because the offer is unreasonable, unfair, too high and was made with the intention to frustrate the agreement on the rental amount.

[50] The plaintiff communicated to the defendant that her offer was not accepted and is withdrawn. The defendant contends that it was in the process of considering the offer and the withdrawal of such an offer was unreasonable and did not make any sense. I am unable to agree with the contention made by the defendant that the plaintiff could not withdraw her first counter-offer. It is accepted that a party to a negotiation may drive a hard bargain and threaten to withdraw from negotiation prior to completion in order to achieve a good bargain. The general rule is that the offeror may withdraw his offer at any time before it has been accepted subject thereto that the withdrawal has to come to the notice of the offeree.

[51] I accept that the offer dated 30 January 2013 was validly withdrawn before it was accepted. As a result, it cannot be said that there is a rental amount upon which the parties could have agreed. I say so because the subsequent offer was not acceptable by the defendant. Is the withdrawal made in bad faith?

[52] The defendant bears the onus to prove on balance of probability that the plaintiff breached her obligation to renegotiate the rent in respect of the further period¹⁷.

[53] It is important to clarify some misconception made by the defendant which give rise to the court consideration of the plaintiff's conduct. The first being that the defendant alleges that it has expressly exercised the option to renew the lease. This is certainly not correct. All that the defendant had done was to give notice to the plaintiff of its intention to renew the lease and renegotiate a rental amount. Therefore, it is clear that there is no valid option.

[54] The defendant also alleges that there was a renewal of the lease. This is incorrect. It is common cause that the parties negotiated the rental amount and did not reach an agreement. As a result there was no renewal of a lease agreement as the lease

¹⁷Chetty v Naidoo 1974 (3) SA 13 (A) 20A-E
Sprangers v FGI Namibia Ltd 2002 NR 128 (HC) 131E-1

agreement lapsed by effluxion of time. It is indeed correct that the defendant accepted the first offer made by the plaintiff. However when the defendant accepted the offer, it was already withdrawn and replaced with a further offer. In that regard, the court cannot accept the averments made and advanced by counsel for the defendant that there was a renewal of the lease.

[55] The defendant also raises the issue that the second offer made by the plaintiff, after the withdrawal of the first offer was not unreasonable. It is common cause that the plaintiff's second offer was more than double the rental amount of her first offer however there was no evidence led by the defendant that the said rental is unreasonable. The only evidence tendered by the defendant was that the rental was high, unaffordable and did not take into account the improvement made by the defendant on the property and the capacity of the farms. The defendant testifies that:

“That is a fairly high amount in relation to that particular farm ...

As the contract stood with the maintenance and the repair and the whole package if you take this together with the seventy one dollar per year, this is a very high offer. But it is not unmanageable, it is not unattainable. I foresee that with the lease term, benefit of the long agreement without an increase, I would manage this ...

If something becomes impossible, it is a nullity it cannot happen, it is impossible to try and make a profit from a hundred and sixty six dollars per year plus expenses plus maintenance plus water plus supervision, it is impossible to make this and to accept this. Of course this is a higher amount but is it fair, is it attainable, is it reachable, is it manageable? ...

This is an offer made by the plaintiff to derail the negotiations, to interfere with the exercise of option. That should be read as one continuous process and that is why I am here in court to ask the court to assist us to determine the reasonableness of this option or right that was executed. There must be now a reasonable amount determined. And as far as I am concerned and I might be wrong, the court can do that. The court should assist us now, we are actually here for assistance ...”

[56] The court cannot find in favour of the defendant on this ground because it failed to prove that the second offer made by the plaintiff is unreasonable. The court cannot on its

own, without the assistance of expert evidence determines what is market related rental amount and the reasonableness of the offers made by the parties.

[57] I shall now consider the allegation that the plaintiff breached the agreement by negotiating in bad faith. The defendant alleges that after 27 February 2013 the parties had a meeting and further correspondence was exchanged between them. The plaintiff maintained her stance in respect of the second counter-offer, and the defendant sustained his averment that the plaintiff breached the agreement by failing to negotiate in good faith and reasonably to agree on a reasonable rent for the renewal period.

[58] The defendant's counsel submitted that the evidence establishes on balance of probability that the defendant was seriously considering plaintiff's offer of 4 February 2013 to renew the lease at rentals of N\$8 500.00 per month or N\$102 000.00 per year, when the plaintiff on 27 February 2013 withdrew her offer and made a further offer to renew the lease at rentals more than double the rentals offered in her first offer. On the premise, the evidence demonstrates that the plaintiff lacked good faith, so it is argued. It was further contended that the rental amount in terms of the plaintiff's offer of 27 February 2013 lacked the reasonable moderation of a good person.

[59] In the letter of 4 March 2013, the defendant alleges that it had requested the plaintiff to advise in writing how plaintiff intended to deal with the improvements made by the defendant on the farms. The defendant counsel argued that such communication implied prior communication between the plaintiff and the defendant between 4 February 2013 and 27 February 2013.

[60] The plaintiff denied that there had been any communication between her and the defendant between 4 February 2013 and 27 February 2013. She further testified that if there was any communication between her and the defendant, she could not recall such communication. She however admitted that the defendant raised the issue of improvement on the date of the meeting at which occasion a letter of the defendant dated 4 March 2013 was handed over to her. She however expected the defendant to make suggestion or proposal on how the improvement should be treated, which did not happen.

[61] Although the defendant's counsel placed great emphasis on the communication between the plaintiff and the defendant between 4 February 2013 and 27 February 2013, to infer that the plaintiff acted in bad faith, it is not the only probable inference one can draw from such evidence.

[62] If one accepts that the plaintiff's first offer was made on 31 January 2013 via text message and communicated by email to the defendant on 4 February 2013 it is highly probable that the plaintiff withdrew the offer because it was not accepted. It is also probable that she withdrew the offer because she was negotiating to make a good bargain. Nothing turns on the fact that the defendant was considering accepting the first offer. What is relevant is that the defendant did not accept the offer that was actually open for acceptance. In any event, the defendant did not make any other counter offer and the parties could thus not reach an agreement. The defendant was also entitled to make a counter offer considering the improvements made. This is in any event in stark contrast to the evidence tendered by the defendant to the effect that he expected the plaintiff to bargain hard and make a higher offer. It is common cause that the defendant insisted on being compensated for the improvement allegedly made on the farm prior to accepting or rejecting the plaintiff's first offer. The defendant did nothing about the improvements nor made an offer relating thereto. In any event, the allegation that the plaintiff withdrew her offer because the defendant was considering accepting it, was made for the first time during the hearing of this matter.

[63] Significantly the defendant never indicated what would be considered as a reasonable offer in view of the fact that both parties bargained for their own commercial interests when they made their respective offers. The defendant made an extremely low offer while the plaintiff made an extremely higher offer. In fact, on the evidence of the defendant, the plaintiff came in with a higher counter-offer (first offer).

[64] Having considered the totality of the evidence, I find nothing wrong with the conduct of the plaintiff in withdrawing her first offer and replacing it with a higher offer. It was open to the defendant to make a further counter offer considering the improvements he maintained were made to the property. After all, the defendant expected a higher offer from the plaintiff and was prepared to negotiate it down.

[65] It is common cause that the defendant did not negotiate any further with the plaintiff after having made an alleged 'extremely high offer'. This is obviously the reason why the parties did not reach an agreement. The defendant instead was stuck on the initial offer made by the defendant instead of negotiating to achieve a reasonable offer. The negotiations between the parties failed because the parties were unable to agree on the offers made to one another, and not because plaintiff acted in bad faith or in any way breached any agreement.

[66] Although the plaintiff was not able to justify the rental amount made by her in her second counter offer, she was clear that she intended to benefit from her farms and the price was not unreasonable. She was of the view that, as owner of the farms she was entitled to determine the price. I do not find anything wrong with such a stance, after all, this is a free market economy. She doubled the price to obtain a good bargain for herself and not to frustrate the defendant. The defendant was free to bargain her offer down. The actions by both parties were within their rights to negotiate commercial terms which are in line with public policy in a free market economy.

[67] I find no evidence before me to conclude that the plaintiff acted in bad faith when she made an 'extremely high offer'. In light of my finding that the parties were entitled to negotiate for a good bargain for themselves, withdraw from negotiations and withdraw from their respective offer, it cannot be said that the plaintiff breached any terms of the agreement or acted in bad faith.

[68] On the totality of the evidence presented before me and the submissions made by respective counsel, I am unable to conclude that the defendant proved on the balance of probabilities the alleged tacit terms of the lease agreement as pleaded. It thus follows that the plaintiff claim succeeds as pleaded.

[69] The defendant had continued to occupy the farms without a valid lease agreement in place. Such occupation became unlawful when the parties failed to agree upon a rental amount for a further period. The plaintiff is entitled to be compensated for the occupation and use of her farms by the defendant. I am unable to find an amount which is reasonable as compensation other than the rental amount which the plaintiff had offered

to the defendant. In that respect, the plaintiff is entitled to be compensated the amount she was prepared to rent the farms to the defendant, which is N\$20 000.00 per month or N\$240 000 per year from 1 May 2013 to date of vacation of the defendant from the said farms.

[70] There remains one issue for consideration by the court which is raised on the papers, and extensively relied upon by the defendant concerning the development of the common law. Based on the evidence presented in this court, the defendant failed to prove that hard bargain- withdrawal of offers or even from negotiation- is against public policy or offends some value of the Constitution. It would suffice to observe that the defendant drafted the lease agreement while being represented by a legal practitioner, while the plaintiff is without any legal background. Plaintiff participated in negotiations despite the fact that at common law she was not obliged to do so. She persisted in such negotiation well after the time for such has expired. She was never legally represented throughout such period and complied with all the expressed provisions of the lease agreement. It can not be said that she acted in bad faith. At least the evidence presented was not persuasive to move the court to find that she was *mala fide*. At the very least the court may observe that plaintiff was desperate to make a good return on her farms having agreed to longer period of lease.

[71] There is simply no basis upon which the court should embark upon developing the common law in the absence of evidence of unfairness, inequality and prejudice by either party. Afterall, the court would endeavour to develop the common law in order to do justice between the parties. I am of the view that there was no injustice done to either party to warrant the court to develop the common law. Similarly, the defendant was unable to refer the court to the values in the Namibian Constitution which are said to be undermined by the conduct of the plaintiff or the terms of the lease agreement, which defendant drafted.

[72] As already stated, the court having found the conduct of the plaintiff as not unconscionable, nor the terms of the lease agreement reprehensible, it cannot be expected of this court to disturb the common law unless it is judicially required to do so.

This is simply not a case for the court to develop the common law on the facts and evidence presented by the parties.

[73] The defenses fail, the plaintiff's claim succeeds, I accordingly make the following orders:

1. It is hereby declared that the option contained in the lease agreement (annexure A to the particulars of claim) is null and void.
2. The Defendant is ejected from the premises or the aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares as set out in paragraph 5.1 hereof;
3. The Defendant is ordered to vacate the premises being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares within 21 days from date of this court's order;
4. In the event that the Defendant does not vacate the aforesaid premises or aforesaid properties being farm Rooiwal-Oos measuring 1127 hectares and farm Teenspoed measuring 1784 hectares in compliance with this Court's order as set out in prayer 2 hereof, The Deputy sheriff or the Magisterial District of Rehoboth is hereby ordered to immediately evict the defendant from the aforesaid premises
5. The Defendant is ordered to the Plaintiff occupational rent in the amount of N\$ 20 000.00 per month or N\$204 000 per year computed from 1 May 2013 to a date the defendant vacate the premises.
6. The Defendant is ordered to pay interest on the aforesaid amount at the rate of 20% per annum calculated from date of judgment to date of final payment.
7. The Defendant is ordered to pay the Plaintiff's costs, such costs to include costs of one instructing counsel and one instructed counsel.

E M ANGULA
ACTING

APPEARANCES

Plaintiff: Mr Dennis Khama
Instructed by: Sibeya and Partners Legal Practitioners

Defendant Ms Herman Steyn
Instructed by Kruger, Van Vuuren & Co