IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 388/2013

In the matter between:

SWAZILAND NATIONAL TRUST COMMISSION **Applicant**

And

HAWANE VILLAGE (PTY) LTD **Respondent**

Neutral citation: ***Swaziland National Trust Commission v Hawane Village (Pty) Ltd (388/2013) [2013] SZHC 78 (3rd May, 2013)***

Coram: **M. Dlamini J.**

Heard: **26th March 2013**

Delivered: **3rd May, 2013**

– interpretation of a contractual document – whether contract of lease or joint venture – principles guiding interpretation of a contract - wording to be assigned daily meaning – intention of parties to be determined from wording – lessor's subsequent acceptance of rentals does not per se amount to renewal of lease - right of retention - when applicable -

Summary: The applicant by motion proceedings under a certificate of urgency prays for an order of ejectment on the ground that the lease agreement between applicant and respondent has expired. The respondent on the other hand contest applicant's application on the basis that the agreement concluded between themselves was not a lease agreement but a joint venture.

[1] This court is urged by both parties to interpret the contractual document on whether it was a lease or a contract of joint business venture.

[2] The parties herein entered into a written contract on 25th July 2007. The applicant is a body corporate by virtue of its parastatal status, while the respondent a company *strict sensu*.

[3] The applicant relies on a number of clauses for its assertion that the contract entered into was a lease agreement.

[4] At applicant's paragraph 7.1 to 8 of the founding affidavit it reads:

> "*7.1 The S. N. T.C. hereby leases the land, improvements and operational assets to the operator to enable it to give effect to the appointment described in clause 5.1;*
>
> *7.2 This lease shall commence on the commencement date and terminate on the fifth annual anniversary of that date, unless extended or terminated for any other lawful or mutual agreed reason prior to that date.*
>
> *7.3 The lessee shall for each year of this lease pay to the S.N.T.C. the turnover rent.*

8. The commencement date in terms of the agreement clause 2.2.2. is the 1st August 2007 and the fifth annual anniversary was on the 30th July 2012."

[5] It is applicant's contention that before the lease agreement expired, it duly notified the respondent of its intention not to renew the lease agreement. It subsequently called upon respondent by correspondence to vacate the premises and further invited it to the table for negotiations, on an "*orderly termination*". Although respondent through its legal representative informed applicant that it was prepared to meet applicant on a fixed date, respondent never pitched up on that suggested date. Another date was arranged. Again the respondents did not show up. Applicant called upon respondent to vacate the premises but extended further invitation to negotiate a termination. In answer to the invitation to negotiate a termination, responded stated that it was never respondent's intention not to attend the said meeting.

[6] I must mention at this juncture that when the matter came before me on the 26th March 2013, on the basis that both parties were willing to negotiate a termination, I granted the parties an opportunity to fix another date for negotiations. I then postponed the matter pending this said meeting. However, on the return date both parties reported a deadlock.

[7] Respondent declined to vacate the premises. In its answering affidavit respondent raises a *point in limine* on the basis that the matter is not urgent.

[8] It further contests as follows at paragraph 5.2.:

"*5.2 In the first instance, the applicant relies on a lease agreement as the basis of the relationship between the parties however, that is not factually correct. The lease agreement is but one part of a comprehensive document termed "Malolotja Nature Reserve Joint Management Agreement ("The Agreement")" which encompasses not only a lease agreement, but a joint venture relationship between the parties which, on the Respondent's version is in existence and has not been, terminated."*

[9] Respondent further avers at paragraphs 5.3 and 5.4:

"*5.3 Furthermore, the Respondent contends that there is a process set out in the agreement as to how the parties' relationship is to be brought to an end in terms of Chapter 5 of the Agreement at page 27 thereof. Clause 26 mechanism set out in clause 26 is how the Respondent should exit the relationship. Full legal argument will be presented at the hearing of this application.*

5.4 It will become more apparent during the course of this affidavit that there are material dispute of facts which cannot be resolved on affidavit and as such, this application should have been launched by way of action proceedings. Consequently, the application stands to be dismissed on that basis."

[10] Respondent raises two grounds as *point in limine*. The averments at paragraphs 5.2 and 5.3 are part of the merits. The two grounds on point of law are that the matter is not urgent or rather applicant has failed to establish urgency and that this matter could be properly decided on action proceedings as it is attended by dispute of facts.

[11] On the first *point in limine* that the matter is not urgent, I draw analogy from the case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal No.23/2006** where their Lordships considered as factors influencing the question of urgency that the subject-matter was a business premises where reputation and intellectual property could be affected were action proceedings to be instituted.

[12] It is of judicial notice that in our courts action proceedings could sometimes take not less than two years before enrolment. It is common cause between the parties hereof that the subject matter is one involving business premises and as in **Shell Oil** case *supra*, that a delay in prosecution of the matter may prejudice appellant in his reputation and intellectual property resulting to financial loss. It is therefore my considered view that *prima facie* this matter is urgent by its nature.

[13] I am further persuaded by the *dictum* of **Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 18 SZSC** where it was held that matters should be disposed off on merits not on technicalities.

[14] The next question is whether the present application is invariably infested with material disputes of facts so as to render it impossible to be determined on affidavits.

[15] Rule 6 (17) reads:

> "*Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.*"

[16] This rule calls for the court to exercise its discretion. This discretion should be exercised judiciously. Laying the guidelines on how to determine whether there exist a material dispute, their Lordships in **Nokuthula N. Dlamini v Goodwill Tsela (11/2012) [2012] 18 SZSC** at page 17 held:

> "*The established and trite judicial practice which now determines the approach of the Courts world wide, to be found in a long line of cases across jurisdiction, is that a court cannot decide an application on the basis of opposing affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issue to be determined are not in dispute, the application can properly be determined on the affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The Court has a duty to carefully scrutinise the nature of the dispute with microscopic lense to find out –*
>
> *(i) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way, that the determination of such issue is dependent on or influenced by it.*
>
> *(ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the affidavits.*
>
> *(iii) If the dispute of a material fact is of such a nature that even if not resolved does not prevent a determination of the application on the affidavits.*

(iv) If the dispute as to a material fact is a genuine or real dispute.

[17] Their Lordships continue at pages 18 to 19, paragraph 30 to point out as follows:

> "*A fact is material or relevant where the determination of a claim is dependent on or influenced fundamentally by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on affidavits. If the conflict or dispute is not on a material fact, the application can be decided on the affidavits. If the dispute or conflict is on a material fact but the dispute is of such a nature that it is reconcilable or resolve on the affidavits, then the application can be decided on the affidavits. If the dispute on a material fact is of such a nature that it cannot prevent the proper determination of the application on the affidavits, then the court will decide the application on the affidavits. If the dispute on a material fact is not genuine or real, then the application can be determined on the affidavit. This can arise where the denial of fact is vague, evasive or barren or made in bad faith to abuse the process of court and vex or oppress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the affidavits or to instigate a dismissal of the application or cause a trial oral or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the applicant is a gross abuse of process. We cannot close our eyes to the high incidence of abuse of court processes. Parties often times do not show readiness to admit liability even when it is obvious that they have no defence to an application or claim. Such a party, if he or she is a defendant or respondent, tries to foist on the plaintiff or applicant and the court a wasteful trial process or*

dismissal of the application through frivolous denials. The objective or Rule 6 is to avoid a full trial when there is no basis for it and avoid delayed and protracted trials in such cases. It is the duty of a Court to ensure that a law meant to facilitate quicker access to justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims."

[18] In light of the above *ratio decidendi* and having highlighted the issue herein *viz.* interpretation of annexure "**RM1**" filed by respondent, and the totality of the pleadings hereof, it is my considered view that there are no material or relevant and real disputes of facts in *casu* to warrant the court to refer the matter to trial, nor has respondent pointed out specific areas which turn out to be disputed facts.

[19] On the merits respondent answers as follows at paragraph 10.4 – 10.6:

"*10.4 The agreement is a complex document which provides at clause 3.6 thereof for the following:*

10.4.1 [An] initial agreement commencing on 1st August 2007 and terminating on the 31st March 2008, the provisions of which are set out primarily but not exclusively in chapter two of the agreement.

10.4.2 An undertaking by the parties in accordance with the provisions of the agreement to cause a private company to be incorporated under the laws of Swaziland for the purposes set out in Chapter 3 of the agreement and to course that the company to become a party to the

agreement so as to implement the applicable provisions of the agreement as set out in chapter 3, and

10.4.3 The conclusion of a lease agreement referred to in Chapter 4 of the agreement;

10.4.4 The final allocation of shares in the company to a bidder identified as a competent operator as provided in Chapter 5.

10.5 The agreement was borne out of the applicant's need to formulate a private/public partnership in line with the Governments Privitasation Policies, which would set up a company in the name of Malolotja Nature Reserve Development Company (Pty) Limited ("the company") whose main object would be to manage and operate the Malolotja Reserve in accordance with the provisions of the turnaround strategies, the business plan and the provisions of the agreement as more fully described in clause 13 of the Agreement . In that regard, I refer this Honourable Court to paragraphs 3 and 11.4 of the Agreement.

10.6 The agreement envisaged establishment of the company and ultimately the sale of the Respondent's shares and loan account to a bidder on a tender basis in terms of clause 26. The Applicant also retained the right to purchase the Respondent's shares therein. This goes to the sprit of the agreement and underlines the fact that this was not just a simple lease."

[20] At paragraph 10.8 respondent pleads:

"*10.8 To that end, clause 6 of the Agreement provided for a joint management forum ("RJMF") which was established and of which representatives of the Applicant and the Respondent set to execute the provisions of the Agreement, the turnaround strategy and the business plan contained in the agreement. That forum was put into effect and held regular meetings as more fully appears from an extract of one of the minutes of the meeting which took place on the 17th of June 2009 which is annexed hereto marked "L.C.2"."*

[21] Respondent concludes on the status of the document:

"10.9 I dispute therefore that the Agreement was simply a lease agreement as the Applicant would wish for the Court to believe."

[22] Respondent in its answering affidavit further demonstrates that there were certain obligations and rights flowing from the entire document which were in some instances discharged or benefited as the case may be, at the instance of both parties. Respondent further spells out the material terms of the agreement which again sets out the duties and responsibilities of each party.

[23] **C. G. Hall, Maasdorp's Institutes of South African Law, Vol. III 8th Ed**. at page 26 writing on the golden rules of interpretation of contract points as follows:

"To put an interpretation on a document means to ascertain or determine the meaning of the particular words used, the grammatical construction of the sentences, and the facts or external objects to which the words of the document relate, thus arriving at the sense of the whole document. The rule of interpretation is to ascertain, not what the parties' intention was,

but what the language used in the contract means, i.e. what was their intention as expressed in the contract. The intention must be gathered from the language they used, not from what either of the parties may merely have had in mind."

[24] Applying this principle, **Solomon J**. in **Pletsen v Henning 1973 AD 82** at 99 held:

"*The intention of the parties must be gathered from their language, not from what either of them may have had in mind*."

[25] **Lord Elden** in **Saambou Nationale Bouvereniging v Fredman 1979 (3) S.A. 994** is recorded to have protested:

"*his task was not to see that both parties really meant the same thing, but that both gave their assent to that proposition which, be it what it may, de facto, arises out of the terms of their correspondences."*

[26] In the same case **Saambou** *supra,* **Brian C. J**. stating the *rationale* for the interpretation of agreements in the manner mentioned above, proclaimed as follows:

"*that the intent of a man cannot be tried, for the devil himself knows not the intent of a man."*

[27] It is against the above backdrop therefore that I intend to interpret the agreement before me as annexed by respondent and marked annexure "**RM1**" hereinafter referred to as "*the agreement*".

[27] Applicant has asserted that the agreement is two fold *viz*. lease agreement and joint business venture agreement. Applicant submits that the first part of the agreement being the contract of lease, has terminated by virtue of lapse of time. The second portion as an agreement was subject to a condition.

[29] **Harms**, **Amler's Precedents of Pleadings, 4th Ed**. at page 187 reveals three requisites of a contract of lease. These are:

> "*(a) an undertaking by the lessor to deliver a thing to the lessee;*
> *(b) an agreement between the parties that the lessee have temporary use and enjoyment of the thing;*
> *and*
> *c) an undertaking by the lessee to pay rent.*"

[30] I now turn to the agreement to ascertain whether the above essentials are present.

[31] The agreement reads at clause 16:

> *"LEASE*
>
> *16.1 Subject to the requirements of the Land Control Board, if any, the SNTC hereby leases the land, improvements and operational assets to the Operator to enable it to give effect to the appointment described in clause 5.1, subject to and in accordance with the provisions of this Chapter 4, but without limiting the effect of the other clauses of this agreement.*
>
> *16.2 This lease shall, during the period of the initial agreement, be subject to the right of the SNTC, freely and without let or*

hindrance to enter and be on the land and to occupy and use any improvements on the land in order to enable it to execute its obligations under and in terms of this agreement, which right shall be exercised by the SNTC subject to the supervision of the RJMF.

16.3 The Operator hereby agrees and undertakes, on the effective date, and provided that the company is incorporated on that date, to assign its rights and obligations under this lease to the company, and upon such assignment, the rights and obligations of the operator under this lease shall be terminated.

16.3.1 The parties agree and undertake to cause the company to accept assignment of this lease as contemplated in clause 16.3.

16.4 When ever reference in this lease is made to a lessee, it shall, during the period of the initial agreement, mean the Operator, and, from the effective date as defined in clause 12.1.6. to the date of the termination of the lease, it shall mean the company.

17 DURATION

17.1 This lease shall commence on the commencement date and terminate on the fifth annual anniversary of that date, unless extended or terminate for any other lawful or mutually agreed reason prior to that date.

18 RENT

18.2 The lessee shall for each year of this lease pay to the SNTC the turnover rent, which amount shall be pain in the following manner:

18.2.1 The lessee and the SNTC shall at the commencement of each year of the lease estimate the expected turnover for that year, based on the budgets required to be prepared by the RJMF and the company in terms of this agreement, adjusted to the year applicable, and shall calculate the estimated turnover rental based on such budgeted turnover.

18.2.1 The turnover rental shall be paid in the following manner:

a) the amount of the turnover rental payable for the first month of any year of the lease shall be calculated on the twelfth of the expected turnover calculated in terms of clause 18.2.1.

b) the amount of the turnover rental for each succeeding month of any year of the lease shall be calculated on the actual turnover recorded in the books of the company for the immediate preceding month."

[32] From the above it is clear that the three elements as stated by the learned author **Harms** *supra wit., delivery of a thing; enjoyment for a while, payment of rentals*, are all present in *casu.* It can safely be concluded therefore that the parties herein did enter into a lease agreement.

[33] It would appear that the position that the parties herein did conclude a lease agreement is not in issue *per se.* This is evident as respondent later avers at paragraph 18.3.3:

> "*The rental for the year 2013 is being paid in accordance with clause 18. The Respondent contends therefore that the lease agreement has been renewed for a further calendar year…"*

[34] At paragraph 10.7 respondent had pointed:

> *"10.7 The agreement therefore was not simply a lease agreement but it was much more than that. It is a comprehensive document which provided for the joint management by the Respondent as shareholder/operator and Applicant as shareholder/owner of the Malolotja Nature Reserve."*

[35] It is not disputed by either party that the agreement consist of more than one type of a contract. Both parties refer to the second contract as joint business venture. What remains for determination is the operative date. Did this contract (joint venture) commence on the date of signing the contract or was it meant to operate on a future date depended on an uncertain event, as it were?

[36] Our common law recognizes that a contract may be conditional upon the happening or not happening of some future and uncertain event. There are two types of conditions in our contracts *viz.* suspensive and resolutive. Defining suspensive condition, **Wessels** on the **Law of Contract in South Africa, 2nd Ed.** at page 399 states:

> "*A contract is said to be subject to a suspensive condition if its operation depends upon a future and uncertain event. The legal effect of such a contract is suspended until such time as the event takes place.*"

[37] I am much alive to clause 27 which reflects:

> "*27 SEVERABILITY*
>
> *27.1 It is recorded that the provisions of this agreement are an integrated whole intended to achieve the objectives stated in clause 3 of this agreement and no part of this agreement may be severed from any other part of the agreement."*

[38] **J. De Villiers, J. P**. in **Provident Land Trust, Ltd. v Union Government (Minister of Mines) 1911 A. D. 615** was faced with the question of interpreting an agreement whether it had a suspensive condition as alleged at page 627 his Lordship stated:

> "*Now, **de Kok** expressly stipulated that on the day when the sum of Pounds 60 is paid in full, but not until then the company should view the said land as sold to him and that at that date a sale should be declared. If effect is to be given to this clause as it reads, there is only one construction to be placed on it, and that is that the contract, whatever its nature, was entered into under a suspensive condition (negotirum a*

conditione suspenditur). Such a contract cannot therefore be considered to be a concluded contract of sale until the event which suspends it coming into force has actually happened. This event is the payment of the full Pounds 60. As long as this amount has not been paid in full, there is no contract of sale. <u>This follows from the agreement of the parties which must be given effect to unless for some reason in the law or in the contract itself the court comes to the conclusion that effect should not be given to it.</u>" (my emphasis)

[39] The learned Judge proceeded:

"*Courts of law do not hesitate to strip transactions of disguise and reveal their true nature.*"

[40] He then concludes at page 628:

"Undoubtedly if there were all the elements of a present sale, the mere fact that parties purported to postpone the coming into operation of this contract to some future date would not prevent the court from declaring the prior date to be actual date of sale."

[41] In essence his Lordship stated that regard must be had to the total reading of the contract and the subsequent conduct of the parties.

[42] In making the determination hereof, I consider the authorities cited above. Does this agreement carry suspensive condition as submitted by the applicant or is it not disguised as per his Lordship **J. De Villiers** *supra*.

[43] Chapter 1 of the agreement deals with general matters such as identification of the parties to the agreement and interpretation clauses, the objectives of the agreement. Clause 3.2 reads:

> *"THE CONTEXT*
>
> *3.2 In compliance with the Government's Privatisation Policy and its Tourism Policy, the SNTC, AS A Category A Public Enterprise designated as such in the Public Enterprises (Control and Monitoring) Act No.8 of 1989, is required:*
>
> *3.2.1 to restructure itself to operate as a regulatory authority for nature and cultural heritage conservation in Swaziland;*
>
> *3.2.2 to operate all its reserves more commercially and to more fully utilize its assets , amongst other things, to generate revenues so as to reduce its dependency on future government subvention and to contribute more effectively towards the economic growth of the tourism sector in Swaziland; and*
>
> *3.2.3 to promote private sector participation in the management and development of the reserve."*

[44] More notably is clause 3.5 which reflects:

> *"3.5 In order to comply with the requirements recorded in clause 3.2.2, the SNTC (a*pplicant) *and the Operator (*respondent) *hereby enter into this agreement which provides a framework for the preparation of the reserve to enable it to be operated and managed as a commercial venture whilst at the same time achieving the core*

mandate of the SNTC set out in the SNTC Act.*"*(words in brackets my definition and underlined my emphasis)

[45] At the same time clause 3.3 reveals:

> *"3.3 It is recorded that the Government is currently engaged in the preparation of a Bill to be submitted to Parliament in order substantially to amend the SNTC Act so as to facilitate and promote the commercialization of the SNTC and its activities."*
>
> *3.3.1 The SNTC will endeavor to facilitate that Parliament will amend the SNTC Act as contemplated in clause 3.3 so as not to delay the performance of this agreement."*

[46] From clauses 3.5 and 3.3.1 it is clear that the parties appreciated that the SNTC Act needed amendments, thus the obligation upon applicant as per 3.3.1.

[47] Further, the reading of clause 3.3 informs us that a third party is currently attending to the amendment of the SNTC Act. It further demonstrates that the commercialization of the SNTC and its activities cannot be undertaken without first amending the applicant's Act.

[48] Now, having highlighted as reflected in clause 3.2 that the object of the agreement was to commercialize the SNTC and its activities, or as the words are correctly reflected at 3.5 was to turn the SNTC into "*commercial venture*" it is clear that such was dependent on Government or Parliament amending the SNTC Act.

[49] Respondent was intended to be a partner with SNTC in the "*commercial venture.*" All that Chapter 2 of the agreement does, is to set out in unambiguous terms the establishment of a joint management forum drawn from applicant and respondent representative, its functions and duties and the manner of discharging those functions. This is evidence from clause 6.1 and 6.1.1. Clause 6.3 fortifies this position further as it reads:

> "*6.3 The RJMF shall have the same role and function of a board of directors of a company incorporated under the Companies Act No.7 of 1912 vis-à-vis the parties, suitably adapted for the purposes of this agreement, and the parties shall give effect to every decision, directive and resolution of the RJMF made at any meeting of the RJMF and any failure to do so without good and sufficient cause shall constitute a dispute between the parties and be dealt with in accordance with clause 28.6."*

[50] In other words the members of the forum shall be the board of directors in respect of a company envisaged to be established. This company is fully provided for under Chapter 3.

[51] The object of the agreement is found in its preamble. In *casu*, the parties decided to employ the term "*The context*"

> "*3. THE CONTEXT*
>
> *3.1 The reserve has been managed and operated by SNTC since its inception.*
>
> *3.2 In compliance with the Government's Privatisation Policy and its Tourism Policy, the SNTC as a Category A Public Enterprise*

designated as such in the Public Enterprises (Control and Monitoring) Act No.8 of 1989, is required:

3.2.1 to restructure itself to operate as a regulatory authority for nature and cultural heritage conservation in Swaziland;

3.2.2 to operate all its reserves more commercially and to more fully utilize its assets , amongst other things, to generate revenues so as to reduce its dependency on future government subvention and to contribute more effectively towards the economic growth of the tourism sector in Swaziland; and

3.2.3 to promote private sector participation in the management and development of the reserve.

3.3 It is recorded that the Government is currently engaged in the preparation of a Bill to be submitted to Parliament in order substantially to amend the SNTC Act so as to facilitate and promote the commercialization of the SNTC and its activities.

3.3.1 The SNTC will endeavor to facilitate that Parliament will amend the SNTC Act as contemplated in clause 3.3 so as not to delay the performance of this agreement.

3.4 In order to implement the objective described in clause 3.2, the SNTC

3.4.1 has adopted the turnaround strategy to restructure the current conservation management and tourism operational activities of the reserve into more commercially viable

'stand-alone business unit' in order to convert the reserve to a 'Concession Opportunity' which may be marketed to the private sector at the conclusion of this agreement, and

3.4.2 in collaboration with the Operator, will adopt the business plan as provided for in clause 3.9.

3.5 In order to comply with the requirements recorded in clause 3.2.2, the SNTC and the Operator hereby enter into this agreement which provides a framework for the preparation of the reserve to enable it to be operated and managed as a commercial venture whilst at the same time achieving the core mandate of the SNTC set out in the SNTC Act.

3.6 This agreement consequently provides for the following:

3.6.1 The initial agreement commencing on the commencement date and terminating on the 31st March 2008, the provisions of which agreement are set out primarily but not exclusively in Chapter 2 of this agreement.

3.6.2 An undertaking by the Parties, in accordance with the provisions of this agreement, to cause a private company to be incorporated under the laws of Swaziland as contemplated, and for the purposes described, in Chapter 3 of this agreement, and to cause the company to become a part to this agreement so as to implement the applicable provisions of this agreement as primarily set out in Chapter 3, and

3.6.3 The conclusion of a lease referred to in Chapter 4 of this agreement.

3.6.4 The final allocation of shares in the company to a bidder identified as a competent operator as provided for in Chapter 5.

3.7 The turnaround strategy is contained in two documents, annexed hereto marked A and B, both dated 3August 2006 and entitled:

3.7.1 Final Turnaround Strategy: Conservation Management Plan, and

3.7.2 Final Turnaround Strategy: Tourism Operations.

3.8 The provisions of the two documents referred to in clause .37, in their original or amended, adjusted or varied form:

3.8.1 shall be deemed to be an integral part of this agreement, and

3.8.2 may be amended, adjusted and varied from time to time during the currency of this agreement by mutual agreement of the parties, provided that any such amendment, adjustment or variation shall be reduced to writing and shall be noted by the signature thereof by each party.

3.9 It is recorded that the business plan has, at the date of the commencement of this agreement, been prepared for adoption by the SNTC and the Operator and shall, upon adoption thereof by

the parties by their signatures thereto, be annexed to this agreement as Annexure C.

3.9.1 The purpose of the business plan shall be to implement and apply the provisions of the turnaround strategy in a businesslike , efficient and effective manner.

3.9.2 In addition to any other requirements incorporated into the business plan, it shall contain performance management and measurement indicators for the purpose and in accordance with the provisions of clause 7.

3.10 In the event of the business plan not being adopted by the parties within 30 days of the date of commencement of this agreement, then, in the sole discretion of the SNTC, it may:

3.10.1 from time to time extend the period of 30 days by such additional period as it may determine, or it may

3.10.2 at the end of the initial 30 days or at the end of any extended period, declare this agreement cancelled and to be of no force and effect, in which case, if the Operator shall have taken occupation of the land under the provisions of this agreement or any other agreement lawfully entitling the operator to so take occupation, the Operator shall vacate the land and restore possession thereof to the SNTC within 60 days of the ending of the particular period.

3.11 Upon adoption by the parties, the business plan in its original or amended, adjusted or varied form:

3.11.1 shall be deemed to be an integral part of this agreement,

3.11.2 shall be reviewed by the Parties at least annually in accordance with any requirements of the SNTC and its financial year for relevance and effectiveness in achieving the objectives of the turnaround strategy in the light of practical experience gained in the implementation of this agreement and the turnaround strategy, and

3.11.3 may be amended, adjusted and varied from time to time during the currency of this agreement by mutual agreement of the parties, provided that any such amendment, adjustment or variation shall be reduced to writing and its adoption shall be noted by the signature thereof by each party.

3.12 In the event of any Party requiring any amendment, adjustment or variation of the turnaround strategy or the business plan and being unable to obtain the consent of the other of them thereto as contemplated in clause 3.8.2 or 3.11.3, then such aggrieved party may in the first instance, refer the dispute to the RJMF for resolution and failing that, it may invoke the provisions of clause 28.6 to resolve such dispute.

3.13 The Operator records that at the commencement date, the register of members maintained by the Operator in terms of section 25 (1) of the Companies Act No.7 of 1912 reflects that Robin Roth and Lionel Chambers jointly hold the majority shares in the company.

3.13.1 The Operator warrants that no person or institution has any lien over the shares issued to any members of the

Operator recorded in the register of members maintained by the Operator in terms of section 25 (1) of the Companies Act as at the commencement date, nor have such shares been pledged to any person as security for any debt or other obligation.

3.13.2 The Operator undertakes to ensure that, during the currency of this agreement, it will procure that no such member shall permit any lien to be established over the shares issued to such members, and that no member shall pledge or otherwise encumber such shares as security for any debt or other obligations unless the written consent of the SNTC is first obtained which consent shall not be unreasonably withheld.

3.13.3 It is a condition of this agreement that, during the currency of this agreement, the Operator will not cause or permit any person other than the members of the Operator recorded in the register of members maintained by the Operator in terms of section 25 (1) of the Companies Act as the commencement date to acquire and / or hold a majority of the shares in and to the Operator unless the written consent of the SNTC is first obtained which consent shall not be unreasonably withheld.

3.13.4 The Operator acknowledges that the SNTC has appointed it in terms of clause 5.1 because of the skill and expertise of its members, and in particular of Robin Roth and Lionel Chambers, and that such skill and expertise is unreservedly available to the Operator to give effect to the obligations

imposed on the Operator under and in terms of this agreement.

3.14 The provisions of clauses 3.13 and its sub-clauses inclusive are material conditions which go to the root of this agreement, and a breach thereof shall be a material breach entitling the SNTC to forthwith terminate this agreement.

3.15 In the event any member of the Operator referred to in clause 3.13, or any other member entered in the aforementioned register with the consent of the SNTC, ceasing to be a member for any reason during the currency of this agreement, then the SNTC shall be entitled to review the provisions of this agreement and satisfy itself that the Operator has the skill and expertise to give effect to the obligations imposed on the Operator under and in terms of this agreement.

3.16. In the event of the SNTC forming the opinion that the Operator does not, under the circumstances referred to in clause 3.13.4, have the skill and expertise to give effect to the obligations imposed on the Operator under and in terms of this agreement, then it may declare a dispute and refer such dispute in accordance with clause 28.6."

[52] The holistic reading of this clause (3) reflects that the applicant was now acting in terms of the Public Enterprise (Control and Monitoring) Act No.8 of 1989 Section 10 (b) (c) or (d). In the words of the agreement it was stepping into "*commercial venture*".

[53] Clause 3.3 clearly spells out that in order for the SNTC (applicant) to become a "*commercial venture*" a legislation was to be in place. It can

further be deduced from clause 3.3 that the present Act regulating the functions of applicant lacked the necessary provision for the SNTC (applicant) to venture into commercial enterprise of the degree or level anticipated or intended by the parties herein. This amendments were to usher applicant into '*commercial venture'*. In other words both parties herein where at *consensus ad idem* that for the applicant and the respondent to carry out fully their obligations and benefit from the agreement lawfully, they needed the sanction of the legislature, a body outside the control of applicant.

[54] It is further clear that respondent was to be a partner into this '*commercial venture*' with applicant.

[55] Chapter 2 of the agreement as expected lays out the logistics of this joint venture. For instance, it establishes the offices (management, forum and board of directors) and outlines their functions and duties and the manner in which such would be given effect.

[56] This Chapter 2 commences with the wording at 4.1:

> "*For a period of the initial agreement, the Reserve shall be jointly managed in accordance with the provisions of this Chapter…."*

[57] In order to understand what this "*initial agreement*" is, reference is to be made to clause 3.6.1. which reads:

> "*3.6.1 The initial agreement commencing on the commencement date and terminating on the 31st March 2008, the provisions of which*

agreement are set out primarily but not exclusively in Chapter 2 of this agreement."

[58] The commencement date according to the interpretation clause 2.2.2. was 1st August 2007 and as shown above the expiry date was 31st March. 2008.

[59] Clause 4.1 must be read with clause 3.5 which as I highlighted above forms part of the *causa* for the agreement. It is apposite to recite this clause for purposes of clarity:

> *"3.5 In order to comply with the requirements recorded in clause 3.2.2, the SNTC and the Operator hereby enter into this agreement which provides a framework for the preparation of the reserve to enable it to be operated and managed as a commercial venture whilst at the same time achieving the core mandate of the SNTC set out in the SNTC Act."*

[60] *En passe*, the core business of applicant is to maintain as category A enterprise in terms of the Public Enterprise (Control and Monitoring) Act No.8 of 1989.

[61] The total reading of these clauses *wit.* 4.1, 3.6.1 and 3.5 demonstrates beyond reasonable doubt that both parties at the time of contracting this agreement, anticipated that by the end of the initial agreement, the applicant's Act would have been amended, a position which was not to be however. Their understanding was, at any rate, in order as from the reading of clause 3.3, the Government was already engaged in the preparations of "*the Bill"*. It is therefore misconceived to state that the agreement commenced on the 1st August 2007.

[62] Respondent contends at its paragraph 10.8 that to prove that the joint venture agreement was in force, there were a series of the RJMF meeting. Respondent refers the court to minutes of 17th June, 2009.

[63] Firstly, the establishment of the RJMF was of necessity even before the parties entered into the joint venture. In terms of the agreement herein, the duties and functions of the RJMF emanated not only from the joint venture but even under the lease agreement. I refer to clause 16.2 and for purposes of clarity it is appropriate that I cite it once again:

> *16.2 This lease shall, during the period of the initial agreement, be subject to the right of the SNTC, freely and without let or hindrance to enter and be on the land and to occupy and use any improvements on the land in order to enable it to execute its obligations under and in terms of this agreement, which right shall be exercised by the SNTC subject to the supervision of the RJMF.*

[64] This clause comes directly from the section of the agreement entitled "lease" as demonstrated at paragraph 20 of this judgment. In other words the meetings were in compliance with clause 16.2 which called for the two parties to meet and determine a budget prepared by the RJMF. To demonstrate this point further, the RJMF had to meet in order to carry out duties under clause 18.2.1 *viz.* determination of budget for purposes of ascertaining rentals. It is worth reciting this clause:

> "*18.2.1The lessee and the SNTC shall at the commencement of each year of the lease estimate the expected turnover for that year, based on the budgets required to be prepared by the RJMF and the company in terms of this agreement, adjusted to*

the year applicable, and shall calculate the estimated turnover rental based on such budgeted turnover."

[65] This clause (18.2.1) is preceded by clause 18.2 which appears under the title "Rent" and reads:

> "*18.2 The lessee shall for each year of this lease pay to the SNTC the turnover rent, which amount shall be pain in the following manner:"*

[66] Secondly, if ever the parties began to discharge duties and acquire rights, which I have not been referred to in terms of the agreement exclusive of Chapter 4, nothing prevented them from doing so if in their discharge, they anticipated that full force and effect of their activities would be given upon the passing of the Bill. It is expected of any astute businessman to carryout those activities which will "*prepare*" as reflected in clause 3.5 of the agreement as a ground-work for the commercialization of the entity in the light of the awaited amended Act.

[67] Chapter 3 proscribes on the modalities of the formation of the company as set out again in clause 3 specifically clause 3.6.2.

[68] As already stated, Chapter 1 although entitled general, under clause 3, the *causa* for the agreement is reflected as being a joint venture as per the intention of both parties. Chapters 2 and 3 lay down the obligations and rights of the parties in the contract so as to give its efficacy.

[69] Lastly, it would be remise of me not to highlight clause 16.4 under "*Chapter 4 – Lease*" which reads:

"16. THE LEASE

16.1 Subject to the requirements of the Land Control Board, if any, the SNTC hereby leases the land, improvements and operational assets to the Operator to enable it to give effect to the appointment described in clause 5.1, subject to and in accordance with the provisions of this Chapter 4, but without limiting the effect of the other clauses of this agreement.

16.2 This lease shall, during the period of the initial agreement, be subject to the right of the SNTC, freely and without let or hindrance to enter and be on the land and to occupy and use any improvements on the land in order to enable it to execute its obligations under and in terms of this agreement, which right shall be exercised by the SNTC subject to the supervision of the RJMF.

16.3 The Operator hereby agrees and undertakes, on the effective date, and provided that the company is incorporated on that date, to assign its rights and obligations under this lease to the company, and upon such assignment, the rights and obligations of the Operator under this lease shall be terminated.

16.3.1 The parties agree and undertake to cause the company to accept assignment of this lease as contemplated in clause 16.3.

16.4 When ever reference in this lease is made to a lessee, it shall, during the period of the initial agreement, mean the Operator, and,

from the effective date as defined in clause 12.1.6 to the date of the termination of the lease, it shall mean the company."

[70] This clause should not be misconstrued to mean that there was only one agreement. On the contrary it shows that the parties had hoped that before the termination of the initial agreement, the Act would have been amended giving way to the joint venture. They further anticipated that as the lease agreement was to terminate on the fifth anniversary, a period way after the termination of the initial agreement, the lease agreement should not be disturbed should the initial agreement be in force by virtue of the joint venture contingent upon the passing of the Bill.

[71] It is therefore my findings in the totality of reading the agreement that the joint venture was a suspensive condition of the agreement, standing alone. The lease agreement was effective from the date of parties concluding the lease agreement in Chapter 4 of the agreement.

[72] Respondent has raised as second ground of its defence that the contract of lease was renewed upon its termination. This averment appears at paragraph 18.2.2 of respondent's answering affidavit as follows:

"*18.3.3. The rental for the year 2013 is being paid in accordance with clause 18. The respondents contends therefore that the lease agreement has been renewed for a further calendar year up to and including 31 December 2013 by virtue of the conduct of the parties in that the rental for year has been paid and the applicant has received it without any protest."*

[73] By this deposition on behalf of respondent the next question for determination is whether there was any tacit renewal of the contract of lease in *casu*.

[74] **Willie and Millins Mercantile Law of South Africa** by **J. F. Coaker** *et al* at page 302 wisely write:

> "*On the expiration of the lease it may be renewed either expressly, i.e. by the agreement of the parties, or tacitly i.e. by virtue of the lessee remaining in the occupation of the premises formerly let to him and the landlord, being aware of this fact, raising no objection to his doing so."*

[75] **Trollip J. A.** in **Kahn v Raatz 1976 (4) S.A. 543** at 547 held:

> "*When the lessee elects to exercise his option, his intention to do so must be timeously expressed and conveyed to the lessor clearly and unequivocally i.e. positively and unambiguously, since the exercise of the option is tantamount to the acceptance by the lessee of the lessor's standing offer to renew the lease."*

[76] I see no reason why the *ratio decidendi* in **Kahn**'s case should not apply with equal force where the lessor gives notice of intention not to renew the lease agreement.

[77] **Trollip** *supra* further points out that the due notice of the intention by either party is essential.

[78] In *casu,* by means of annexure SNTC 3, applicant advised the respondent on the 9th January 2013 that it shall not renew the agreement. Respondent by correspondence, SNTC 4 objected to the non-renewal. I need not

deliberate any further on this point because it is not in issue that a notice was given and that it was timeous for the non-renewal of the agreement. This can clearly be deduced from respondent's correspondence marked "SNTC 4"

[79] The respondent contends that the applicant accepted payment of rentals for the year 2013 and by inference, renewing the lease agreement.

[80] In as much as this ground sound good, it cannot stand in *casu* for the following reasons:

[81] Firstly, considering the circumstances of this case, I am afraid, it cannot be held that there was a consensus ad idem, an essential feature of a contract. This is because as per **J. F. Coaker** *et al supra*, renewal of a contract of lease constitutes a new or fresh lease. This of course does not mean that the parties cannot incorporate either expressly or impliedly the terms and conditions of the prior terminated contract.

[82] Secondly, there was no meeting of minds as between the parties. Not only did the applicant write correspondence advising respondent of the intention not to renew but on several occasions invited respondent to discuss the termination. This act by applicant clearly demonstrates its intention not to renew the lease agreement.

[83] Thirdly, clause 28.3 reads:

> *"28.3 Should the SNTC cancel this agreement in terms of clause 28.2 and the Lessee dispute the SNTC's right so to cancel this agreement and remain in occupation of the land, then:*

28.3.1 the Lessee shall, pending the determination of such dispute, continue to pay to the SNTC on the due date thereof, all mounts due under this agreement, including rental, and the acceptance thereof by the SNTC shall be without prejudice to the SNTC's rights;

28.3.2 should such dispute be determined in favour of the SNTC, then any such payment shall be deemed to be accounts paid by the Lessee on account of damages suffered by the SNTC by reason of the cancellation of this agreement, and / or the unlawful holding over by the Lessee.

28.4 Any issue or dispute arising from any cause contemplated in clause 28.2 shall be resolved by a court of competent jurisdiction."

[84] It is clear from the reading of this clause that the parties intended that should there be a dispute going to the root of the lease agreement, the respondent shall not be excused from payment of rentals. It can be correctly inferred therefore that the respondent, aware of its obligation in terms of clause 28.3 paid the rentals. I say this because on its own showing it paid over the years rentals after annexure SNTC 3 was received by it.

[85] Forthly, **J. F. Coaker** *et al op.cit* states at page 323 as follows:

"If the tenant has failed to pay rent by the day fixed in the forfeiture clause landlord acquires a vested right to cancel the lease; he cannot be deprived of this right by an act on the part of the tenant, such as a subsequent tender of the rent…."

[86] By analogy, the applicant cannot be deprived of its right not to renew the agreement by virtue of accepting the rentals. Under ordinary cause of events, a lessor is expected to mitigate or avoid future litigation costs by accepting rentals where the lessee insists on occupying the premises despite notice to vacate.

[87] Lastly, when the agreement was concluded, it was anticipated by both parties that *inter alia* effluxion of time will terminate the agreement. This is evident from clause 29.1 which reads:

> "*TERMINATION*
>
> *29.1 Subject to the provisions of Clause 28, upon the termination of this agreement for whatever reason, whether as a consequence of the effluxion of time or otherwise, improvements on the land shall remain the property of the SNTC, without compensation of any sort to the Lessee, subject to the provisions of this agreement."*

[88] It follows therefore that the ground raised against applicant on *estoppel* stands to fall.

[89] The last ground raised by respondent is that owing to a number of improvements and other investment on the business in compliance with the joint venture, it has a right of retention over the property.

[90] **His Lordship Carlisle A. J. P.** on the question of retention held in **Mackenie N.O. v Basha 1950 (1) S.A. 615** at 619:

"*The respondent could not refuse to restore possession of the leased property until he was compensated. His duty at common law is to give up possession and then claim compensation.*"

[91] *Fortiori*, respondent in *casu* cannot in terms of our common law hold over as it were occupation. His right to claim whether for compensation or damages lies elsewhere.

[92] Similarly, respondent cannot hold on to the *merx* on the basis that applicant failed to discharge its obligation in terms of Chapter 2 mainly that of management of the biodiversity of the reserve.

[93] In the totality of the aforegoing, the following orders are entered:

1. Applicant's application is granted;

2. Respondent or its agent or anyone who holds title or acting on its behalf is hereby ordered to vacate the premises *viz.* Malolotja Nature Reserve situate at Hhohho region forthwith;

3. The deputy sheriff for the district of Hhohho or any other person duly appointed is hereby authorized to:

    3.1 serve this order;

    3.2 enforce prayer 2 hereof.

4. Respondent is ordered to pay costs.

M. DLAMINI
JUDGE

For Applicant : Mr. S. P. Mamba

For Respondent : Mr. J. Henwood