REPORTABLE

CASE NO.: SA 27/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WITVLEI MEAT (PTY) LIMITED **Appellant**

and

AGRICULTURAL BANK OF NAMIBIA **Respondent**

Coram: MAINGA JA, STRYDOM AJA and CHOMBA AJA

Heard: 28 October 2013

Delivered: 27 May 2014

APPEAL JUDGMENT

STRYDOM AJA (MAINGA JA and CHOMBA AJA concurring):

[1] By notice of motion the respondent (the applicant in the court *a quo)* applied in the High Court of Namibia for the following order against the appellant (the respondent in the court *a quo)* namely -

‘1. An order that respondent or any person claiming occupation through or under it be ordered to forthwith vacate the immovable property owned by the applicant comprising abattoir facilities situated on Portion 38 of the Farm Okatjirute No. 155 in the Village of Witvlei.

2. An order ordering the respondent to vacate possession of the premises to the applicant.

3. In the event of the respondent or any person claiming occupation of the premises through or under it refuses to vacate the premises as ordered by the Honourable Court to do so the Deputy Sheriff of the above Honourable Court be authorised and directed to effect an eviction and handover possession of the premises to the applicant.

4. The respondent pays the costs of this application.

5. Alternative relief.’

[2] The respondent was successful and the court *a quo* ordered the appellant to vacate the premises owned by the respondent. The appellant appealed against the whole judgment of the court *a quo* and the orders made by it. The appellant was represented by Mr Tötemeyer, assisted by Mr Corbett, whereas Mr Bokaba SC represented the respondent, assisted by Mr Namandje.

[3] Mr Iipumbu, the Chief Executive Officer of the respondent, deposed to an affidavit on behalf of the respondent. He stated that the respondent has the power to purchase, sell and let property. He pointed out that the respondent, in the discharge

of its functions and duties, was responsible to the Minister of Finance and Minister of Agriculture, Water and Forestry (Ministers).

[4] The deponent stated that the parties entered into a lease agreement whereby the respondent leased the above premises to the appellant for a period of two years commencing on 1 August 2006 and terminating on 31 July 2008. The lease agreement contained an option in favour of the appellant to buy the property for N$15 million. The option was for a period of two years covering the period of the lease. During any renewal or extension of the lease agreement the respondent shall have a right of pre-emption subject to certain conditions.

[5] In terms of the agreement the lease was renewable for a further period of two years but the appellant was required to give six months' notice of its intention so to renew. It was alleged that the terms and conditions of such renewed lease would be the same as those contained in the original agreement except for a change in the amount of rent to be paid by the appellant.

[6] The lease agreement contained a non-variation clause and unless the variation was reduced to writing and signed by both parties it would not be valid. The lease also contained a non-waiver clause. Furthermore the appellant was required to improve and re-commission the abattoir at its own costs to an amount not less than N$500 000.

[7] In a letter dated 25 January 2008 the appellant requested the respondent to amend clauses 2 and 18 of the agreement by extending the periods mentioned therein, namely 2 years, to 3 years. This request was denied but the respondent offered to renew the lease for a further period of 2 years commencing on 1 August 2008 and terminating on 31 July 2010. A written renewal agreement was duly concluded on 26 January 2009.

[8] It was alleged by Mr Iipumbu that at the time when the lease agreement was renewed, on 26 January 2009, the appellant had not yet exercised its option contained in the original lease and as the option was only open for a period of two years it meant that the option had lapsed and was no longer available to the appellant. The appellant subsequently requested a change to the monthly rental to be paid by it and another renewal agreement was concluded by the parties on 30 November 2009.

[9] However, on 18 August 2009 the appellant applied for a loan from the respondent in order to buy its property in the amount of N$15 million as was stated in the original lease. It further offered as security a first bond over the property and to repay the loan over a period of ten years at a monthly rate of N$178 052,66 and at an interest of 7.5% calculated at $^{1}/_{12}$ of the annual interest rate on the remaining principal amount.

[10] Mr Iipumbu denied that this was an offer made in terms of clause 18 of the original lease agreement. He stated that it was also not understood by either himself or the Board of the respondent to be in terms of clause 18. Consequently it was not an exercise of the option contained in the original lease agreement as by that time the option to purchase had already expired.

[11] The respondent's Board of Directors considered the offer by the appellant and resolved to make a distinct and separate offer to sell the property for N$15 million. In regard to the interest rate it proposed a rate of 8.5% payable over a period of ten years at monthly repayments of N$175 000. It also stated that the counter-proposal was subject to the approval of the two Ministers.

[12] By letter dated 15 February 2010 the Board recommended the sale of the property on the above conditions to the respective Ministers. This recommendation, so it was stated, was made in terms of the offer by the appellant dated 18 August 2009 and not in terms of the original lease agreement containing the option. Furthermore the appellant was informed by letter dated 19 February 2010 of the conditions proposed by the Board. This letter further explained to the appellant that the proposal was subject to the approval of the Ministers. This offer by the Board was purely for the purpose of discussion and there was, at least at that stage, nothing firm on the table. The respondent stated that whatever the outcome of the discussions between the parties it was still subject to the approval of the Ministers. Mr Iipumbu emphasised that the respondent could not unilaterally take a decision to sell the

property, as such a decision would have been a breach of its statutory duties and therefore illegal.

[13] The appellant replied to this offer by letter dated 26 February 2009 confirming its right to exercise the option and furthermore by accepting the conditions set out in the letter of the respondent. Notwithstanding its acceptance of the conditions set out in the respondent's letter the appellant indicated that it would still decide whether to arrange its own funding or whether to opt for the funding proposal of the respondent. Respondent stated that appellant's letter was clearly out of tune with the events that had preceded. Furthermore it was clear that the appellant was making a counter offer to the respondent's counter offer.

[14] Consequently, so it was said by the deponent on behalf of the respondent, it was clear that the appellant did not accept the proposals by the respondent and no agreement was concluded. In further correspondence the appellant claimed that it had entered into a binding agreement with the respondent when it exercised its option whereas the respondent denied this claim on various grounds.

[15] By letter dated 30 July 2010 Mr Iipumbu proposed, on behalf of the respondent, to extend the lease for a further six months in order to obtain the necessary approvals from the two relevant Ministers. This was rejected by the appellant which indicated that the lease should continue until such time as ownership of the property had been passed to it. The respondent's offer of a further extension of

the lease for six months was withdrawn and cancelled and consequently the occupation of the property by the appellant remained unlawful and the respondent stated that the rental paid by the appellant and accepted by it was in lieu of damages suffered by it for the unlawful occupation of the premises by the appellant.

[16] By letter dated 30 May 2011 the Minister of Finance advised the respondent that Cabinet has directed that the respondent should offer the property at a market related price which, at 23 July 2010, was N$40 494 141,00.

[17] On behalf of the appellant a Mr Badenhorst, the Managing Director of the appellant, filed an affidavit. He stated that the purpose for leasing the abattoir was to use it as an export facility. The abattoir previously had European Export approval. However at the time that appellant had leased the abattoir it did no longer hold such approval, it was non-operational for some time and was in a state that required serious maintenance, refurbishment and upgrades before it could again function as an abattoir. To again regain its export status the appellant had to expend more than N$20 million which increased the value of the facility to that amount. According to the deponent that was common cause between the parties. Appellant was only able to operate as an export facility a year after the lease had been entered into.

[18] Mr Badenhorst pointed out that even after the abattoir regained its European export status, it did not follow that it immediately became profitable. All the factors present at the time, such as the worldwide recession, necessitated that the lease had

to be extended for a further two years on the same terms and conditions as set out in the original lease agreement. It is alleged that that in fact happened and the agreement was extended for a further period of two years on the same terms and conditions as before with exception of the rental which was increased.

[19] With reference to the letter of 19 February 2009, which originated from the respondent, the deponent said that there was now a condition imposed whereby the proposal by the respondent to buy the property for N$15 million was made subject to the approval of the Ministers. This, so it was stated, was something new which did not form part of the agreement of the parties. In terms of the agreement between the parties it was not permissible for the respondent to now introduce a new term to the agreement.

[20] Further correspondence ensued between the parties wherein the appellant insisted on the terms of the option, as set out in the original lease agreement and which were, according to it, made part of the renewal agreement. Mr Badenhorst stated that it was only by letter dated 10 June 2010 that the respondent for the first time denied that the appellant was entitled to purchase the property in terms of clause 18.1 of the lease agreement. Appellant said that bearing in mind the amounts spent by the appellant in upgrading the abattoir the appellant would never have done so if it did not at all times have the option to buy the property.

[21] Thereafter, and by letter dated 22 July 2011, appellant sent to respondent a deed of purchase of the property drafted by it. The respondent refused to sign this agreement. Appellant still tendered to pay the purchase price of N$15 million in respect of the abattoir and said that it is entitled to specific performance by the respondent. Appellant further denied that it was unlawfully occupying the property and stated that it timeously exercised the option whereby it purchased the said property and that the respondent was obliged to transfer the property to appellant.

[22] In its replying affidavit the respondent re-iterated its position that the clause containing the option had not been extended by the renewal agreement and that it had lapsed when the original lease period ended. There was therefore no timeous exercise of the option by the appellant. The respondent again took up the position that approval by the Ministers was a legislative requirement which could not be bypassed by the respondent. It was further pointed out that in terms of clauses 7.3 and 7.4 of the lease agreement the appellant was protected in regard to improvements made by it in that it had a right of claim to the specific items mentioned or could claim compensation.

[23] The respondent further stated that its letter of 19 February 2010 was clearly a proposal by it which had to be approved by the relevant Ministries. This proposal, so it was said, was never accepted by the appellant. Referring to the appellant's letter dated 26 February 2010 the respondent said that the appellant effectively rejected the counter proposal made by it and it was clear that the appellant intended to make yet a

counter proposal to the respondent's counter proposal. Hence no agreement had been concluded. Referring to the letter by the appellant dated 9 September 2010 the respondent stated that the only investment made by the appellant in relation to the property amounted to N$2 476 282,18.

[24] Respondent further referred to its letter dated 8 July 2011 in which it had indicated that it would only be prepared to sell the property at a market related price. This offer was rejected by the appellant.

[25] The learned judge *a quo* made the following findings:

(a) That where in eviction proceedings the ownership of an applicant was admitted as well as the continued occupation of a respondent the onus would be on such respondent to establish its right to remain in occupation of the property. (See *De Villiers v Potgieter and Others NNO,* 2007 (2) SA 311 (SCA).) The court found that the lease agreement between the parties was terminated at the end of July 2010 when the renewal agreement came to an end as a result of the effluxion of time and that no further renewal was agreed between the parties. There was also no tacit relocation of the lease as both parties made it clear by conduct and express external manifestations that the lease had come to an end. It was also common cause that there was no transfer of the property to the appellant and hence no lawful basis had been

established by the appellant to be in occupation of the property. The respondent was therefore entitled to the eviction of the appellant from the property.

(b) Dealing with the renewal agreement the court found that at the time the agreement was concluded the option to purchase had already lapsed by virtue of effluxion of time and was no longer a term or condition which could be enforced even if the terms of the lease were made applicable to the renewed lease.

(c) The court further found that it was not clear that the conduct of the appellant, as evidenced by its correspondence in December 2009 and February 2010, was an unequivocal exercise of the option. The court found that the appellant's letter of 26 February 2010 had accepted the conditions as put forward in the respondent's letter of 19 February 2010 and one such condition was that the approval of the two Ministers, to the sale of the property, was necessary. The letter also contained further proposals in regard to the rate of interest to be paid and was also a rejection of the appellant's proposal by making the counter offer. The court therefore found that it was not clear that the acceptance of the contents of this letter would create an enforceable agreement as the parties had not reached consensus on the essential and material terms

of the agreement. In any event, the non-fulfilment of the condition of ministerial approval would render the contract void.

[26] Before dealing with the merits of the appeal there is the issue of condonation. The appellant applied for condonation for its failure to comply with the provisions of rules 8(2) and 8(3) read with rule 5(5) of the Supreme Court Rules by not arranging for security before the filing of the record. This failure had the further result that in terms of rule 5(5) the appeal of the appellant had lapsed and the appellant now also has to apply for the re-instatement of the appeal.

[27] The application for condonation is opposed on various grounds and to that extent the respondent had filed an opposing affidavit.

[28] Some factors which the court must consider in an application for condonation were set out by this court in the matter of *Rally for Democracy and Others v Electoral Commission of Namibia and Others,* 2012 (3) NR 664 (SC) at para 68, as follows:

> '. . . the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the importance of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by the other litigants as a result of the non-compliance, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'

[29] It was further stated by this court in the matter of *Rainer Arangies t/a Auto Tech v Quick Build* (SA 25/2010) [2013] NASC 4 delivered on 18 June 2013 para 5 as follows:

> 'These factors are not individually determinative, but must be weighed one against the other. Nor will all the factors necessarily be considered in each case. There are times, for example, where this Court has held that it will not consider the prospects of success in determining the application because the non-compliance with the rules has been glaring, "flagrant" and "inexplicable". '

[30] A point which was strongly argued by Mr Bokaba was that the appellant's legal practitioner did not disclose that the appellant was pursuing some other relief in the High Court which, according to counsel, covered the same issues as the appeal. These proceedings were instituted on 23 May 2013 and counsel further submitted that the appellant's non-compliance with the rules of this court was because it had abandoned the appeal in favour of the fresh proceedings. Consequently counsel submitted that the non-compliance with the rules had been wilful.

[31] The inference Mr Bokaba asked the court to draw seems to me not to be supported by the facts in this case. The facts, which are not in contention, showed that on 21 May 2013, that is two days before the instituting of the new process, a facsimile was addressed to the legal practitioners of the respondent requesting them to indicate what security was required by the respondent. Surely by then the appellant must have been aware that it was going to institute the fresh proceedings. Then on 3 June 2013 the legal practitioner for the appellant addressed a further request,

seemingly not having had any reply to the first request. This was followed up by further correspondence on 12 June and the filing of the record on 19 June 2013. The steps taken by the appellant gainsaid any intention by it to abandon the appeal and there is no substance in Mr Bokaba's submission.

[32] While I agree that a legal practitioner cannot shield behind his lack of knowledge of the rules, the delay was not inordinate. How the delay came about was in my opinion fully explained by the legal practitioner of the appellant and although one could say that he should have started attempts to resolve this issue earlier it also seems that although he tried to resolve the issue he was hampered in this regard by circumstances, sometimes beyond his control.

[33] The finalisation of this matter is certainly of importance to both parties and in my opinion there was not a deliberate and flagrant non-compliance with the rules. I am further of the opinion that there is merit in the appeal. Compare the decision of this court in *Chairperson of the Immigration Selection Board v Frank and Another,* 2001 NR 107 (SC) where condonation was granted for the late filing of the record on the appellant's good prospects of success on appeal, even where there was no explanation for a delay of five and a half months. Under these circumstances I am of the opinion that the application for condonation should succeed and the appeal should be re-instated, which I hereby do.

[34] There are primarily three issues which the court must decide, namely-

(a) Whether clause 18 of the lease agreement, which contains the option clause, was transferred into, and became part, of the renewal agreement;

(b) If it did, whether the option was properly exercised; and

(c) If it was properly exercised, whether an enforceable contract was concluded between the parties.

[35] The last two issues overlap to a certain extent and will be dealt with together.

[36] As far as the first issue is concerned there are various cases dealing with the question when provisions, which are not strictly part of the lease provisions, such as option clauses, will be carried forward into a renewal of the lease agreement. The court *a quo* did not refer to any of these cases either because it felt that in all the circumstances they were irrelevant or the attention of the learned judge was not drawn thereto.

[37] The first case is *Webb v Hipkin* 1944 AD 95. In this matter the lease agreement was for a period of three years and it granted to the lessee, at that time a person with the name Schuld, the option during the currency of the lease and until 1 September 1941, i.e. the date on which the lease terminated, to buy the property. However, in January 1942 the parties agreed to a renewal of the lease for a further period of three years under the same terms and conditions as before. Schuld, in the meantime, had

assigned the lease to Hipkin with the consent of the lessor. In 1943 the new lessee exercised the option contained in the original lease agreement with Schuld and claimed transfer of the property. This was resisted by the lessor who maintained that the option had expired on 1 September 1941 and that the renewal of the lease did not extend the option beyond that date.

[38] Feetham, JA, who wrote the judgment of the court, referred to what was stated in *Halsbury,* (2 ed) Laws of England, (Vol 20, para 69) under the heading *Landlord and Tenant,* as well as to two English cases, namely *Sherwood v Tucker* (1924, 2. Ch 440) and *Batchelor v Murphy* 1926, A.C. 63. The first case was an example where the extension of the lease was found not to cover an option to purchase contained in the original lease agreement. The words used in the renewal contract were '*We, the undersigned, hereby agree that this lease be extended for three years expiring December 21, 1923'.* The court found that one could not extend a lease and that the word 'extend' could only refer to the period of the lease and did therefore not include the option clause.

[39] The latter case was an example where the court concluded that the new lease did contain an option to purchase the property. This was an instance where a new lease was granted to a new lessee in regard to the unexpired term of the lease granted to the previous lessee. The previous lease contained an option to purchase the property and the operative part of the new lease, which called for interpretation, was the following, namely, '*execute a new lease for the unexpired term of eight years*

and six months from the sixth of October last on the same terms and conditions in all respects as the lease of 17 October, 1913'. (The reference to the lease of 17 October 1913 is a reference to the original lease contract.)

[40] The English Appeal Court concluded as follows at pp 70-71:

> 'In this memorandum of November 17, 1915, there are three references, two of them in terms and one, in effect, equally direct, to the lease so described of October 17, 1913. In my opinion as a matter of construction each of these three references is a reference to the indenture or document of that date and not to the tenancy thereby constituted. That document, which also contains an option of purchase, is described in the memorandum as a "lease", but I think there can be no question that, even so described, the option contained in it is one of its terms, collateral to the letting though it be. When, therefore, you find, as you do, that the new "lease" is to be on the same terms and conditions in all respects as the 'lease of October 17, 1913 – I supply the word "contains" - it seems to me to follow by necessity of reasoning that this new lease is amongst its terms to include the provision relating to the option of purchase, which is one of the "terms" of the document of October 17, 1913.'

[41] In the *Webb*-case the learned judge Feetham JA pointed out that these two decisions did not depend on any principle peculiar to English law but were illustrations of the manner in which the English Courts have dealt with questions of interpretation which were similar to that which the court had to deal with.

[42] The words which the court in the *Webb*-case was called upon to interpret were the following:

> 'We, the undersigned, . . . do hereby agree to a renewal of the aforementioned Lease; for a further period of three (3) years from 1 September, 1941, under the same terms and conditions as aforewritten.'

[43] The learned judge first dealt with the words the 'aforementioned lease' and pointed out that where these words were previously used, both in the assignment and the consent by Mrs Webb to the assignment, they referred to the previous lease between Webb and Schuld. The learned judge then concluded that the same words as used in the renewal of the lease was *prima facie* to be read as meaning a reference to the document containing the lease with Schuld.

[44] The court concluded as follows at p 102:

> 'In the renewal agreement with which we are here concerned, there seems to me to be no room for doubt that the "lease" to which reference is made is the document containing the terms of the lease and not merely the demise. I have already dealt with the question of the meaning of the expression "the afore-mentioned lease", and the conclusion to which the use of that expression points is strongly fortified by the final words of the agreement "under the same terms and conditions aforewritten", which may be compared with the corresponding phrase used in the memorandum in *Batchelor v Murphy,* and seems to me to be quite unmistakable, and necessarily to refer to the terms and conditions written in the document of lease.'

(See also the following cases: *Levy v Banket Holdings (Private) Ltd,* 1956 (3) SA 558 (FC); *Doll House Refreshments (Pty) Ltd v O'Shea and Others,* 1957 (1) SA 345 (T); *Tor Industries (Pty) Ltd v Gee-Six Superweld CC and Others,* 2001 (2) SA 146 (W)

and *Southline Retail Centre CC v BP Namibia (Pty) Ltd,* 2011 (2) NR 562 (SC) at p 576, para 34.)

[45] From a reading of the above cases it seems that where the renewal of the lease was *simpliciter* (see *Levy v Banket Holdings, supra,* at p 562) or in instances where there was a tacit re-location of the lease (see *Doll House Refreshments, supra,* at p 348) collateral issues contained in a contract of lease, such as an option to purchase, are not carried forward into the renewal of the lease and the renewal will only contain those terms which have a direct bearing on the lease. Where the renewal is governed by an express contract between the parties, as is the case in this instance, the question whether collateral issues also form part of the renewal will depend on an interpretation of the renewal contract and in this regard it is relevant whether what is renewed is only the lease *simpliciter* or whether the intention was to renew the document containing the lease which would then include all the terms contained in such document, also collateral issues such as an option to purchase.

[46] Because of its importance I will set out the entire renewal contract entered into between the parties. In this regard I must point out that there are two renewal contracts, one entered into on 26 January 2009 and the other on 30 November 2009. This came about because the appellant, subsequently to the contract of 26 January, requested a change of the monthly rent to be paid to which the respondent had acceded. Except for this alteration the two contracts are identical. I will herein set out the contract entered into on 26 January 2009, namely:

‘RENEWAL OF DEED OF LEASE

MEMORANDUM OF AGEEMENT MADE AND ENTERED INTO BY AND BETWEEN:
AGRICULTURAL BANK OF NAMIBIA

(herein duly represented by Leonard Nangolo IIPUMBU
in his capacity as Chief Executive Officer)
(hereinafter referred to as the “LESSOR”)
of the one part
AND
WITVLEI MEAT (PTY) LTD
Company No. 2005/153
(Herein duly represented by Sidney Wilfred Martin in his capacity as
Executive chairman
and him warranting to be duly authorised thereto)
(hereinafter referred to as the “LESSEE”)
On the other part

WHEREAS the LESSOR is the registered owner of certain premises situated on Portion 38 of the Farm Okatjirute No. 155 in the village of Witvlei (Registration Division “L”) REPUBLIC OF NAMIBIA;

AND WHEREAS the LESSEE gave due notice of its intention to renew the existing Deed of Lease in terms of Clause 25 thereof;

AND WHEREAS the LESSOR is prepared to renew the existing Deed of Lease upon the expiry thereof, on the same terms and conditions contained therein, and subject to the terms and conditions contained and agreed;

AND WHEREAS the parties have reached agreement to the terms and conditions upon which the renewal of the Deed of Lease shall occur; subject to such terms being recorded in writing;

NOW THEREFOR it is hereby agreed as follows:

1. **RENEWAL:**

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

2. **VARIATION OF RENT**:

   In terms of clause 25 of the existing Deed of Lease, the parties hereby agree that the annual rental shall increase to N$1 500 000,00 per annum for the two years renewal and that:

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

3. **Other provisions of the existing Deed of Lease to continue.**

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

THUS DONE AND SIGNED AT WINDHOEK . . . '.

The document is styled as the RENEWAL OF THE DEED OF LEASE. In the second WHEREAS clause reference is made to the Lessee's intention to renew the 'existing Deed of Lease in terms of clause 25 of the original Deed of Lease'. Then in the third WHEREAS clause the Lessor expressed its willingness to renew the existing Deed of Lease 'on the same terms and conditions as contained therein'. Clause 3 was made subject to clause 2 of the renewal agreement which contained the alteration of the monthly rental and then continued '. . . all the terms and conditions of the existing

Deed of Lease dated 1 August 2008 shall continue and operate during the said further period of renewal.'

[47] Where ever the word 'lease' was used in the renewal contract it was prefaced by the words 'deed of'. According to the *Concise Oxford Dictionary, 11th Edition revised,* by Soanes and Stevenson, the word 'deed' has the following meanings: n **1** a conscious or intentional action; **2** a legal document that is signed and delivered, especially one relating to property ownership or legal rights. Hiemstra and Gonin*, Trilingual Legal Dictionary,* translates the word 'deed' as a 'document' and a 'deed of lease' as 'a contract of lease' (Huurkontrak). The word 'deed' therefore means the instrument or contract/document and where this is then used in conjunction with the words 'all the terms and conditions of the existing Deed of Lease . . . shall continue and operate' the meaning of the words necessarily convey, in my opinion without doubt, that all the terms and conditions contained in the document, styled the Deed of Lease, shall continue to apply, except for the exclusion set out in clause 2 of the renewal Deed of Lease. It therefore also included clause 18, the clause which contained the option to purchase and the other provisions set out therein.

[48] I further agree with Mr Tötemeyer, assisted by Mr Corbett, that the conduct of the parties, as expressed by their correspondence or lack thereof, is a further clear indication of the intention of the parties to incorporate all the terms of the original Deed of Lease also in their renewal agreement.

[49] As early as 28 January 2008 the appellant addressed a letter to the respondent in which it had set out its problems in getting the necessary EU approval for the abattoir, which was only achieved at the end of the first year of the 2 year lease period. Furthermore the letter stated that uncertainties concerning the future of trade agreements between Namibia and other countries, concerning the meat market, including Europe, affected their ability to enter into longer term and firm supply contracts with overseas markets. The appellant then requested the respondent for more time and suggested that instead of a 2 year contract the contract of lease should be extended to 3 years. The appellant further stated that these problems had a significantly negative impact on their financial position. It seems to me to be justified to draw the inference that financially the appellant was not then in a position to exercise the option to buy the abattoir and that they needed more time in order to improve their position. The respondent did not accede to this request but offered a renewal of the contract for a further period of 2 years which was accepted by the appellant.

[50] The first renewal agreement was concluded on 26 January 2009. Shortly thereafter, in an e-mail dated 29 January 2009, the appellant raised two issues. The first was to complain that the monthly rental to be paid in the renewal agreement, namely N$125 000 was erroneous and should have been the sum of N$68 750. This request was acceded to by the respondent. The second issue mentioned concerned the interpretation of the renewal agreement and was stated as follows:

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

[51] There was no challenge by the respondent of this statement and it prepared and submitted for signature the second renewal agreement which was precisely the same as the first renewal except that the amount of rental, payable monthly, differed. If the respondent did not agree with the interpretation of the renewal contract by the appellant it would have said so and it would have qualified the contract to exclude the option clause becoming part of the renewal contract. This it did not do and it furthermore did not respond in any way to the interpretation set out above.

[52] Then on 18 August 2009 appellant wrote a further letter to respondent enquiring about the possibility of obtaining a loan for the option amount of N$15 million. Attached to this letter was a copy of a page from the initial Deed of Lease, containing the option and with that portion underlined where it was stated that the option was valid for a period of two years from 'the date of signature of this agreement'. I agree with counsel that Mr Iipumbu's assertion that neither he nor his Board understood this to be an offer in terms of the option, cannot be accepted. The offer subsequently made by the respondent's Board to the appellant by its letter dated 19 February 2010 contained nothing which was not consistent with the option agreement save for a rider added that the approval of the Ministers was necessary before a binding contract could be concluded. I will later herein show that the

respondent's insistence on approval by the Ministers was based on a misconception on their part.

[53] As far as the appellant was concerned the respondent only in a letter dated 10 June 2010 took up the position that the renewal of the Deed of Lease had not included clause 18.1 of the initial agreement.

[54] Counsel for the respondent, Mr Bokaba, supported the finding by the court *a quo* that the option was time bound and that it did not survive once the first term of 2 years, for which the Deed of Lease was valid, came to an end. It was also argued that because the renewal only took place during January 2009, i.e. after the lease had already lapsed on 31 July 2008, and with it clause 18, the option was therefore not capable of being extended. This, so it was submitted, was supported by clause 18.2 which only provided for a right of pre-emption in the case of any further extension or renewal of the lease agreement and did not also similarly make provision for extension or renewal of the option set out in clause 18.1.

[55] The relevant provisions of clause 18 read as follows:

> '18.1
>
> For the duration of a period of 2 years from the date of signature of this agreement, the LESSOR grants the LESSEE an option to purchase the LEASED PREMISES for an amount of N$15,000,000.00 (FIFTEEN MILLION NAMIBIAN DOLLARS).

18.2

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

[56] As far as the first submission is concerned Mr Bokaba conceded, correctly in my view, that nothing prohibited the parties from also extending the provisions of clause 18 of the original Deed of Lease in the event of a renewal or extension thereof. However, counsel submitted that if it were the intention of the parties to include the option clause in the renewal agreement it would have been necessary for them to state so expressly. I do not agree. The words 'all the terms and conditions of the existing Deed of Lease . . . shall continue and operate' already included clause 18 and the only way to have avoided the wide import of the words would have been to qualify them as was done in respect of the increased monthly rental to be paid. In order therefore to determine what the intention of the parties was the original Deed of Lease cannot be of assistance because what the parties intended when they renewed the Deed of Lease is only determinable from their renewal contract. That is the instrument which must be interpreted. It seems to me that the court *a quo* and counsel for the respondent erred when they answered this question by only interpreting the provisions of the original Deed of Lease. For the reasons set out herein before this argument must be rejected.

[57] The second submission by counsel concerns the lapse of the lease agreement during the period 1 August 2008 and when the renewal agreement was signed on 26

January 2009. It was submitted that clause 18.1 lapsed on the 31 July 2008 and could therefore not be renewed by a renewal agreement, concluded only in January 2009. In *Webb's*-case, *supra,* a similar argument was presented. In that matter the lease agreement lapsed on the 31 August 1941 and the renewal agreement was only concluded in January 1942. The court, at p 104, rejected this argument and stated as follows:

> 'I am willing to assume that pending the renewal the options had ceased to exist during the interval mentioned; but, even if that was so, there was no reason why they should not be revived by the renewal agreement which, according to my construction of it purported to revive the options, as well as the tenancy, retrospectively, as from 1 September 1941.'

[58] Also in this instance the renewal agreement stated that the existing lease is renewed from 1 August 2008 (and not the 26 January 2009) till 31 July 2010 so that the renewal agreement revived all the terms retrospectively, including the option clause, from 1 August 2008.

[59] Because of the conclusion to which I have come on this issue it is not necessary to deal with Mr Tötemeyer's alternative argument that the option clause was by implication revived when the renewal agreement was concluded.

[60] The second issue to be decided is whether there was a proper and valid exercise of the option by the appellant. This question depends on the correspondence which was exchanged between the parties. The sequence of events, as reflected in

the correspondence between the parties, started with the letter dated 18 August 2009 in which the appellant applied to the respondent for a loan of N$15 million to enable it to acquire the property and plant situated at Witvlei. This letter also contained a proposal to repay the loan over a period of 10 years at a monthly sum of N$178 052,66 and at a rate of 7.5% calculated at $^{1}/_{12}$ of the annual interest rate on the remaining principal amount.

[61] According to the minutes of a meeting of respondent's Board on 28 January 2010, the following resolution was tabled, namely-

> 'The Board has agreed to sell the Abattoir to Witvlei Meat (Pty) Ltd for an amount of N$15 million at the interest rate of 8.5% over a period of 10 years. The interest rate, as will all other interest rates, can be varied depending on the movement of the interest rates. Witvlei Meat (Pty) Ltd should pay the transfer duty and costs and they should make monthly payments of N$175 000.00. The monthly payment amount should be verified by the Credit Department and management should meet with Witvlei Meat (Pty) Ltd to sort out the modalities. This decision of the Board is subject to the approval by the Minister of Finance and the Minister of Agriculture, Water and Forestry.'

[62] Following this resolution by the respondent a letter was addressed to the appellant in which the following three conditions were set out for discussion between the parties namely -

'1. You can buy the Abattoir for the price of N$15 million at an interest rate of 8.5% over a period of 10 years. As with all other loans, the interest rate can be varied depending on the movement of interest rates;

2. The Bank will finance the purchase of the Abattoir against registration of a bond over the property; and

3. The loan must be repaid over 10 years in equal monthly instalments and the transfer costs and bond fees are to be paid by the purchaser and will not be part of the loan.'

[63] The letter further informed the appellant that the proposal by the Board was subject to the approval of the Ministers. The appellant was further informed that such approval had been sought.

[64] By letter of 26 February 2010 the appellant replied as follows to the above letter by the respondent, namely:

> **'RE: PURCHASE OF WITVLEI PLANT**
>
> Dear Mr L. Iipumbu,
>
> Witvlei hereby confirms to exercise it *(sic)* right to acquire the plant subject to conditions between the Agribank and Witvlei as per the letter dated 19 February 2010. Witvlei will communicate in due course when to engage the Bank with its own funding arrangements or to opt for the funding proposal from the Agribank of Namibia.
> We trust that this transaction can be finalise *(sic)* in due course.'

The letter was signed by S W Martin the executive chairman of the appellant.

[65] On the 19 May 2010, the appellant wrote to the respondent in the following terms:

> **'RE: APPLICATION FOR THE ACQUISITION OF THE WITVLEI PLANT**
>
> Dear Ambassador Leonard N. Iipumbu
>
> We hereby kindly request your good office to arrange for a meeting with the Honourable Minister of Finance and Honourable Minister of Agriculture in respect to our application exercising our right in terms of the lease agreement to purchase the Witvlei Plant.
>
> We have entered into a binding agreement with the Agricultural Bank of Namibia for the lease of the said plant with the exclusive option to purchase the plant for the amount of N$ 15 million as per the lease agreement dated 1 August 2006.
>
> The lease agreement has been extended until 31 July 2010 however "*all the terms and conditions of the existing Deed of Lease dated 1 August 2006 shall continue and operate during the said further period of the renewal"* which is now coming to an end 31 July 2010.
>
> Our application to purchase was not based on a valuation to be done on the property to determine a selling price. The selling price has already been agreed between the Agricultural Bank of Namibia and ourselves in terms of the lease agreement.
>
> Our application was based on financing of the plant through the Agricultural Bank of Namibia based on its terms and conditions and as per your letter dated 19 February 2010 and feedback for the condition of funding was sought from the relevant Ministry.
>
> We now note that there appears to be a diversion that the selling price is subjected to a valuation.

> The question to be answered is who has to pay for the value that has been created. Any valuation will have a substantial value that has been created by Witvlei Meat (Pty) Ltd.
>
> We regard this approach unacceptable as substantial investments were made by the shareholders at own risk to bring the plant to the standard where it is today.
> This diversion is jeopardizing the provisional N$23 million loan for the purchase and expansion of the plant we have obtained from Norfund and which is subjected to ownership of the plant to be transferred to Witvlei Meat (Pty) Ltd.
>
> We herewith call on your good office to inform the relevant Ministry that they must inform us to whether the Agribank is going to fund Witvlei as per the conditions requested or not. Norfund has indicated that they will not compete with the Agribank if the latter is going to fund the purchase.
>
> If the answer is in the affirmative for Agribank not to fund then Witvlei will then arrange for the payment of the N$15 million on or before the 31 July 2010 to the Agricultural Bank.'

The letter was again signed by S W Martin.

[66] The last letter which is relevant to the present issue was from the respondent to the appellant dated 10 June 2010. It stated as follows:

> 'Dear Sir
>
> **RE: SALE OF WITVLEI ABATTOIR TO WITVLEI MEAT (PTY) LTD**
>
> We refer to the above matter and your letters dated 19 May 2010 and 08 June 2010.

> We have noticed that in your two previous letters you are stating that you have the exclusive right to purchase the Abattoir. In terms of Clause 18.1 of the Lease Agreement you had the option to purchase the Abattoir within the first two years of the initial Lease Agreement which option Witvlei Meat (Pty) Ltd did not exercise within the required period. This option has expired and was not carried over into the Renewal Agreement because it was time bound. Witvlei Meat (Pty) Ltd now has the right of pre-emption in terms of Clause 18.2 and this cannot be interpreted as an exclusive right to purchase.'

[67] Before dealing with the correspondence between the parties I must correct two misconceptions under which the respondent, and unfortunately also the court *a quo,* laboured. The first concerns the allegation by Mr Iipumbu that the respondent was under a statutory obligation to obtain the approval of the Ministers. This claim was repeatedly made in the affidavits of the respondent. This attitude of the respondent was also reflected in their letter of 19 February 2009 wherein they *informed* the appellant that their offer was subject to this approval. If this was a correct statement of the law then *cadit quaestio* that would have been the end of this matter.

[68] The respondent was established by Act, 5 of 2003 with a Board of Directors (s 7) and a chief executive officer (s 16). In s 6(1)*(b)* the respondent's powers to sell, buy and let property were set out. Nowhere in the Act was the exercise of these powers made subject to the approval of the above Ministers or any other instance. Mr Bokaba could also not refer us to any provision in the Act, or anywhere else, where these powers were made subject to such approval. The best counsel could do was to refer the court to the case of *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 NR 781 (SC) which dealt with the overall

duty of Cabinet to direct, co-ordinate and supervise the activities of parastatals according to the provisions of Art 40 of the Constitution. In the present instance the respondent was specifically given the power to sell its assets by an Act of Parliament and it seems to me that only Parliament could do away with those powers. In the *Petroneft* matter this was not the issue and the case is distinguishable. Such notification, requiring the approval by the two Ministers, did not form part of the option agreement, and as the appellant was unaware thereof, it follows that the respondent could not impose such a qualification unilaterally. If the respondent wanted such approval to be binding it should have included it as a term of the option agreement. This was not done. (See *Legator McKenna Inc and Another v Shea and Others* 2010 SA (1) 35 (SCA) at p 42, para 16.)

[69] The second misconception was that the appellant accepted the notification that the offer was subject to the approval of the Ministers. As far as the sale of the property was concerned the respondent's proposal contained three conditions. Because of the respondent's misconception in regard to the approval by the Ministers it merely informed the appellant that the sale was subject to their approval. As far as the respondent was concerned this issue was not open for negotiation as it believed that it was legally obliged to obtain such approval. In its letter of 26 February 2010 the respondent confirmed to exercise its right to acquire the property subject to the conditions per the respondent's letter dated 19 February 2010. However, in correspondence following upon this letter the appellant denied that the respondent had the right to change the terms of the option unilaterally by adding a rider that the

proposal required the approval of the Ministers. In para 23 of its founding affidavit the respondent confirmed, in my view, that the conditions to which it had referred were only those paras numbered 1, 2 and 3 set out in its letter of 19 February 2009. These were the only conditions conveyed to the appellant for consideration. This clearly did not include the rider concerning approval by the Ministers. (See para 24 which dealt separately with this issue.)

[70] The *essensialia* of a contract of sale are identification of the seller and the purchaser, identification of the *merx,* and the price at which the property was sold. (See *Meyer v Kirner* 1974 (4) SA 90 (N) at p 97 to 98 and the cases there referred to, and *Johnston v Leal* 1980 (3) SA 927 (A).) However, in order to comply with the formalities set out in s 1(1) of the Formalities in respect of the Land Act 71 of 1969, the cases have laid down that all material terms of such contract had also to be in writing and signed by the parties or their agents acting on their written authority. It is also trite that the terms of the contract need not be contained in one document but can consist of various documents, such as letters, provided that the provisions of the Act had been complied with. (See *Meyer v Kirner, supra,* p 97D-F and *Johnston v Leal,* at p 937E–H.)

[71] Generally speaking once the court had come to the conclusion that the option clause had been part of the renewal agreement the payment of the purchase price had to be in accordance with the agreement of the parties, namely the option. The option agreement did not require the appellant to obtain funding from the respondent

and how the appellant would arrange its funding was entirely a matter which was left into the hands of the appellant. (See *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A) at 244B-G and *Wacks v Goldman* 1965 (4) SA 386 (W) at p 388 to 389.) Where an agreement is silent as to when payment should be made, as is the case in this instance, our law requires that payment be made simultaneously (*pari passu*) with the transfer of the property. (See *Venter v Liebenberg* 1954 (3) SA 333 (T) at 339A and *Herselman v Orpen en 'n Ander* 1989 (4) SA 1000 (T) at p 1005 to 1006.)

This is usually done by means of a guarantee of the purchase price by the purchaser who must perform once he or she is called upon to do so. Where the option granted did not provide for a date of transfer of the property, once the option had been exercised, transfer must take place within a reasonable time. (See *Visagie v Gerryts en 'n Ander* 2000 (3) SA 670 (C) at 676C.)

[72] Clause 18.1 granted an option to the lessee to purchase the leased premises. The leased premises is properly identified in the Deed of Lease as Portion 38 of the Farm Okatjirure No 155 in the Village of Witvlei (Registration Division 'L'). The parties were identified as the Agricultural Bank of Namibia, being the owner/lessor of the property and Witvlei Meat (Pty) Ltd, the lessee. Furthermore the purchase price was determined to be N$15 000 000. Respondent did not at any stage argue that any uncertainty or ambiguity pertained to these formal essentials which had to form part of a sales agreement.

[73] Apart from the fact that the exercise of the option had to be in writing and signed, clause 18.1 did not prescribe any other formal requirements so that an intimation in writing that the appellant exercises the option would, in my opinion, suffice to bring about a valid exercise of the option and would bind the parties. (See *Amcoal Collieries Ltd v Truter* 1990 (1) SA 1 (A) at 4D.)

[74] The fact that the respondent, as the owner of the property, was a possible source to finance the purchase by the appellant was a coincidence, and it did not change the position of the appellant to obtain funding elsewhere on terms which were more favourable than those which the respondent was offering unless the appellant had accepted this offer set out in respondent's letter of 19 February 2010.

[75] Furthermore this being a contract of sale of immovable property the manner of the repayment of the loan, and the terms thereof, became material terms of the contract of sale which had to be in writing and should be clear in order that acceptance thereof by the appellant constituted a contract. See Kerr: *The Principles of the Law of Contract,* 5 ed p150 where the learned author stated:

> 'Further, a statement concerning the manner of payment of the purchase price is not essential to the existence of a sale of movables but if the parties to a sale of land agree on a provision other than the residual one concerning the manner of payment it must be reduced to writing.'

[76] In this regard Mr Tötemeyer submitted that the appellant's letter of 26 February 2010 in regard to the issue of funding was merely a request to elicit a response from the respondent in regard to its funding proposal and did not affect the unequivocal exercise of the option. (See *JRM Furniture Holdings v Cowlin* 1983 (4) SA 541 (W) and *Seagulls Cry CC v Council for the Municipality of Swakopmund* 2009 (2) NR 769 (HC) para 36.) Although I agree with counsel, for reasons that will follow, that the exercise of the option was not affected by the appellant's non-acceptance of the terms of the funding, I do not agree that this letter was merely a request, which, if rejected by the respondent would still result in a binding agreement. If that were so then there was no basis for the appellant to still leave himself with a choice whether to accept funding from the respondent or to arrange funding elsewhere. This was not an instance where the offeree 'makes some simultaneous "request", but it must appear that . . . the offeree has assented to the offer, even though the offeror shall refuse the request'. (*JRM Furniture Holdings* case at 544G.) The 'request' was conditional on the respondent accepting the appellant's terms as set out in its letter of 18 December 2009. If those terms were not accepted by the respondent the appellant left itself the choice to find funding elsewhere. That was also made clear in the appellant's letter of 19 May 2010.

[77] I agree with the learned judge *a quo* that the mode of payment of the purchase price was a material term and that in this instance, where the sale concerned landed property, it also had to be in writing and signed by the parties or their agents on their

written authority. This did not happen. It follows therefore that the issue of funding by the respondent did not materialise into a binding agreement.

[78] The fact that the parties could not agree as to the mode of funding did, in my opinion, not affect the exercise of the option by the appellant in its letter of 26 February 2010 read with the letter of 19 May 2009. The appellant did not in any way in the said letter make the exercise of the option conditional on acceptance of its proposal in regard to the funding. The option is a separate issue which stands on its own and on its own the exercise thereof brought about a binding agreement between the parties. I refer to the principles set out herein before where the common law steps into the breach where parties had not agreed to the mode and time of payment it lays down that the sale is for payment *pari passu* with the registration of transfer of the property which had to be within a reasonable time. Once the agreement of the funding by the respondent did not materialise it follows in my opinion that the parties could still perform in terms of their option agreement. For his part the appellant offered to do so in the letter of 19 May 2010.

[79] Although the appellant exercised the option 'subject to conditions between Agribank and Witvlei as per the letter dated 19 January 2010', a further reading of the letter showed that the appellant still reserved for itself the right to choose funding from a source other than Agribank. This reservation had the result that no agreement was reached in regard to the funding of the purchase price by the respondent. I agree with the court *a quo* that, as far as the issue of funding was concerned, the letter of 19

February was a counter proposal and did not result into an acceptance of funding by the respondent.

[80] The court *a quo* found that because the appellant made a counter offer the exercise of the option was not unequivocal and therefore the exercise of the option did not result into a binding agreement of purchase and sale. The counter offer only pertains to the issue of funding by the respondent. I agree that the letter was clumsily worded and if there was any doubt or uncertainty left that was in my view cleared up by the letter of 19 May 2010 when the appellant offered to pay the purchase price of N$15 million against transfer of the property into its name.

[81] This was rejected by the respondent based on its attitude that the option clause had not been renewed and by concluding that it was statutorily obliged to obtain the approval of the two Ministers before it could alienate the property. I have found that both these conclusions were wrong. This also takes care of Mr Bokaba's arguments based on these issues. Mr Bokaba's argument concerning these issues is self-destructing. On the one hand he argued that the appellant had accepted the conditions set out by the respondent in its letter of 19 February 2010. On the other hand he argued that the appellant made a counter offer in its letter of 26 February 2010, which was not accepted by the respondent and consequently there was no valid exercise of the option. The two issues, namely the option, and the exercise thereof, and the funding, are separate and should be dealt with as such.

[82] The question remains whether under these circumstances the court should still order the appellants to vacate the premises bearing in mind that their lease contract had come to an end and that they are, as yet, not the registered owners of the property. With reference to the case of *Du Plessis N.O. and Another v Goldco Motor and Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA), Mr Tötemeyer submitted that it was the conduct of the respondent which resulted in frustrating to give effect to the valid exercise of the option and the resultant agreement of sale which came into being. Counsel submitted that but for this conduct of the respondent the exercise of the option would have resulted in permanently securing the appellant's right of possession. Counsel further submitted that where there was a deliberate frustration of contractual performance the doctrine of fictional fulfilment of conditions comes into play and should be applied in the circumstances of this case.

[83] Mr Bokaba, on the other hand, submitted that it was never the case of the appellant, as made out in the affidavits, to rely on the doctrine of fictional fulfilment of the contract or frustration of the contract. Counsel submitted that as a result thereof it was impermissible for the appellant to do so at this late stage.

[84] Because of the conclusion to which I have come I need not decide whether this is an appropriate instance to apply the doctrine of fictional fulfilment. I agree with Mr Tötemeyer that in the event that after the exercise of the option the transfer of the property could not be completed before the period of lease came to an end that it was an implied term of the original lease agreement, and the renewal thereof, that the

appellant would remain in possession of the property until transfer was given. I am satisfied that at the time when these agreements were concluded, and if the parties had been asked by the hypothetical bystander what would happen if transfer of the property would only be finalised after the lease had come to an end that both parties would have said ‘it’s obvious; of course the appellant must remain in occupation till transfer took place’. (See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 525C and 533B and *Delfs v Kuehne & Nagel (Pty) Ltd* 1990 (1) SA 822 (A) at 827G.)

[85] I say so for the reason that the appellant, if it had to vacate the premises for any period of time, might have had to again make renovations and would have had again to apply for EU approval. It would also, according to the evidence, have to fulfil contracts with clients, which could not happen if it had to vacate the premises at any time. It also demonstrates its attitude that it was entitled to remain in occupation of the premises, by its refusal to vacate the property.

[86] The respondent was willing to offer the appellant an extension of the lease after the lapse thereof by effluxion of time. It further had the benefit of receiving the monthly rental for as long as it would take to complete the transfer of the property to the appellant. The Board of the respondent, acting reasonably, would have known that any interruption of the appellant’s business, as an abattoir with overseas contracts, could spell disaster for the business and would have acted in a way to avoid such a situation arising.

[87] In this instance, and as I have already found, the option contains all the essentials required for a sale of the immovable property so that the valid exercise thereof constituted the agreement of the parties.

[88] It follows therefore that I am of the opinion that the appeal must succeed.

[89] In the result the following order is made:

1. (a) The application for condonation is allowed and it is ordered that the appeal be re-instated.

   (b) The applicant is ordered to pay the costs of the application which will include the costs of one instructing counsel and two instructed counsel.

2. The appeal succeeds with costs, such costs to include the costs of one instructing counsel and two instructed counsel.

3. The order of the court *a quo* is set aside and the following order is substituted therefore:

‘The application is dismissed with costs including the costs of one instructing and one instructed counsel’.

_____

STRYDOM AJA

_____

MAINGA JA

_____

CHOMBA AJA

APPEARANCES

APPELLANT:	Mr R Tötemeyer (with him Mr A W Corbett)
	Instructed by H D Bossau & Co
RESPONDENT:	Mr T J B Bokaba SC
	(with him Mr S Namandje)
	Instructed by Sisa Namandje & Co Inc