IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Civil Case No. 454/2015

In the matter between:

EARLY HARVEST FARMING (PTY) LIMTED **Plaintiff**

And

E I RANCH (PTY) LTD **Defendant**

Neutral citation: *Early Harvest Farming (PTY) LTD vs E I (PTY) LTD & 2 Others (454/2015) 2016 SZHC 12 (01 December 2016)*

Coram: Hlophe J

For thePlaintiff: Advocate G.I. Hoffman SC

For the Defendant: Advocate P. Flyn

Date Heard: 2nd November 2016

Date Handed Down: 1st December 2016

Summary

Application Proceedings – Order confirming the perfection of a Land Lord's hypothec brought on the basis of an alleged verbal lease agreement – Whereas invoices fixing the rentals at a certain percentage of the purchase price were issued monthly, Respondent denies the existence of a lease but contends that a lease was still being negotiated between the parties

Applicant contends that the existence of a lease between the parties was not disputable because there was not only a monthly issuance of invoices on the outstanding rentals without eliciting a dispute of same from the Respondent, but the Respondent had claimed VAT Tax based on the alleged outstanding rentals as claimed in terms of the invoices presented as well as the fact that instead of disputing same, the Respondent asked for a moratorium on the payments of the claimed outstanding rentals.

Applicant contends that whether or not a lease agreement was being negotiated at the time, was immaterial as there already existed a lease agreement – Respondent contends applicant failed to disclose pertinent facts yet it proceeded exparte

A conclusion is incscapeable that there existed an oral lease agreement between the parties independent of the one being negotiated - Alleged failure to disclose all the facts despite proceeding exparte not an appropriate conclusion to make when looking at the basis of the alleged lease agreement - Contention that matter was in any event amicably settled between the parties made by the Respondent – Circumstances of the matter considered in their totality to determine the existence or otherwise of a settlement agreement between the parties – Although a settlement looked near from the correspondence exchanged, it cannot be said that same was reached – Court of the view the matter was not settled between the parties.

Whether any of the parties should be liable for the costs of the application for the revival of the rule considered – Facts of the matter reveal that the rule in the main matter lapsed after which, despite an agreement it was to be extended, it was not so extended – Dispute of fact exists on who was responsible for the non – extension of the rule – Whilst applicant contends it was the Respondent's Attorney who attended court who failed to extend the rule as verbally agreed, she contends otherwise, claiming that the court struck the matter off the rule mero mutu –

Reality is that an application for the revival of the rule was necessary to move in the circumstances - No purpose would be served by determining the dispute surrounding the failure to extend the rule which seeks to draw the Court into it – Application for revival of the rule nisi was not opposed – Although acrimony exhibited between the parties counsel, fairness dictates that on the application for the revival of the rule and the non- opposition thereto, it was only fair that each one of the parties bears its own costs.

JUDGMENT

Introduction

[1] The applicant instituted application proceedings seeking an order of this Court inter alia perfecting the landlords hypothec together with that seeking the normal and ancilliary orders as are often sought in such applications. These are often expressed in an order of court that interdicts the removal of the movable goods or assets from the property allegedly forming the subject of the lease, pending the payment of the judgement debt. It also empowers the deputy sheriff to lay all the movable assets found on the said property under attachment by listing them in an inventory.

[2] Whilst these reliefs would form part of a rule nisi that operates with immediate and interim effect, there would also be a part of the same rule that operates without immediate and interim effect, which calls upon the Respondent to show cause why the lease cannot be cancelled, why the Respondent cannot be ejected or evicted from the premises concerned and why the Respondent cannot be ordered to pay Plantiff the arrear rentals, interest thereon at the legal or agreed rate and costs at the scale often agreed upon between the parties or at the legal rate.

[3] It merits mention that whereas under the Common Law an application to perfect the Landlord's hypothec is separate from the action proceedings instituted to eject the defendant from the premises or property concerned whilst also seeking an order compelling him to pay the amount for arrear rentals, together with the other ancilliary reliefs, there has developed a practice in this jurisdiction in terms of which the Chief Justice through a Practice Directive designed a form which provides for the perfection of the Landlord's hypothec whilst providing as well for the payment of the arrear rentals and the ejectment of the Defendant from the premises concerned in the same proceedings. In terms of this practice, the payment of the amount for the outstanding arrear rentals and the ejectment of the defendant from the premises together with the ancillary reliefs is enforced

by means of a rule nisi operating without an interim effect as opposed to that seeking the perfection of the hypothec which is done exparte in terms of a rule nisi operating with immediate and interim effect pending finalization.

[4] In the current proceedings, bar the imperfections here and there on the form relied upon, this is the practice that the applicant sought to follow in its application for the perfection of the Landlords hypothec on the one hand together with the cancellation of the lease agreement, the payment of the alleged arrear rentals and the ejectment of the Respondent from the premises or the farms concerned.

[5] The E I Ranch Farm is situated at Sidvokodvo area whilst the other known as the HorseShoe Farm is situated at Mankayane area. It suffices that only the E I Ranch Farm was acquired in October 2013 by the Respondent. Otherwise the HorseShoe Farm was acquired by the latter in February 2014.

Background Information

[6] As a basis for its application the applicant claims that sometime in October 2013 and February 2014, there was concluded between itself and the Respondent two respective verbal lease agreements (being month –

to- month leases) in terms of which it leased its properties aforesaid (Farms) that it had just purchased, called the E I Ranch Farm and the HorseShoe Farm to the Respondent.

[7] The rental was allegedly to be calculated following a certain formular in each case which however was certain. It was to be the total purchase price of the property concerned multiplied by 8% which was to be divided by the number of days in a year in order to get the daily rate. This product would itself be multiplied by the number of days in a given month so as to come up with a monthly rate or monthly rental. There would also be added to that figure 14% as value added tax. This formular as stated applied to both farms.

[8] It was allegedly a term of the lease agreement as well that the rental for each month would further incorporate what was called a social responsibility component calculated through finding 0.50% of the purchase price of the farm divided by 365 days a year so as to come up with a daily component which would in itself be multiplied by the number of days in each particular month so as to come up with a month's social responsibility component.

[9] As a result of the application of these formulae in order to determine both the rentals qua plus the VAT and the Social Responsibility component, the average monthly rental was a sum of about E175, 410.30 for the E I Ranch whilst it was to be E57, 769.55 for the Horseshoe Farm.

[10] It is not in dispute that the applicant used to issue monthly statements on the rentals due for each month. It is a fact that not once did the Respondent quibble or dispute its liability to pay the rentals as set out in terms of the monthly statements. Instead it is not in dispute that the Respondent used to claim what is known as the VAT input from its customers which it was required to pay in terms of the amounts for rentals as revealed in the same statement. The rational it is alleged, was to ensure that one can only claim it because he is liable to pay it out.

[11] In fact the facts reveal that at one point the Respondent, as opposed to quibbling its duty to pay rentals to the applicant ordered it to consolidate all the invoices it had already issued into one statement, which the latter did. It is further not in dispute that at some point, the Respondent asked that there be a moratorium on the rentals, which was again inconsistent with disputing of liability to pay the rentals claimed per the statement.

[12] Although not disputing same, the Respondent did not pay the rentals claimed but kept on receiving the rental statements or invoices sent to it. It however claimed the VAT input based on the said statements. Of course the non-payment of rentals occurred for a period of close to two or so years.

[13] Whilst statements for rentals kept on being issued to the Respondent without them being disputed, the parties were busy engaging each other for the conclusion of a fixed term lease. This kept on being negotiated without consensus or an agreement being reached. What transpires is that the relations between the said parties did not sour immediately but took time to do so such that even after the applicant had reached a decision that the Respondent would have to vacate the Farms to enable it establish a dairy project, the agreement being negotiated had still not materialized.

[14] When instituting these proceedings the applicant approached this court on an exparte basis seeking the reliefs mentioned above which were effectively the perfection of the Landlord's hypothec together with a rule nisi being issued calling upon the respondent to show cause why it could not be ordered to pay the arrear rentals together with interest thereon at

mora rate as well as the ejectment of the Respondent from the Farms concerned together with costs.

[15] Although this court had granted the application, the Respondent opposed it when served with the court order together with the application. It raised several points of law in its opposition. The points of law raised by the Respondent included the following:

(a) The application was allegedly not urgent or such urgency as could be established was of the applicant's own making.

(b) The applicant's application had a foreseeable dispute of fact on the existence or otherwise of a verbal lease agreement which necessitated that the application be dismissed.

(c) Notwithstanding that the applicant had allegedly approached the matter on an exparte basis, he failed to make a full and proper disclosure of all the material facts in the matter which were within its knowledge.

[16] In the merits, the Respondent effectively denied the existence of a verbal lease agreement between the applicant and itself. It contended that a lease agreement was still being negotiated between the parties which it said was one of the facts the applicant had failed to disclose in its application. It was revealed that in actual fact, numerous draft lease agreements had been sent to the Respondent for signature which would each time be returned to applicant for one or the other issue being raised for inclusion in the said agreement.

[17] Although it could not be disputed that the Respondent took occupation of the E I Ranch Farm in October 2013 and in February 2014 in respect of the HorseShoe Farm, it was denied this was as a result of any lease agreement but that it was a business arrangement between the parties. It was explained that although the statements revealing arrear rentals were sent monthly, they did not confirm an agreement because they could not realistically represent rentals as they were allegedly too exorbitant. An explanation was also given why the VAT input was claimed including why a moratorium was sought instead of a straight dispute of the rentals being raised if there was no lease.

[18] It is a fact that before the opposing affidavit could be filed there had ensued attempts to settle the dispute between the parties amicably. Numerous Correspondences in this regard were exchanged between the parties in this regard.

[19] According to the Respondent these letters culminated in an agreement of settlement of the matter which the applicant however denies. The latter contends that the Respondent failed to unequivocally accept the final offer it had been given within the period stipulated and contends further that there was therefore no settlement of the dispute between the parties.

[20 It was at the height of these negotiations and at the time when the settlement of the dispute looked real that the Responded changed its attorneys of record and engaged the current ones. An engagement to try and resolve the dispute amicably between these attorneys resumed. It was again not looking far from settlement when the return date of the matter fell due.

[22] It is not in dispute that the parties counsel had agreed that the Respondent's Counsel, Mr Henwood, who was based in Mbabane as opposed to

Applicants Counsel, Miss Boxshall Smith who was based in Matsapha, was going to attend court on the day and ask for an extension of the rule nisi to give the parties more time to negotiate and resolve the dispute between them. It is common cause however that the rule nisi was not extended as instead the matter was removed from the roll with a rider it was not going to be reinstated without leave of Court.

[23] Whereas the applicant contends that it was the Respondent's counsel who deliberately failed to extend the rule in the matter resulting in its being removed from the roll, the Respondent's counsel contends otherwise. He claims it was the court that mero mutu removed the matter from the roll leading to the rule lapsing. There is an obvious dispute of fact on what happened leading to the removal of the matter from the roll. It is however a fact that there was from that day no rule in place in the matter. This necessitated that the Applicant moved an application for the revival of same if it was of the view same was necessary in the circumstances of the matter. Such an application was instituted and was not opposed.

[24] With the rule having lapsed in the manner it had, there was exchanged overtly accrimonious correspondence between the parties counsel as one

accused the other of having done something wrong. It seems to me that there is nothing much to gain by repeating what one said to or about the other which I only find to have been unfortunate. I can only point out that from the correspondence it does seem clear that both counsel had somewhat paid limited attention to the salutary rules of ethics namely that their duty is always to the court and that they owed each other courtesy. The fact is that they would still be required to work with each other even in future and in other matters long after this one shall have been resolved by the court.

[25] A significant point from this unfortunate occurrence is the fact that the Respondent had managed to remove all the items laid under attachment from the farm after the rule in question had lapsed. Consequent to this applicant decided not to enforce same anymore but insisted on the costs of the application for the revival of the rule on the basis that applicant had necessitated the institution of those proceedings by allegedly defeating the rule nisi when it rendered same nugatory by allegedly failing to have it extended as agreed.

Questions And Issues For Determination

[26] The question in these proceedings is whether in the circumstances of this matter, there is any liability on the part of the Respondent to pay the costs of the said application for revival of the rule over and above a determination of the question whether or not there was a legal basis for the Respondent to pay the amount of the arrear rentals claimed as well as the ancillary reliefs there to. The other issue was the determination of the question whether or not the dispute had already been settled between the parties.

[27] At the commencement of the hearing of the matter, it was agreed between the parties that the further issues for determination were whether there had been concluded a verbal lease agreement between the parties; whether the applicant had disclosed all the facts it needed to, given that it had instituted the application exparte in the face of alleged apparent dispute of fact and lastly whether as a matter of fact, the matter had been amicably resolved between the parties and therefore that there was neither a basis nor a justification for the claim made. I therefore have to deal with these issues ad seriatim.

A. Whether There Was Concluded A Verbal Lease Agreement Between The Parties.

[28] The essential elements of a lease according to **W.E. Cooper's Landlord and Tenant**, **Second Edition, Juta and Company at Page 3**, are the following;

(a) The Lessor is to give, and the Lessee is to receive, the temporary use and enjoyment of the property;

(b) The property which is let;

(c) The rent for its use and enjoyment

[29] It is not in issue that the Respondent was given and did receive the two properties for its temporary use and enjoyment. The properties in question are certain and identifiable and are called the E I Ranch Farm and the Horseshoe Farm. The question is whether there was any rent agreed upon for payment by the party who allegedly received the properties concerned for temporary use and enjoyment. Whereas the applicant contends that the rent was calculated in terms of the formular stated above in order to come up with the monthly rentals set out in the monthly statements issued and contends further that same was agreed upon, the Respondent denies this. It contends that there was no such agreement and that the alleged rent was exorbitant. The question is, in my view, whether in the circumstances of the matter it can be said that there was concluded a lease agreement.

[30] It cannot be denied from the facts that the applicant religiously sent the Respondent monthly statements depicting the amount of rentals as calculated in terms of the formular referred to above for each one of the properties alleged to have been under the leases. This exceeded a period of over two years. Instead of disputing the rentals allegedly owed by it and clarifying the position under which it came to occupy the premises, the Respondent at one point asked the applicant to consolidate the invoices into one and charged its customers the VAT claimed from it by the applicant in terms of the statements sent to it monthly. At one stage it asked for a moratorium on the rentals, which was not consistant with the conduct of one who knew nothing or who did not owe the rentals claimed.

[31] The point being made is simply that if the Respondent disputed its indebtedness, it would have refuted or disputed the statements claiming rent from it and it would not have asked for their consolidation. It similarly would not have claimed the VAT input on the basis of the amounts reflected on the same statements. By claiming payment of the VAT input based on the same amounts as reflected on the statements and also asking that statements be consolidated into one statement there can

be little doubt that the Respondent was actually acknowledging its indebtedness. Having acknowledged its indebtedness in the aforesaid manner, the Respondent was thus approbating and reprobating or blowing hot and cold at the same time, which is a practice that the law does not countenance. See in this regard **Sandown Travel (PTY) LTD VS Cricket South Africa [2012] ZAGPJHC 249 or 2013 (2) SA 502 (G5J)**

[32] On the Respondent's having asked for a moratorium on the rentals for two years, the law is very clear that implicit on a moratorium is an acknowledgement of indebtedness and requesting that the payment of the said debt be postponed for the specified period which in this matter was two years. This view finds support from the Oxford English Dictionary, Oxford University press of 2009 where the legal meaning of the term "moratorium", which is apposite to the matter at hand is expressed as follows:

> **"Moratorium 1. (Law) – means - a legal authorization to a debtor to postpone payment for a certain time"**

[33] At page 218 and 219 of the Book of pleadings there is an email dated the 12th February 2015, cited as annexure EH19 emanating from the Respondent's Managing Director, Mike Flin , in which he refers to some notes prepared by him and annexed to this email. Of significance in the

said notes is that Mr Flin says the following which clarifies that the Respondent is aware that it owed rentals to the applicant; At paragraph 1 of the said notes as appear at page 219 of the Book of pleadings;

> **"E I Ranch has only received and captured rental invoices up to September 2014 – as a result we have only claimed the VAT on these invoices and nothing thereafter"**

[34] At paragraph 5 of the same document he puts the position as follows;

> "5. As discussed by Evans yesterday, E.I Ranch finds itself in a very precarious financial position, for all the reasons outlined at the meeting. E.I Ranch needs to settle the outstanding overdraft of E1.9 million by end of March 2015. To avoid having to liquidate the company, we are of the opinion that to settle the termination arrangement between E I Ranch and UFF/Early Harvest, the historic rentals be written off and a payment to EI Ranch in the amount of E2,470,000.00 would enable the parties to part ways"

[35] These facts, taken cumulatively, point to one conclusion and one conclusion only that a verbal month to month lease agreement had been concluded between the parties and that the Respondent was failing to settle same. This is because the conclusion I have reached is consistant with all the facts and is the only reasonable one to draw from the facts which is what the Principles of the law of evidence confirm can be used to reason by inference. See in this regard **Hoffman and Zeffert's South African Law of Evidence 4th Edition, Butterworths at page 589 – 590. See also R V Blom 1939 AD 202 at 203,**

B. <u>Had Applicant Set Out All The Facts It Needed To Including The Existence Or Otherwise Of A Dispute Of Fact.</u>

[36] The Respondent contended that the applicant, despite approaching this court on an exparte basis had failed to disclose all the material facts and that it had sought the relief it had by way of application despite the fact that there were foreseeable disputes of fact. As concerns the contention that the applicant had failed to disclose all the material facts, it was contended that the applicant had not disclosed among others the fact that even as it moved the application the parties were allegedly still negotiating an agreement and therefore that there was in reality no lease concluded between the two of them.

[37] Having already found that there was in existence a month to month lease agreement, it is clear that there could be no merit in the contention that there was no disclosure of the fact that a lease agreement was still being negotiated between the parties. I am of the view that from the facts of the matter, all that the applicant needed to disclose in order to obtain the relief it sought was disclosed. In order to obtain an order perfecting the Landlord's hypothec the applicant had to disclose in my view that there had been concluded a month to month lease agreement between the parties and that the Respondent was in arrears with the payment of rentals including his awareness of such arrears. All these factors were in my view disclosed.

[38] It also has to be clarified that it is in law not an unknown phenomenon that parties can conclude a fully binding contract while agreeing to discuss a further one or its further terms. This principle is expressed in the following words in Kerr's **The Principle of the Law of Contract**, 6th Edition at page 37;

> **"There is of course, no reason why parties should not enter into a fully binding contract while expressly or impliedly agreeing to discuss the addition of further terms, perhaps very important ones, after the commencement of the contract. If**

the further terms are not agreed, the original contract stands."

This principle was further enunciated in CGEE Alsthom Equipment **t/a Enterprises Electriques, South African Division v GKN Lankey (PTY) LTD 1987(I) SA B1.**

[39] There is otherwise no gainsaying the correct statement of the law that a party who institutes proceedings exparte has a duty to disclose all the material facts that might affect the granting of the order exparte. This statement of law was put in the following words in Herbestein and Winisen's; **The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta and Company at page 367;**

"Although generally, a party is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his right, when he is bringing an exparte application, in which a relief is claimed against another party he must make a full disclosure of all the material facts that might affect the granting or otherwise of an order exparte. The utmost good faith must be observed by litigants making exparte applications in placing material facts before the court, so much so that if

an order has been made upon an exparte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure"

[40] In making its point in this regard the Respondent contended that the applicant had failed to disclose among other things that they were still negotiating a lease agreement as revealed in the meetings they had held and the various correspondence they had exchanged. It is also contended that applicant had failed to disclose that it had certain alleged counter claims and the means discussed to have the Respondent relocated.

[41] I agree that there is no merit in this contention as well. Whilst it is true that the Respondent's claim can never be extinguished by the Applicant's claim and whilst it is further true that such a claim can always be instituted anytime, the Applicant has, per the replying affidavit acknowledged its indebtedness to the Respondent to at lease a sum of E1, 257,887.13. It has also acknowledged that such a sum can be set of against what it is owed, otherwise the balance of Respondent's claim can

always be raised through an independent action which it is at liberty to institute.

[42] It was argued that the Respondent had a counter claim against the Applicant which was allegedly worth more than what the Applicant was allegedly owed by the Respondent. The position of the Law is that the success or otherwise of a counter claim is not confined to it being raised as such. Herbstein and Van Winsen's; **The Civil Practice of the Supreme Court of South Africa, 5th Edition:** puts this position in the following words at page 667 ;

> **"A counter claim is a claim which the defendant could have instituted by way of a separate action against the Plantiff, and it has been stated that the fact that it has been brought as a counter claim should not deprive the defendant of any rights which he would have had with regard to claim in convention."**

[43] I am convinced that whatever claims the respondent has against the Applicant, it cannot be prejudised by the matter being proceeded with, and with or without the counter claim, which can always be instituted as an independent claim. My view is strengthened by the fact that some

aspects of the Respondent's counter claim are not liquid, which makes them not easily resoluble in the sense that they would require a fully fledged trial to resolve. I am further alive to the fact that those aspects of the Respondent's claim which are liquid have not been disputed which makes it easy for them to be set off against those of the applicant, which has in any event accepted its liability to that extent and has asked that its claim be set off against that liquidated part of the Respondent's own claim.

[44] On the contention that there were disputes of fact which made the current proceedings unsuited; it was argued that the dispute that had a bearing in this matter, was over whether or not a lease agreement was still being negotiated, including the contention that the Respondent had several counter claims against the Applicant.

[45] It should be highlighted that it is not every dispute of fact that would prevent the determination of a matter on the papers or that would render application proceedings inappropriate. A dispute would result in that if it is a genuine or real one and on whether it is a material or relevant one. This position was put succinctly by the Supreme Court in **Nokuthula N. Dlamini Vs Goodwill Tsela Supreme Court Civil Appeal Case No.11/2012** in the following words at paragraph 29 of the Judgement;

"….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 scrutinize the nature of the dispute with a microscope 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 an issue is dependant 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 it 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, it does not prevent a determination of the application on the affidavits.

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

[46] Later on at paragraph 30 of the **Nokuthula N. Dlamini vs Goodwill Tsela judgement** (Supra), the Supreme Court elucidated the position even further saying the following;

> **"If the dispute on a material fact is not genuine or real, then the application can be decided 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 by oral evidence 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 process. Parties often times, do not show a readiness to admit liability**

even when it is obvious that they have no defence to an application or a claim. Such a party whether or not he or she is a Defendant or Respondent, tries to foist on the Plantiff or Applicant and the court a wasteful trial process for a dismissal of the application through frivolous denials. The object of Rule 6 is to avoid a full trial when there is no basis for it and avoid delay and protracted trial in such cases. It is the duty of a court to ensure that a law meant to facilitate quick access to justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claim"

See also **Plascon – Evans Paints vs Van Riebeck Paints (PTY) LTD 1984(3) SA 623(A) at 634 L- 635B.**

[47] These words are apposite to the matter at hand in my view. Whereas some dispute has been raised, I am convinced that same is neither genuine nor real nor is it material or relevant. It seems to me it cannot be disputed that the parties had agreed on a verbal month to month lease when considering all the circumstances set out above. I am convinced

therefore that there is no merit in the contention that there are disputes of fact which make it impossible to determine it on the papers.

(C) The matter was settled between the parties.

[48] As indicated above, after the applicant had already instituted the current proceedings, with an interim order perfecting the Landlord's hypothec and the ancillary reliefs having already been obtained; including a rule nisi calling upon the Respondent to show cause why an order directing the Respondent to pay the amount claimed together with interest and costs, as well as another one seeking ejectment of the Respondent from the premises, there ensued settlement negotiations between the parties to the matter. In this regard numerous letters were exchanged and are annexed to the papers.

[49] In order to correctly answer the question whether or not the dispute between the parties was settled amicably, there is no doubt one needs to examine closely the letters exchanged between the parties. The Respondent set the ball rolling with a letter dated the 11th May 2015. It was proposed in terms of this letter that the matter be settled through the Respondent paying applicant a sum of E500, 000.00. It was further

requested that the Respondent be allowed to harvest the sugar cane and be permitted to remove the cattle from the farm. It was also being proposed that the proceedings between the parties under case no. 454/2015 be withdrawn.

[50] Whereas this offer was rejected by the applicant by means of a letter dated the 12th May 2015, the applicant went on to make a counter offer by means of a letter dated the 15th May 2015. In terms of this letter the applicant counter offered that the Respondent was to vacate the farms by 1630 hours on Sunday the 24th May 2015; that as it does so it removes with it all its employees and movables from the said farms. The sugar cane and all the other crops were to be left on the farms and were not to be harvested by Respondents.

[51] Both farms were to be returned to the applicant in the same or similar state they were in when the latter acquired ownership of them. The offer was a final one and was not open to negotiations. It was to be open for acceptance until 1000 hours on the 18th May 2015. The arrear rentals claim was going to be dropped together with the claim for costs.

[52] Whilst there was no adherence to the deadline put forward by the counter offer made, allegedly due to its having been received late, there does not

seem to have been a problem with that as a letter responding to the said offer was eventually received late on the same day, the 18th May 2015. The language used in this letter was ambiguous as it was not straight forward. It for instance alleged that, the Respondent was in **"Principle amenable to the counter offer" save for what it termed "Somewhat unreasonable time lines."**

[53] Whilst accepting to vacate one of the farms, Horseshoe, by 1630 hours on the 24th May 2015, it talked of commencing the process of vacating the E I Ranch property immediately, which was however allegedly bound to take more time and would not be completed by the deadline put in place, the 24th May 2015.

[54] The reasons put forth on why that was going to be a process were allegedly that; alternative premises had not yet been found and it was to be impossible to have secured same by the deadline of the 24th May 2015; Respondent was going to be forced to retrench employees, which in law had to be preceded by consultations requiring at least a month as notice in law. There was also the allegation that it would take at least fourteen days to remove the machinery from the farm. Whilst coming out clear

after the foregoing to say it was accepting the counter offer, it stated different times and dates from those put forth in terms of the counter offer. It in fact contended it was to vacate the E I Ranch Farm on the 18th June 2015.

[55] It is clear in my view that the foregoing letter contained a further counter offer even though it was perhaps indicative of parties who were about to reach consensus given that the issues on which the parties were now differing were now very few. The reality is that whatever the reasons for not accepting the counter offer as is, it was not accepted it as was made and it cannot in my view be argued that at this point a settlement agreement had been reached. The reality is that the Respondent was still negotiating. The question in such circumstances is whether or not at that point the matter was still open to negotiation.

[56] The Applicant responded to that letter by means of its own dated the 20th May 2015. After clarifying that Applicant did not suggest that Respondent's employees be retrenched nor did it desire same, it stated as follows at paragraph 4 – 4.3 which owing to their effect on the matter, I must now quote verbatim;

4. Our client (Early Harvest) intends that it will accommodate the adjustment to its offer dated the 15th May 2015 as provided by your client subject to the following mentioned reminder:

4.1 No assets as attached under the Landlord's hypothec, including crops and cattle but not limited to, may be removed by your client from E I Ranch (property occupied by Respondent) immovable property and Horseshoe immovable property until an independent third party has certified in writing (The Certificate) that all employees employed by your client have permanently vacated the E I Ranch immovable property and the Horseshoe immovable property. The independent third party shall be appointed by and be acceptable to both your client and our client and further the cost of the engagement shall be borne by your client.

4.2. If and when the above mentioned certificate has been secured, your client shall immediately remove all assets, including crop and cattle from

the E I Ranch Immovable Property and Horseshoe Immovable Property. All assets are to be removed after the certificate has been issued and all assets must be moved from that day to Friday 26th June 2015. Any assets not removed and remaining on the properties after Friday 26th June 2015 shall be forfeited to our client and be removed by our client at the expense of your client.

4.3 Your client is also to pay rental for the month of June 2015 in the amount of E45,933.33 plus VAT and will return the properties in the same or similar state and conditions as per the date of transfer of ownership into the name of our client.

5. We firmly believe that the above proposal is very reasonable and addresses all the arguments raised by your client in its letter as to why it cannot vacate the properties until the 26th June 2015, while at the same time respecting the interest of the employees employed by your client who reside on the E I Ranch Immovable Property or Horseshoe Immovable Property.

6. We insist to record that the Landlord hypothec as granted by the court on the 26th March 2015 is still in full force and effect until such time a written settlement agreement has been signed by our clients and made an order of court, we expect that your client will be guided accordingly and will adhere to the interim court order.

7. We would appreciate written confirmation of acceptance of this offer by 10.00AM and the 21st May 2015.

8. Please be advised that our client's rights remain strictly reserved.

Yours Faithfully

Boxshall – Smith Attorneys

[57] A merited comment here is that the significance of this particular letter in the scheme of things, particularly on whether or not the matter was settled, is contained in its penultimate paragraph. It there talks of an offer that should be accepted at a certain time on a specified date which was written there. This paragraph clearly elucidates what the meaning to be attached to what it says at paragraph 4 is. Whilst it wanted to suggest

there that it could accept (it said accommodate) the adjusted (counter) offer to the counter offer made on the 15th May 2015, it in this penultimate paragraph makes it clear that this was itself another offer (counter offer). In fact what is stated in the said paragraph is consistent with its clarifying that the so called adjustments on the previous offer could only be accepted subject to the conditions set out on Paragraphs 4.1, 4.2, 4.3 and 7 of the letter under consideration herein (that is of the 20th May 2015).

[58] It is clear that after this letter, there is none that seeks to accept the offer made in terms of this letter dispite its clear term it was to be accepted by 1000hours on the 21st May 2016 and its very clear effect of a failure to accept same within that time frame, which is that it would lapse. Since its lapse one is not shown its revival if there was any. The closest to it one sees is in an email exchanged between the Respondents Director, Mr Fliin and the Applicant's Attorney dated 25th May 2016, annexure "MVW 3" in which the former lets out on the existence of an unexplained misunderstanding between itself and its then attorneys. It had no reference on the conclusion or otherwise of an amicable settlement of the dispute between the parties in this matter. All one subsequently sees is

annexure “SSA 5” to the answering affidavit to the application to revive the rule, which is dated 29th May 2015.

[59] Although it suggested that the Respondent was going to vacate the Farms at the end of June 2015 and also that the Applicant should nominate the person it suggested could do the certification, (I guess for the confirmation the farms had been vacated in line with the offer contained in the letter of the 20th May 2016). The problem with this is that it makes no reference whatsoever to the question of the offer that had elapsed as of the 21st May 2015 at 1000hours, including how it had been revived if it had been.

[60] The Respondent is the party who asserts or alleges that the dispute between the parties was settled. Mr Flin argued during the hearing of the matter, that since there was no formal letter responding to that of the 20th May 2015, there was a possibility that the matter was settled because the Respondent had so asserted. He suggested the proper position could be ascertained from those attorneys who were involved in the matter through oral evidence. I do not think it would be proper for this court to make a case or assist each of the parties make their case herein. The salutary rule of practice is that he who alleges must prove. As the Respondent is the one asserting or alleging that the matter was settled between the parties

themselves, it was its duty to establish the settlement agreement unequivocally. This has not happened.

[61] Indeed from what we now know of the matter as revealed in the application to revive the rule whose papers were referred to interchangeably with those of the main matter, it shall be remembered that the Applicant's main complaint is that the Respondent removed the items that formed the basis of the hypothec. It obviously would not have happened like that in the nature of things, if an agreement had already been reached between the parties.

[62] In fact it shall be seen from the said application, that what the parties were talking about when the rule ended up lapsing, which had to be extended in court because the matter had not yet been settled, was the intention to give the parties a chance to conclude or to amicably settle the matter between themselves.

[63] It is clear therefore, and I am convinced that there was never a settlement of the dispute between the parties.

D.Whether Costs Should Follow The Event And whether That Order Should Be Made Against The Respondent In Both The Main Application And In The Application To Revive The Rule nisi.

[64] It is a long settled position of our law that costs in a matter follow the event. That is, success generally calls for the award of costs against the opponent. **Herbstein and Van Winsen's : The Civil Practice of the Supreme Court of South Africa 4th Edition, Juta and Company,** puts the position as follows, at page 705;

> **"It is a fundamental principle that as a general rule, the party who succeeds should be awarded his costs and this rule should not be departed from except on good grounds. If there are no such grounds then ordinarily the court on appeal will interfere"**

[65] It is true that the question of costs in this matter has to be viewed at from two fronts – that of the main application and that of the application to revive the rule. When the matter was argued before me, I did not hear of a dispute in as far as the costs in the main application were concerned. In other words there was no quibbling the above cited principle that costs

follow the event. The issue was with regards the costs of the application to revive the rule that had lapsed in circumstances that were a subject of a heated dispute, with the applicant initially accusing the Respondent's Attorney while the latter also hit back. These accusations and counter accusations ended up overshadowing the real issues and resulted in what I can tell is becoming deep acrimony between the two Counsels when considering the allegations and counter allegations revealed in both the affidavits filed and the correspondence exchanged.

[66] Whereas at the commencement of the hearing of the matter it transpired that owing to the fact that the application to revive the rule had been overtaken by events, and there was therefore going to be no point in pursuing it, the applicant's counsel made it clear that they were insisting on the determination of the question of costs in that application. He argued in that regard that costs should be awarded the applicant in the circumstances of that application.

[67] There was no disputing the fact that for a proper determination of that question, the facts on how the application came to be brought was pivotal. A summary of the relevant facts is therefore necessary.

[68] When the Respondent's current attorneys came into the picture there ensued discussions between the parties Counsel with regards the settlement of the main matter. As the matter was due in court for the extension or confirmation of the rule, an agreement was apparently reached that it be postponed to give the parties a chance to explore the possibility of a settlement. It is also not in dispute that it was agreed that the Respondent's firm, which was based in Mbabane was going to appear in court and apply for the extension of the rule by consent.

[69] The rule was however not extended in court but the matter was removed from the roll by the court with a further order that it was not to be reinstated without leave of court. There is a dispute of fact on how this came about. According to the applicant's attorneys, this was at the instance of the Attorney from the Respondent's Attorneys Firm one Miss Dlamini, but the Respondent's Attorneys contend that such was at the instance of the court acting mero mutu. This was allegedly after realizing that applicant's attorneys were in court. It was for this reason that there ensued the heated exchange of the acrimonious correspondence between the partie's Counsel referred to above.

[70] When the application to revive the rule was eventually moved by the applicant under a certificate of urgency, it was not opposed. It was discovered upon it being served that in fact all the movable assets that had constituted the subject matter of the Landlord's hypothec had been removed from the farms concerned. This discovery deepened the acrimony between the two counsels. A lot was said in its papers by the applicant on how the removal of certain of the assets was allegedly amounting to destruction of the farms infrastructure. Of course this was denied by the otherside.

[71] There was otherwise no use at that stage determining whether or not the removal of the assets concerned had been done maliciously or not. The Respondent's stand point was that the items were not removed following the lapsing of the rule but had been removed following an alleged agreement between the parties. I was again not asked to determine the circumstances under which the said assets were removed. It suffices though to say that the question of there having been an agreement for the removal of the said items has been decided above in the cause of the main matter where it transpired there was no such agreement reached even though it did look near from the correspondence exchanged.

[72] It was with the foregoing background that I was asked to determine the costs of the application for the revival of the rule. The applicant's counsel argued, that the costs in a matter like that should be decided in a robust manner.

[73] The starting point seems to me to be whether or not in the circumstances of the matter, where the rule had lapsed in the manner it had, without proof of the Respondent being responsible either through their own making or that of their attorneys, it would be proper to apportion blame in vacuo and order the Respondent to pay the costs of the application.

[74] The reality is that after the lapse of the rule, for which it is difficult at this stage to apportion blame on the Respondent's Attorneys, an application for the revival of same had to be made. If it is not settled that the Respondent's Attorneys were responsible for the lapse of the rule, for which they later took advantage, it would be premature to mulct them with costs. The unfortunate exchange of the acrimonious correspondence between the parties can only be regrettable. However it on its own cannot help resolve the question on who should bear the costs. I am therefore

convinced that it is a matter where, on the application for the revival of the rule, it is a case of each party having to bear its own costs.

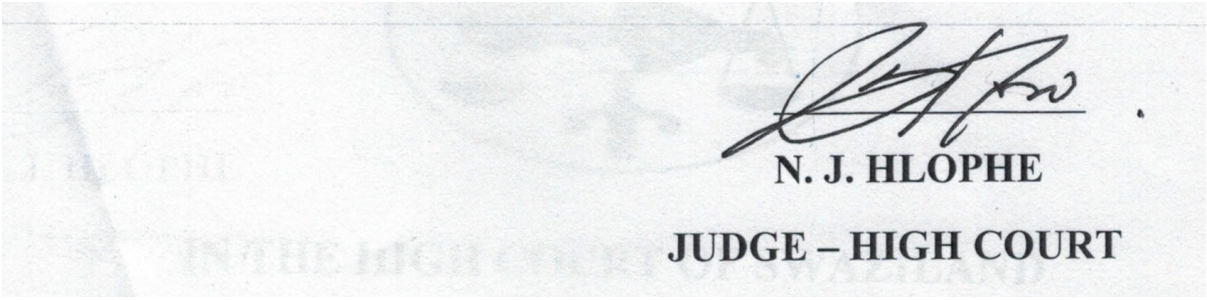
[75] Having pronounced myself in the manner stated above on each one of the points in issue in this matter, I have in general come to the conclusion that applicant's main application succeeds with costs whilst each party was to bear its costs with regards the appreciation for the revival of the rule. I accordingly make the following order:

1. **The Respondent be and is hereby ordered to pay applicant the sum of E2, 936, 450.62.**

2. **The Respondent is to pay interest on the amount stated in order 1 above at 9% a tempore morae from the date of the institution of the proceedings to that of payment.**

3. **The Respondent is ordered to pay the costs of the main application which shall include the costs of counsel reckoned in terms of Rule 68.**

4. **On the application to revive the rule that had lapsed, each party is to bear its costs.**



N. J. HLOPHE

JUDGE – HIGH COURT