REPORTABLE

CASE NO.: SA 9/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SOUTHLINE RETAIL CENTRE CC **APPELLANT**

and

BP NAMIBIA (PTY) LTD **RESPONDENT**

CORAM:	Strydom AJA, Mtambanengwe AJA *et* O'Regan AJA
Heard on:	15/10/2010
Delivered on:	09/06/2011

APPEAL JUDGMENT

O'REGAN AJA:

[1] BP Namibia (Pty) Ltd ("BP"), the respondent, obtained an order in the High Court evicting Southline Retail Centre CC ("Southline"), the appellant, from property in Rehoboth where Southline operated a petrol station on land leased from BP. Southline disputes that BP was entitled to an order of eviction and has now approached this Court on appeal seeking the setting aside of the eviction order.

Factual Background

[2] On 31 August 2005, Southline entered into a lease with BP that was to run for a fixed period of three years from 1 September 2005 till 31 August 2008. At the

same time, Southline entered into a franchise agreement and a supply agreement with BP, which were to be valid only for as long as the lease agreement endured. At its core, the dispute between the parties concerns whether the appellant lawfully exercised an option to renew the lease agreement for the period 1 September 2008 to 31 August 2009. The appellant asserts it did, but the respondent denies this and asserts that the eviction order granted by the High Court should stand.

[3] The relationship between the parties during the subsistence of the lease appears not to have been amicable. According to Southline, it repeatedly complained to BP about the quality of support it was getting from BP in relation to the operation of the service station. Finally on 18 August 2008, Southline referred a complaint to the Minister of Mines and Energy (the Minister) in terms of section 4A(2) of the Petroleum Products and Energy Act, 13 of 1990 as amended ("the Act"). The core of Southline's complaint, crisply stated, was that BP was not providing it with adequate franchising support and was not honouring its obligations to provide fuel to the petrol station in terms of the supply agreement, The complaint outlines what Southline saw to be the unsatisfactory response of BP, as the franchising company, to its concerns. The complaint also mentions the fact that BP was refusing to permit Southline to exercise what the complaint refers to as a "right of first refusal" in relation to a renewal of the lease agreement.

[4] Shortly after Southline referred the complaint to the Minister, on 28 August 2008, its lawyers wrote a letter to BP in which they stated "you are hereby informed that our client exercises its option as envisaged in clause 2 of the

Agreement of Lease". Southline then refused to vacate the premises on 31 August 2008. When Southline refused to vacate the leased premises, BP launched an eviction application in the High Court on 19 September 2008 and set the matter down for hearing on 26 September 2008 on an urgent basis. Southline filed answering affidavits opposing the eviction application as well as a conditional counter-application on BP on 25 September 2008. At the hearing on 26 September 2008, the High Court struck the application from the roll with costs for want of urgency. BP then re-enrolled the application again for hearing on 2 February 2009 by way of notice of set down. Manyarara J granted an eviction order on 13 March 2009 and Southline filed its notice of appeal on 20 March 2009.

Appellants' submissions

[5] In its written argument, the appellant raised the following two arguments *in limine*:

- Paragraph E 9(b) of the High Court Practice Directions is in conflict with article 12(1)(a) of the Constitution which guarantees, in the context of the right to a fair trial, "adequate time and facilities for the preparation" of a defence. According to the appellant's written submissions, the paragraph is constitutionally improper because it does not expressly provide a respondent who has had to prepare answering papers in great haste to counter an urgent application with an opportunity to supplement its answering papers once the application has been struck from the urgent roll. Counsel for the appellant abandoned this argument at the

hearing of this matter and consequently nothing further need be said about it.

- The Minister should have been joined as a party because, as the sale of petroleum products is regulated by legislation falling within the remit of the Minister and as the facts of the present case are concerned with an agreement concerned with the petroleum retail industry, the Minister has a direct and substantial interest in it. Moreover, the appellant had directed a complaint concerning the franchise agreement to the Minister requesting the appointment of an arbitration tribunal, a matter that further indicated that the Minister had a direct interest in the outcome of this case.

[6] In addition, the appellant raises the following arguments on the merits:

- Clause 2 of the Lease Schedule provided the appellant with an option to renew the lease for one year from 1 September 2008 to 31 August 2009, which option the appellant exercised on 28 August 2008.
- Alternatively, if the Lease Schedule, properly interpreted, does not afford an option to the appellant, but an option to the respondent only, the respondent's decision not to exercise the option was unlawful and in breach of article 16 of the Constitution in that it constituted an expropriation without value and in conflict with section 4A(1)(b) of the Act.
- Alternatively, the appellant asserts that it has a lien over the property in respect of improvements it has made to the shop situated on the premises.

Respondent's arguments

[7] The respondent argued that

- There was no need to join the Minister because even if the Minister did have a direct interest in the proceedings, which the respondent disputed, the Minister would suffer no prejudice by not being joined.
- The lease agreement terminated by effluxion of time on 31 August 2008 and the respondent was then entitled to require the appellant to vacate the property.
- The lease agreement, properly construed, did not afford the appellant an option to renew the period of the lease agreement.
- Clause 2 of the Lease Schedule was not in violation of article 16 of the Constitution (the property clause), nor is it in breach of article 18 of the Constitution (the administrative justice clause).
- The lease agreement was not in conflict with section 4A of the Act.
- The appellant's argument that it has a lien in respect of the leased property as a result of the improvements it has made to the shop must be rejected as there is no evidence to suggest that any improvements have been made to the immovable property which are not removable and therefore it has not been shown that the respondent has been enriched at all.

Issues

[8] The issues to be decided in this Court are the following;

- Whether the respondent was obliged to join the Minister as a party to these proceedings;
- Whether the lease agreement entitled the appellant to exercise an option to renew the lease agreement and if it did, whether the appellant exercised its option timeously;
- If the lease agreement does not entitle the appellant to exercise an option, whether clause 2 of the Lease Schedule is contrary to the provisions of section 4A(1)(e) of the Act because it does not provide for reasonable security of tenure, and if it is, what the reasonable period protecting security of tenure would be; and
- whether the failure by the respondent to extend the lease agreement is contrary to the provisions of article 16 or article 18 of the Constitution or section 4A(1)(b)(i),(ii) and (iii) of the Act.

Relevant legal provisions

[9] For ease of reference, the relevant legal provisions shall be set out here. Article 16 of the Constitution provides that:

> "(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees, provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
> (2) The State or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."

[10] Article 18 of the Constitution provides that:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court of Tribunal."

[11] Section 4A(1) of the Act provides that:

> "Any dealer agreement concluded between a wholesaler and an operator, any supplementary provisions to such an agreement, shall be based on and comply with the following:
>
> (a) …;
>
> (b) in so far as the dealer agreement or any provision supplementary thereto provides for the exercise of any discretionary powers which adversely affect rights or interests, such power shall, subject to the other provisions of this section, be exercised in accordance with fair and reasonable practices and procedures, which shall include -
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> (i) the giving of adequate notice of the exercise of the discretion and the nature and purpose thereof, as well as the furnishing of reasons for a decision (if requested thereto);
>
> (ii) compliance with the principle providing the other party reasonable opportunity to be heard;
>
> (iii) acting in good faith having regard to clearly established facts and circumstances only; unless it is justifiable and reasonable under the circumstances to depart from the requirements set out in this paragraph;
>
> (c) notwithstanding paragraph (b), in so far as the dealer agreement or any provision supplementary thereto provides for the termination of the agreement in the event of a breach thereof -
>
> (i) in the case of a non-material breach, written notice shall be given that such non-material breach has occurred and a reasonable

period shall be allowed to rectify such breach prior to termination of this agreement;

(ii) in the case of a material breach, the agreement may be terminated without prior notice or opportunity to rectify the material breach if it is fair and reasonable under the circumstances to do so, and for the purposes of this paragraph -

(aa) only a breach of the agreement which relates to a fundamental and substantive term of the agreement shall be deemed to be a material breach; and

(bb) no agreement shall contain a provision deeming all provisions of the agreement to be material;

(d) reasonable access to correspondence, documents and property only in so far as they relate to the business of operating an outlet in terms of the dealer agreement; and

(e) promotion of security of tenure, but subject thereto that a reasonable probationary lease period may be provided for in the case where a dealer agreement is concluded with a new operator."

[12] Furthermore, section 4A(2) of the Act provides that:

"(a) Without derogating from any other right a person may have in terms of any other law or with regard to access to a court, where a party is of the opinion that a provision in a dealer agreement does not comply with a principle set out in subsection (1), such party may refer the matter for arbitration as provided for in paragraph (b).

(b) The Minister shall by notice in the Gazette determine the arbitration procedure which shall apply with regard to a matter referred to in paragraph (a) and the Minister may by regulation proscribe any matter supplementary to such arbitration procedures."

[13] Section 4A(3) provides:

"(3) The provisions of this section, in so far as they provide for a limitation on the right to conduct business relating to the petroleum industry by any person, are enacted upon the authority of article 21(2) of the Namibian Constitution."

[14] And section 4A(5):

> "For the purposes of this section -
> (a) "wholesaler" means any person who imports or distributes petrol or diesel for purposes of the wholesale thereof by that person in Namibia or who exports petrol or diesel;
> (b) "operator" means any person who conducts business for the sale of petrol and diesel at an outlet."

Joinder

[15] The first issue that arises for decision is whether BP should have joined the Minister as a party to the proceedings. The appellant argues that the retail petroleum industry in Namibia is highly regulated. It asserts that the Minister had a direct and substantial interest in these proceedings because, firstly, the relationship between the appellant and the respondent falls within the purview of section 4A of the Act. In particular, the appellant points to section 4A(2)(b) which provides that the Minister "shall by notice in the Gazette determine the arbitration procedure which shall apply" to a dispute that arises as to whether an agreement complies with the provisions of section 4A(1). In this regard, the appellant relies on the fact that it referred a dispute concerning its relationship with BP to the Minister and requested that an arbitration procedure be instituted. That complaint, together with these provisions, the appellant argues, mean that the Minister has a direct and substantial interest in the outcome of the respondent's application. Secondly, the appellant points to regulations 29 and 30 of the regulations[1] made in the terms

[1] Regulations 29 and 30 of the Petroleum Products Regulations as amended (promulgated in Government Notice 155 of 23 June 2000 and amended in Government Notice 202 of 2002 of 29 November 2002) which were made under sections 2(1) and 2A of the Act, provide as follows:
29. (1) A wholesale licence or certificate is not transferable.

of the Act, which provide that if any information on a petroleum licence is to be changed, the licence holder shall apply to the Minister for an amendment of the licence.

[16] The respondent disputes that the Minister has a direct and substantial interest in these proceedings. It states that the issues raised in the complaint do not correspond to the relief sought by the appellant in this appeal (the setting aside of an eviction order) and that the issues raised in the complaint are not directly pertinent to the appeal. It notes that the complaint does not raise the proper interpretation of clause 2 of the Lease Schedule, which relates to the question of whether the appellant had an option to renew the lease. In the alternative, the respondent asserts that even if the Minister does have a direct interest in the

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(2) A retail licence is not transferable except by way of amendment of the licence under regulation 30.
30. (1) If any information on a licence or certificate is to be changed, the licence-holder or certificate-holder shall prior to such change apply to the Minister for an amendment of such licence or certificate, as the case may be.
(2) If any such change of information relates –
(a) …;
(b) in the case of a retail licence, to a change in the name of the operator, the records required in terms of regulation 4(2) shall be supplied with regard to the proposed new operator, and the proposed new operator shall complete Form PP/1 as set out in Annexure B, in as far as it is applicable, together with the application for an amendment.
(3) Notwithstanding regulation 31(4) and (5), if a retail licence-holder operates a retail outlet in terms of an agreement with a wholesaler that is the owner of such retail outlet, that wholesaler may in the following circumstances apply to the Minister for a change in the name of the operator, whether to that of the wholesaler or to any other operator:
(a) if it is alleged by the wholesale license-holder that the agreement between the wholesale licence-holder and retail licence-holder –
(i) …; or
(ii) has lapsed through the effluxion of time, without renewal of the agreement; …
(4) The Minister may not, upon an application in circumstances contemplated in regulation (3)(a), amend a licence unless a Minister –
(a) has given the relevant retail licence-holder notice in writing of the wholesaler's application;
(b) has invited the retail licence-holder to make representations to the Minister, within a specified period, not being less than 14 days after receipt of the notice, concerning the wholesaler's application; and
(c) has after the end of that period considered any representations made by the retail licence-holder.
(5) Upon the occurrence of an event referred to in sub-regulation (3) the wholesaler shall, until the Minister decides on the application under sub-regulation (4), be deemed to be the holder of the retail licence, except if, in the circumstances contemplated in sub regulation 3(a) the fact whether the agreement has lawfully been terminated or has lapsed is in dispute between the parties."

proceedings, that interest will not be prejudicially affected by the outcome of these proceedings.

[17] On several occasions, the High Court of Namibia has cited with approval the dictum of Corbett J in *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) in which the court had to consider whether subtenants of a lessee had necessarily to be joined in a matter relating to the termination of the lease.[2] The court held that the subtenants did not need to be joined, reasoning that in order for joinder to be necessary

> "what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court." (at 415 H)

This crisp encapsulation of the test for a necessary joinder recognizes that for joinder to be required the party concerned must have a legal, not merely a financial interest, which will be prejudicially affected by the proceedings. The bar is thus set quite high as the facts of *United Watch* illustrate. Is that bar met in this case?

[18] It will be helpful at the outset to consider briefly the two statutory provisions upon which the appellant relies. The first is section 4A(2) of the Act. Subparagraph (a) of that provision states that "without derogating from any other right a person may have … or with regard to access to a court", a person who

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[2] For Namibian High Court cases adopting this test, see, for example, *Yam Diamond Recovery (Pty) Ltd: In re Hofmeester v Basson and Others* 1999 NR 206 (HC) at 211I – 212A; *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC) at 7 B – H and 9 I – J and *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Ltd and Others* 2006 (1) NR 121 (HC) at para 45.

considers that a dealer agreement does not comply with the principles set out in section 4A(1) of the Act may refer the matter to arbitration "as provided for in paragraph (b)". Subparagraph (b) then provides that the Minister shall by notice in the Gazette determine the arbitration procedure that shall apply to a matter referred to in subparagraph (a).

[19] The precise import of subparagraph (b) is not immediately clear. Does the subparagraph give the Minister a general power to provide a general arbitration procedure for the determination of issues under subparagraph (a)? That may well be its purport, although the appellant appears to consider that subparagraph (b) empowers the Minister to provide specific arbitration procedures upon request each time a dispute arises under subparagraph (a).

[20] Whichever is the correct interpretation of subparagraph (b), what is clear is that the role of the Minister is merely to determine the arbitration procedure and to prescribe any matter supplementary to such procedures. Any determination of the dispute is for the arbitrator, not the Minister. Moreover, it is clear from the introductory clause to subparagraph (a) that the right to proceed to arbitration does not derogate from any other right a person may have in terms of other laws or "with regard to access to court". The right to arbitration under section 4A(2) is thus supplementary to any other rights the parties may have.

[21] The second set of statutory provisions relied upon by the appellant are regulations 29 and 30 of the Petroleum Products Regulations made under the Act.[3]

[3]The text of those regulations is set out at fn 1 above.

Those regulations provide for the procedure to be followed to obtain an amendment of a retail (or wholesale) licence by the Minister. Regulation 30(3) specifically provides that a wholesaler may apply to the Minister for the change of name of the operator of a retail licence outlet, where a licence has been granted in respect of a retail outlet that is owned by the wholesaler, and the agreement between the operator and the wholesaler has lapsed through effluxion of time. In these circumstances, the Minister is required in terms of regulation 30(4) to give the retail licence operator an opportunity to be heard. The regulations do not provide that the Minister may vary the contractual relationship between the operator and the wholesaler or grant the Minister any power to intervene in eviction proceedings that may follow upon the alleged termination of a contract of lease. The regulations are concerned only with the amendment of the terms of a licence.

[22] In the light of these statutory provisions, can it be said that the Minister has a legal interest in the subject matter of this case that could be prejudicially affected by the determination of the case? The subject matter of this case is the question whether the respondent is entitled to evict the appellant from its premises. The answer to that question will depend on the terms of the lease agreement signed by the two parties. The crucial question is whether the lease agreement contains an option in favour of the appellant to renew the agreement for a period of twelve months. If it does, and the appellant exercised that option correctly, the respondent is not entitled to an eviction order in these proceedings because at the time the proceedings were launched, appellant was entitled to be in occupation of the leased premises.

[23] Has the Minister a direct legal interest in the proper interpretation of the lease agreement? The Minister is not a party to the lease agreement, nor does he have any rights or obligations flowing from it. The fact that the appellant has referred a complaint to the Minister in terms of section 4A(2)(b) of the Act does not alter this. The referral of the complaint may require the Minister, depending on the correct interpretation of section 4A(2)(b), to determine a process for the arbitration of that complaint but the existence of a statutory procedural obligation of this sort, even if it is terminated by the outcome of these proceedings, something which is not certain, does not result in the Minister having a direct legal interest in the outcome of these proceedings.

[24] Nor do the powers of the Minister under regulations 29 and 30 give rise to the Minister having a direct legal interest in the outcome of these proceedings. The upholding or setting aside of the eviction order made by the High Court may affect whether an application under regulations 29 and 30 is made by the respondent, but the Minister has no direct legal interest in whether an application of that sort is made so these regulations also do not establish that the Minister has a direct legal interest in these proceedings.

[25] Finally, I turn to consider two further South African authorities cited by the appellant in support of its argument that the Minister should have been joined in these proceedings. First, the appellant relied upon *Madadzhe v Chairman, Venda National Liquor Board* 1988 (4) SA 807 (V) at 809. That case concerned an application to review the decision of the Venda National Liquor Board to refuse the

grant of a beer hall licence to the applicant. In terms of the Venda Liquor Act, 8 of 1973, the authority to grant a liquor licence vested in the Minister of Justice. The Liquor Licensing Board, after considering the application, had written to the Minister of Justice informing him that the Liquor Board did not recommend the grant of the licence to the applicant because another bottle store was about to be erected in the area and it was this decision that the applicant sought to review. The Liquor Board argued that the Minister of Justice should have been joined. The High Court upheld this argument reasoning that the Minister was an essential party that had to be joined because he may wish to express views as to why the decision of the Board should not be set aside, even if those views related only to policy.

[26] It is not necessary for the purposes of this case to decide whether *Madadzhe* is persuasive authority. It is quite clear that the facts of this appeal are distinguishable. *Madadzhe* concerned the review of a decision to recommend the grant of a liquor licence, where the final grant of the liquor licence was a matter for the Minister. This case concerns the grant of an eviction order based on an interpretation of the contract between the parties. The Minister has no right, whether under section 4A(2) of the Act or under regulations 29 and 30, to determine whether the respondent has a right to evict the appellant or not. That is a matter that turns upon the proper interpretation of the contract and the facts of the case. Nor can it be said that the outcome of the eviction proceedings would be prejudicial to the Minister's interest in the proper regulation of the fuel industry.

[27] Secondly, the appellant relied upon *Nguza and Others v Minister of Defence* 1996 (3) SA 483 (TkS), where the applicants sought an order that they were entitled as of right to retire from the Defence Force. The consequence of an order in their favour entitling them to retire from the Defence Force would have been that they would have been entitled to greater pension benefits from the Department of Social Welfare and Pensions than if they were to have resigned from the Defence Force. The High Court ruled that in the circumstances the Minister of Social Welfare and Pensions had "a real and direct interest" (at 486D) in the application because if the application were to be successful, he would legally be obliged to pay increased pension benefits to the successful applicants (and all those similarly situated).

[28] Again it is not necessary to determine whether the case is persuasive as *Nguza* is clearly distinguishable from the facts in the present appeal. Here, the outcome of the proceedings will not automatically impose direct legal and financial obligations on the Minister of Mines and Energy in respect of either the respondent or the appellant. It is true that were the eviction order to be upheld, the referral to arbitration of the applicant's complaint against the respondent might be affected in some way, but the Minister's role in relation to the arbitration is merely to prescribe a procedure to be followed. Section 4A does not give the Minister any direct interest in the substance of the complaint. Similarly, it may be that the consequences of this case might result in an application for the variation of a licence in terms of regulation 29 and 30. Again, however, those provisions specifically entitle a wholesaler to apply for the variation of the terms of a retail licence when an agreement to operate the licence has terminated by effluxion of

time. Whether or not the Court concludes that the contract has terminated by effluxion of time, no legal interest of the Minister under regulation 29 and 30 will be affected. The Court will have determined one of the jurisdictional facts relevant to the exercise of the Minister's power to amend the licence, but the Minister has no legal interest in the determination of that jurisdictional fact. Both cases cited by the appellant are therefore distinguishable from the present case.

[29] In the light of the reasoning set out above, the appellant's argument that the Minister should have been joined in these proceedings fails. I turn now to consider the merits of the case.

Did clause 2 of the Lease Schedule create an option for the appellant to extend the lease for a year?

[30] The lease agreement contains five parts: the Memorandum of General Conditions of Lease, the Equipment Loan Agreement, the Service Station Equipment Schedule, the Maintenance Schedule and the Lease Schedule. The Lease Schedule contains, amongst other things, some of the key terms of the lease including the duration of the lease and the rental while the Memorandum of General Conditions contains, amongst other things, the description of the leased property. Clause 2 of the Lease Schedule under the heading "Duration of Lease" provides:

> "The lease shall be for a period of 3 (three) years commencing on 01st September 2005 terminating on 31st August 2008 with the option of
> being renewed for a further 1 (one) year."

In the Memorandum of General Conditions of Lease, the "lease period" is defined as "the period of duration of the lease as set out in the lease schedule".

[31] The appellant argues that clause 2 of the Lease Schedule entitled it, as the lessee, to renew the lease contract for a further year, which it did by its attorney's letter of 28 August 2008. The respondent disputes that the appellant had the right to exercise an option to renew the lease and points to clause 4.2 of the Memorandum of General Conditions of Lease which stipulates:

> "The lessor shall give the Lessee written notice not later than 1 (one) calendar month prior to the termination of the Lease Period if the Lessor is prepared to consider granting the Lessee a further lease, or such other agreement relating to the supply and sale of petroleum products from the Leased Premises, upon the Lessor's then prevailing terms and conditions for such a lease or agreement of supply."

[32] The High Court held that clause 2 of the Lease Schedule should be read with clause 4.2 so that clause 2, properly interpreted, confers an option on BP, the lessor, to renew the lease agreement. The High Court concluded therefore that Southline, the lessee, was not entitled to exercise an option to renew the lease agreement for a year.

[33] An option to renew or extend the period of a lease, in our law, is a form of pactum de contrahendo, an agreement to make a contract in the future.[4] An

[4]See the South African decision, *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A) at 765I.

option has two components: an offer proposing the conclusion of a specific contract, and an agreement not to revoke the offer.[5] According to Kerr:

> "Options are contracts to keep offers open for a period. Those found in leases normally give the lessee power to renew the lease or to purchase."[6]

[34] An option in a lease agreement relating to the renewal of the lease or the extension of the period of the lease is thus normally, though not invariably, an irrevocable option in favour of the lessee, not the lessor. The exercise of the option is the acceptance of the offer and it must ordinarily be exercised before the original lease has ended.[7] The effect of the exercise of an option is ordinarily that the contract is renewed on the same terms and conditions as the original contract, unless the option stipulates otherwise.[8]

[35] Before turning to considering the proper interpretation of clause 2 of the Lease Schedule, it will be useful to consider clause 4.2 of the Memorandum of General Conditions of Lease. The clause provides that the lessor shall give the lessee written notice at least one month prior to the termination of the lease period if the lessor is prepared to consider the granting of a further lease upon the lessor's then prevailing terms and conditions for such leases. As mentioned above, "lease period" is defined as the duration of the lease as set out in the Lease

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[5] See DJ Joubert *General Principles of the Law of Contract* Juta 1987 at 53 and *Theron v Pieterse* 1995 NR 211 (HC) at 213 G – H.

[6] AJ Kerr *The Law of Sale and Lease* 3rd ed Lexis Nexis 2004 at 457.

[7] See *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Ltd and Others*, cited above n 2, at para 37. See also the South African decision, *Bowhay v Ward* 1903 TS 772 at 777-778 and Joubert, cited above n 4 at 55.

[8] See, for example, *Levy v Banket Holdings (Pty) Ltd* 1956 (3) SA 558 (FC) at 560.

Schedule. It thus refers to the stipulation in clause 2 of the Lease Schedule that provides for three years, with an option to renew for a further year.

[36] From the above it is clear that Clause 4.2 does not contain an irrevocable offer to enter into a further lease by the lessor. Nor does it contain an irrevocable offer by the lessee to enter into a further lease. It can, in the circumstances, not be construed to be an option as an option is an irrevocable offer to contract.

[37] Let us turn now to look at clause 2 of the Lease Schedule. It stipulates that the lease shall be for a period of three years “with the option of being renewed” for a further one year. The clause contemplates an option, which as set out above, is an agreement in which one party irrevocably offers to the other party the right to renew the agreement.

[38] It is not clear on what basis the High Court concluded (and the respondent in this Court argues) that clause 4.2 of the Memorandum of General Conditions of Lease should be read together with clause 2 of the Lease Schedule. Clause 2 appears to confer an option, an agreement in which an irrevocable offer is made by one party to the other, whereas clause 4.2 provides for the possibility that the lessor may in the future make an offer to the lessee on terms that are to be determined at some future date. Clause 4.2 contains neither an irrevocable offer by the lessor, nor an irrevocable undertaking by the lessee to accept any future offer by the lessor if the lessor decides to make it. It is just not accurate to refer to clause 4.2 as conferring “an option” upon the lessor, as the respondent argues in this Court.

[39] There is a further problem of textual consistency with reading clause 2 of the Lease Schedule as referring to the provisions of clause 4.2. Clause 4.2 does not speak of any limitation on the period in respect of which the lessor may make an offer to lease the property in future. This is not surprising because clause 4.2 does not bind either the lessor or lessee in any way, but merely records that there is a possibility of a future lease, the terms of which (including its duration) are not determined in clause 4.2. On the other hand, clause 2 of the Lease Schedule expressly contemplates the renewal of the lease under an option for a period of one year only.

[40] In the circumstances, the High Court was incorrect when it found that clause 2 of the Lease Schedule should be read subject to clause 4.2 of the Memorandum of General Conditions of Lease. The two clauses cannot be read together. Clause 4.2 does not contain an option. It merely contains a provision stating that the lessor may decide once the lease period is coming to an end to offer the lessee a further contract of lease on the same or different terms. It does not purport to require the lessor to do so, nor to compel the lessee to accept such offer, if ever made. Clause 4.2 is clearly contemplating a different or new lease in the future, and not the renewal of the existing lease. Both the reasoning of the High Court, and the submission of the respondent, that clause 4.2 is a provision regulating the “option” referred to in clause 2 of the Leas Schedule cannot therefore be accepted.

[41] The question thus remains. What is the proper meaning of clause 2? Clause 2 stipulates that the period of the lease is three years with the option of being renewed for one further year. Clause 2 thus appears to contain an irrevocable offer to extend the period of the lease for one further year but it does not explicitly state who may exercise this option, a matter to which I turn in a moment. Before considering that question however, it should be noted that for an option to be valid, it must specify with reasonable certainty the terms of the renewed lease agreement. Leaving aside the identity of the parties, there is certainty with regard to the leased property and with regard to the rental. The clause regulating the rental for the property (clause 3 of the Lease Schedule) provides a baseline rental for the first year of the lease (September 2005 – August 2006) and then provides for annual cost of living increases. The rental for an additional year's lease would therefore be covered by the cost of living increases contemplated in clause 3 of the Lease Schedule.

[42] Respondent argued that the absence of an express term as to when the option should be exercised provided support for its argument that clause 2 does not in fact confer an option to renew the lease. As a matter of law an option to renew a lease must be exercised before the lease expires.[9] Although it may be desirable to provide for notification earlier than the expiry of the lease, the absence of any express period, or manner for notification of the exercise of the option, does not render the option invalid. This argument of the respondent can thus not be accepted.

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[9] See *Clear Channel Independent Advertising Namibia (Pty) Ltd and Another v Transnamib Holdings Ltd and Others*, cited above n 2, at para 37. See also the following South African decisions: *Bowhay v Ward*, cited above n 7, at 777-8 and *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A) at 126 D – E.

[43] In summary, other than the identity of the party who may exercise the option, all the other essential terms of a renewed contract (leased property, rental price and other terms and conditions) are certain.

[44] As to the identity of the party who enjoys the option, there are only two possible candidates -- the lessee and the lessor. Neither party argued that, properly construed, clause 2 created an option per se exercisable at the instance of the lessor. Instead the respondent argued that clause 4.2 provided the lessor with a right to propose a further lease in future, at its discretion, and suggested that clause 2 should be read as an adjunct to that clause, an argument rejected above. But the respondent did not argue, perhaps understandably given the provisions of clause 4.2, that clause 2 created an option, exercisable at the instance of the lessor, separate and in addition to what clause 4.2 conferred upon the lessor. Nor did the respondent in its dealings with the appellant ever suggest or act on the basis that it enjoyed a separate option to renew the lease for a year under clause 2. Moreover, such an interpretation of clause 2 would be an unusual one in the light of ordinary commercial practice. In all these circumstances, interpreting clause 2 as an option in favour of the lessor cannot be said to be a reasonable interpretation of the clause.

[45] Given that it is not reasonably possible as a matter of construction to interpret clause 2 as creating an option in favour of the lessor, the question that arises is whether properly interpreted, it creates an option in favour of the lessee or whether it must be concluded that it is too vague to bear any meaning. As a

general matter of interpretation, a court will try to avoid concluding that words in a contract are meaningless.[10] Generally, words in commercial contracts are intended to have business efficacy and should be interpreted consistently with such a purpose. Of course, any interpretation must be consistent with other provisions of the contract, and with the statutory provisions relevant to the contractual relationship. Moreover, in determining the meaning of the provision a court may consider both the conduct of the parties and the ordinary commercial practices of the environment in which they contract.

[46] There is no other provision in the lease agreement that would conflict with interpreting clause 2 of the Lease Schedule as affording an option to the lessee. Consequently, that interpretation would not be repugnant with any other provision of the lease agreement, nor would it lead to any absurdity.

[47] The respondent points to the conduct of both parties to suggest that neither party considered the lessee had a right to exercise an option to renew until the lessee asserted the right in writing shortly before the end of August 2008. It is clear on the record that both parties were aware of the provisions of clause 4.2, and that the respondent wrote to the appellant stating that it did not intend to extend the agreements. Yet it is also clear that neither party construed clause 4.2 as establishing an option of renewal at the instance of the lessor. Once it became clear to the lessee that the lessor was not going to offer a new lease, and after taking legal advice, the lessee sought to fall back on the option in clause 2. It may

[10] See *Kühn v Levey and Another* 1996 NR 362 (HC) at 336 C – F. For South African authority on this point, see *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 931 G – H; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670 G - H; *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) at 641 B - F

well be (and the record suggests so) that the lessee would have preferred another long-term contract, of lease as contemplated in clause 4.2, rather than renewal for only a year under clause 2. Only when it became clear that the lessor would not offer a new contract did the lessee purport to rely on clause 2. Even if the respondent is correct that the conduct of the parties does not suggest that either considered the lessee to have the right to exercise an option under clause 2 prior to 28 August 2008, when the lessee purported to do so, that of itself cannot be determinative of the meaning of clause 2 in the Lease Schedule.[11] Particularly as Southline did exercise the option on 28 August 2008. So at the very least at that stage, Southline considered that clause 2 of the Lease Schedule conferred an option upon it.

[48] Another consideration is that ordinarily the commercial practice is, as Kerr states in the quote above (at para 34), that an option to renew in a lease is an option in favour of the lessee. Though not an invariably so as a matter of law, general commercial practice suggests that options to renew are afforded to lessees by lessors, and reported cases in the law reports bear this out. This is not surprising, particularly where a lessor has property that is commercially attractive, as does the respondent in this case.

[49] There is one further important relevant to the interpretation of clause 2 of the Lease Schedule which is to be found in section 4A(1) of the Act . That section

[11]For "in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, ie what their intention was as expressed in the contract." *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 505 per Greenberg JA. This approach has been endorsed by the Namibian High Court in *South African Iron and Steel Industrial Corporation Ltd v Moly Copper Mining and Exploration Co (SWA) Ltd and Others* 1993 NR 194 (HC) at 204 C – D.

(set out in full above at para 11) provides that any dealer agreement between a wholesaler and an operator shall be "based on and comply with" a range of factors, one of which is "promotion of security of tenure".[12] Given the definition of "wholesaler" and "operator" in section 4A(5),[13] it seems clear that the lease agreement, which includes provisions regulating the supply of petrol and diesel as well as the lease of land, is a dealer agreement within the meaning of section 4A. The statutory principle in section 4A(1)(e) clearly seeks to promote the security of tenure of retail operators within the industry vis a vis wholesalers. As a statutory principle that governs dealer agreements, it is relevant to the interpretation of a dealer agreement in case of ambiguity or uncertainty. One must presume that both BP and Southline were aware of the principles set out in section 4(A)(1) and that they intended to contract in accordance with those principles. Given that the Act clearly intends to "promote" security of tenure of operators, such as Southline, reading clause 2 as affording Southline an option would be consistent with this statutory purpose.

[50] In all these circumstances, given the principled desirability of attaching meaning to clause 2 that is consistent with the other provisions of the contract, with commercial practice and with the statutory purpose of encouraging security of tenure of retail operators in the industry, appellant's argument that clause 2 created an option, exercisable at its instance, must be upheld.

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[12] Section 4A(1)(e).

[13] Section 4A(5) provides that for the purposes of section 4A:
"(a) 'wholesaler' means any person who imports or distributes petrol or diesel for purposes of the wholesale thereof by that person in Namibia or who exports petrol or diesel;
(b) 'operator' means any person who conducts business for the sale of petrol and diesel at an outlet."

[51] The appellant's argument that it exercised an option to extend the lease for a period of one year therefore succeeds. The consequence is that, at the time the respondent sought to evict the appellant, the appellant was in lawful possession of the property and the respondent was not entitled to an eviction order. In the result, as the appeal succeeds, it is not necessary to consider the other arguments raised by the appellant. The eviction order made by the High Court must be set aside.

Costs

[52] The appellant has succeeded and it is appropriate, therefore, that costs should follow the result and the respondent ordered to pay the costs of the appellant in this Court and in the High Court, such costs to include the costs occasioned by the employment of two instructed and one instructing legal representative.

[53] The following order is made:

1. The appeal succeeds.

2. The order of the High Court is set aside and replaced with the following order:

> "The application is dismissed with costs, such costs to include the costs of two instructed and one instructing counsel."

3. The respondent is ordered to pay the costs of the appellant in this Court such costs to include the costs of two instructed and one instructing counsel.

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O'REGAN AJA

I concur.

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STRYDOM AJA

MTAMBANENGWE, AJA

[1] I have read the draft judgment (the judgment) of O'Regan, AJA and agree with the first part thereof (up to paragraph [29]). I give hereunder the reasons why I find myself unable to agree with the reasoning in the rest of the judgment and the order arising from that reasoning.

[2] The last part of the judgment deals with the central issue namely how clause 2 of the Lease Schedule should be interpreted, and whether clause 4.2 of the Memorandum of the General Conditions of Lease should be read together with clause 2 of the Lease Schedule.

[3] Clause 2 provides:

> "The Lease shall be for a period of 3 (three) years commencing on 01st September 2005 terminating on 31st August 2008 **with the option of being renewed for a further 1 (one) year."** (My emphasis)

Whereas clause 4.2 stipulates.

> "The Lessor shall give the Lessee written notice **not later than 1 (one) calendar month prior to the termination of the Lease Period if the Lessor is prepared to consider granting the Lessee a further lease**, or such other agreement relating to the supply and sale of petroleum products from the Leased Premises, **upon the Lessor's then prevailing terms and conditions for such a lease** or agreement of supply." (My emphasis)

The High Court (Manyarara, A.J.) concluded and respondent in this Court argues that clause 4.2 should be read together with clause 2, so that clause 2, properly interpreted, confers an option on BP, the lessor, to renew the lease agreement. As a result the High Court concluded that Southline was not entitled to exercise an option to renew the lease. O'Regan, AJA questions the basis on which the High Court could come to such a conclusion. I respectfully also disagree with the conclusion drawn by the High Court. On the other hand I disagree with the conclusion in the judgment that clause 2 and clause 4.2 "cannot be read together". (paragraph [40])

[4] The judgment concludes (paragraph [40]) and I fully agree, that "clause 4.2 does not contain an option. It merely contains a provision stating that the lessor may decide once the lease period is coming to an end to offer the lessee a further contract of lease on the same ... terms". The language used in clause 4.2 leaves no doubt that that was what the parties intended. Surprisingly the judgment then goes on to seek an interpretation of clause 2 that seems to completely ignore this provision.

[5] O'Regan, AJA rightly says:

(a) in paragraph [41] of the judgment, "for an option to be valid, it must specify with reasonable certainty the terms of the renewed lease agreement".

(b) In paragraph [45], “As a general matter of interpretation, a court will try to avoid concluding that words in a contract are meaningless. Generally words in commercial contracts are intended to have business efficacy and should be interpreted consistently with such a purpose...any interpretation must be consistent with other provisions of the contract...” It seems to me that logic requires that all these principles be applied to both clause 2 and clause 4.2 and that an interpretation of one (clause 2) should be sought that is consistent with the other (clause 4.2). In other words before other aids to interpreting clause 2 are resorted to a court should first seek an interpretation that does not render clause 4.2 meaningless. This would therefore necessitate that the two clauses should be read together.

[6] I am in agreement with the judgment that clause 2, even if read with clause 4.2, does not confer an option exercisable by BP separate and in addition to the right conferred on it by clause 4.2. Given that the words in clause 4.2 cannot or should not be regarded as meaningless what then is the meaning of those words in clauses 2 and 4.2 which I have underlined in paragraph [3] above. And can they be made to harmonise with the vague phrase in clause 2 “with the option of being renewed”?

[7] To begin with, I see no contradiction in regarding the words “a further lease” as meaning an option to lease if you describe an option as an irrevocable offer in favour of the lessee, in other words as good as a contract to be perfected at the

instance of the lessee. In this regard, I would uphold respondent's submission (reflected in the judgment (paragraph [40]) "that clause 4.2 is a provision regulating the 'option' referred to in clause 2 of the Lease Schedule", and reject the strained reasoning that seeks to give clause 2 a meaning to the effect that, standing alone, it gives an option to be exercised by the lessee. I would therefore conclude that there was nothing in the nature of "an irrevocable option in favour of the lessee" until the lessor exercised his right conferred by clause 4.2. The conduct of Southline purporting to belatedly (i.e. three or four days before the expiry of the lease) resort to clause 2 and belatedly exercising the so-called option speaks volumes against the interpretation the judgment seeks to put on clause 2.

[8] The fact that respondent mistakenly argued that clause 2 gave the lessor an option does not prevent this Court from adopting an interpretation of the clauses that accords with the language used in the contract as a whole, that harmonises clause 2 and clause 4.2 and that accords with what the lessee, according to the language of clause 4.2 and its own conduct, was entitled to expect, which was, in my view, that the lessor would offer it an option to renew the lease not "on terms that are to be determined at some future date" as the judgment says, but "upon the Lessor's then prevailing terms and conditions" as clause 4.2 says. It is simply not correct to say (paragraph [39] of the judgment) that "Clause 4.2 does not speak of any limitation on the period in respect of which the lessor may make an offer to lease the property in future", it does, when it says, "at least 1 month prior to the termination of the lease period".

[9] With respect, it seems to me that the approach taken in the judgment, of reading clause 2 apart from clause 4.2 and straining to find that an irrevocable option was granted to the lessee, amounts to making a contract for the parties. In this regard, I do not understand the basis of the judgment concluding (paragraph [46]) that "there is no other provision in the lease agreement that would conflict with interpreting clause 2 of the Lease Schedule as affording an option to the lessee". That can only be said by regarding the words of clause 4.2 as completely meaningless. The conduct of the parties, particularly that of appellant, who it must be assumed, were fully aware of both clauses, provides a very strong indication that neither regarded that clause 2 conferred an option upon the lessee (see in particular paragraph [47] of the judgment).

[10] In reaching the conclusions I have come to above, I have not ignored the other considerations that the judgment took into account, but the fact that Southline only belatedly sought to assert that it had an option in terms of clause 2 (when "It may well be that the lessee would have preferred another long-term contract, of lease.....rather than renewal for only a year"), in my opinion far outweighs all the other factors considered in the judgment to support the principle that "…general commercial practice suggests that options to renew are afforded to lessees by lessors…" (paragraph [48] of the judgment), and the presumption that both parties intended to contract in accordance with the principles (security of tenure) set out in section 4A(1) of the Petroleum Products and Energy Act, Act 13 of 1990, as amended. The simple answer to the first is that provisions in clause 2 and clause 4.2 are not the ordinary provisions one finds in contracts of lease. In regard to the second (the assumption) and in regard to both one must also

assume that both parties were aware of these principles and deliberately chose the language they used in both clause 2 and clause 4.2. Moreover, there is no suggestion on the record, nor did either party submit that either of them negotiated from a position of inferiority to the other. These considerations leave no room for speculation.

[11] In all the circumstances I conclude that both appellant's arguments upheld by O'Regan, AJA must be dismissed and in the result the appeal fails.

[12] The following order is made:

1. The appeal is dismissed with costs, such costs to include the costs of two instructed and one instructing counsel.

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MTAMBANENGWE, AJA

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