

SOUTH AFRICA / JUDGMENT

Sun International (South Africa) Ltd v Crocodile Enterprises CC (1833/13) [2014] ZANWHC 52 (5 December 2014) [2014] ZANWHC 52

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

1833/13

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IN

THE NORTH WEST HIGH COURT

MAFIKENG

CASE

NO.: 1833/13

In

the matter between:

SUN

INTERNATIONAL (SOUTH AFRICA)

LTD.....Applicant

and

CROCODILE

ENTERPRISES

CC.....Respondent

CIVIL

MATTER

KGOELE

J

DATE

OF HEARING : 14 AUGUST 2014

DATE

OF JUDGMENT: 5 DECEMBER 2014

FOR

THE APPLICANT : Adv. Bhana (SC) With

Him

Adv.

Meiring

FOR

THE RESPONDENT : Adv. Levenberg

JUDGMENT

KGOELE J:

A.

INTRODUCTION

[1] This is an application in which the applicant, Sun International, seeks an order for the eviction of the respondent, Crocodile Enterprises CC, and all those who hold under it, from a portion of land forming part of Doornhoek Farm, No. 910, which it came to occupy under a lease agreement which was concluded between

the parties. Among other things, the applicant runs the Sun City Resort of on this farm Doornhoek, which is situated in North

West Province.

[2] The respondent has met this application with a counter-application, by which, in the main, it seeks the following relief:

1.1 A declaratory order that the lease that commenced on 1 August 2005 (“RH1”), as amended by “AA12”, has, in terms of clause 5 of “RH1”, been extended to 31 July 2015.

1.2 A declaratory order that, until the expiration of “RH1”, guests residing in the chalets on the premises, shall have free access to the grounds of Sun City and the Valley of the Waves – together with an ancillary order requiring Sun City to allow such access.

1.3 A declaratory order that the respondent has an improvement lien entitling it to remain in possession of the premises until the applicant has compensated it for the value of the useful and necessary improvements it has effected to the leased premises.

B. FACTUAL BACKGROUND

[3] The respondent conducted a crocodile farming enterprise from the leased premises for nearly 30 years, commencing in 1985. The initial lease was for a period of 20 years from 1988 – 2005.

[4] As appears from clause 6 of the original lease which has been attached to the papers as Annexure “RH1”, the respondent

was required to put out a considerable financial investment in order to establish a Crocodile Farm and to turn it into a working

enterprise. Furthermore, the respondent was responsible for all of the capital outlay for the improvements to the premises in order to render the premises suitable for conducting the business of a Crocodile Farm. The applicant was not going to bear any of the cost. The respondent invested significant amounts of money in order to establish the Crocodile Farm, turned it into a working and successful operation, and operated it.

[5] It appears from the respondent papers that at that time, the applicant was a relatively new enterprise which did not wish to

invest in the establishment of the Crocodile Farm. At the same time, Sol Kerzner, the founder of Sun City Resort and the Sun International Group, was very eager to have the Crocodile Farm because of its potential to attract tourists. Among other

things, it would provide an activity for families visiting Sun City. This would enable parents to take advantage of adult facilities such as gambling, while at the same time offering daytime family activities, especially for children. In addition, the Crocodile Farm served as a draw for foreign tourists.

[6] As a consequence of the respondent's considerable investment, the initial lease was for a period of 20 years. The rental was R30 000 per annum, if turnover did not exceed R600 000. If the turnover exceeded R600 000, the rental would be a percentage of the turnover.

[7] The improvements that the respondent has effected to the property since 1985 include: a water reticulation and filtration system,

roads, fencing, electricity, water and sewerage facilities, boreholes, ponds, walkways, bridges, the development of gardens, ponds as natural habitats for crocodiles, an outdoor amphitheatre and an indoor auditorium for talks and movies about crocodiles, restaurants, kitchens, public facilities and toilets.

[8] After 2005, in accordance with the second lease the respondent built 14 chalets to house guests near the Crocodile Park, including housing for the staff.

[9] The original lease expired in 2005. The parties agreed that it would be extended for a further five year period with two successive rights of renewal, thereby effectively permitting the respondent a further 15 years to operate the Crocodile Farm. Although the commencement date was 1 August 2005, because of the trust the parties posed in each other, so say the respondent, it continued to operate the Crocodile Farm and paid the rent, while the documentation was prepared. The agreement was eventually signed by the applicant on 8 September 2006, more than a year after its commencement.

[10] Under the original lease, the respondent was not entitled to provide accommodation to guests on the premises. The new lease expressly allowed the respondent to provide accommodation. Clause 7.2 of the schedule to the lease agreement required that the respondent pay a rental of 10% of the accommodation income (inclusive of VAT). This was over and above the 5% of the admission income to be paid by visitors to the Crocodile Farm.

- [11] These chalets (which were erected entirely at the respondent's cost) are rondawels with a self-catering kitchenette, bathroom, toilet and air conditioning. In addition, public facilities were built to serve the chalets, including the linen rooms, expansion of the restaurant to provide for a breakfast lounge, offices appertaining to the chalets, and a reception. A covered parking lot was also provided.
- [12] At the time that the second lease was concluded, the applicant and the respondent entered into an oral agreement, the material terms whereof were as follows: "Guests residing in the chalets would have free access into the grounds of Sun City and enjoy free entrance into the Valley of the Waves like all Sun City overnight guests for the duration of the lease from the Applicant to the Respondent."
- [13] In terms of the second lease agreement, the lease period endured for a period of 5 years commencing on 1 August 2005 to 31 July 2010. Clause 5 thereof provided that the respondent had an option to renew the lease agreement for two further successive five year periods. The option was to be exercised by no later than four months before the expiry of the first five year period of the lease. The respondent in its papers contends that it had on the 13 January 2010 exercised its option, which is more than four months before the expiry of the initial period under the second lease. The letter of renewal was delivered to Yazeed Patel, a representative of the applicant, according to the respondent on 13 January 2010, by Ranot a representative of the respondent. The contents of said letter were couched as follows:

"We refer to Crocodile Enterprises t/a Kwena Gardens' agreement of lease signed by your Company on 8th September 2006.

We hereby notify you that we would like to exercise our option to renew as per paragraph 5 in the lease agreement. We are both aware of the proposed changes and possible signing of the new (revised) agreement, naturally, in case we reach an understanding and the new agreement is signed, this notice will be replaced by the new agreement.

Please confirm receipt of this notice to us in writing." [Emphasis added].

This letter is the bone of contention in this application.

C. EVENTS PRIOR THE 14 JULY 2010

- [15] Prior to this alleged renewal, on 24 February 2009, during the currency of the second lease, the respondent received a letter from Patel, the applicant's representative. Patel referred to clause 16.1 of the lease which provided that "the Lessee shall not permit its empowerment shareholding to fall below 30%". Patel purported to give the respondent 7 days to rectify this breach and to obtain a 30% "empowerment shareholding". After the receipt of this letter, a number of letters were exchanged between the representatives of the applicant and the respondent concerning this alleged breach.

[16] On 17 April 2009 Ranot received a letter from the applicant's attorneys of record, Knowles, Hussain, Lindsay Incorporated firm, written on behalf of the applicant. In that letter, Knowles purported to cancel the second lease and required that the respondent vacate the premises by no later than 31 May 2008.

[17] After a series of without prejudice communications, Knowles addressed a letter to the respondent's attorneys on 27 May

2009. In that letter Knowles stated:

"2. Sun City Resorts is agreeable to the proposal made by your client at the meeting. Accordingly, our client has instructed us to prepare an addendum to the lease agreement for signature by your client. In essence, this addendum will –

2.1 delete reference to clause 16.1 of the lease and give your client one year from 30 May 2009 to find a buyer, which is in compliance with the empowerment requirements of our client (which requirements will be clearly set out), for 100% of its business; and

2.2 to the extent that your client is not able to sell the business as contemplated in paragraph 2.1 above, your client will be given a further six month period from 21 May 2010 to set up a trust, for the benefit of employees of Crocodile Enterprises CC, in that 30% of the net profits of The respondent will be paid annually to such employees.

3. In the circumstances, we will prepare the necessary addendum which will be forwarded to you shortly for signature by your client."

[18] The final version of the Addendum was prepared by the applicant's attorneys on 16 May 2010. The Addendum was signed by the applicant on 24 May 2010. Thereafter it was presented to the respondent and signed by Ranot, although he did not date it.

[19] It appears that the effect of the Addendum was to remove clause 16.1 of the second lease, which had previously required respondent to have a 30% black empowerment shareholding. This clause was replaced with Annexure "D" to the Addendum. In terms of the Addendum, respondent was now afforded until 20 May 2010 to find a 30% black empowerment shareholder.

[20] It further appears from the Addendum that if respondent was unable to obtain the appropriate black empowerment shareholder during that time, respondent would be afforded a further 6 months from 21 May 2010 to 30 October 2010 to form an appropriate employee trust that would provide for the respondent's employees to receive at least 30% of the annual profit of it for that year, regardless of whether or not dividends or other distributions were declared or paid by it to its members during that year or not.

D. EVENTS THAT LED TO THE CURRENT APPLICATION

[21] On 10 July 2012, out of the blue, the respondent then attorney, Nowitz, received a letter from Knowles in which he stated, inter alia, as follows:

“4. Our client terminated the lease agreement with your client on 17 April 2009. Your client disputed that our client had validly done so and protracted negotiations took place. These negotiations did not culminate in a written and signed agreement. The cancellation thus stands.

If for any reason our client is incorrect in the conclusion reached in paragraph 4 above (which is not conceded) the lease agreement came to an end by effluxion of time on 31 July 2010.

5. Insofar as your client is now occupying the premises on some sort of month to month tenancy (which is not conceded) our client, although entitled to require your client to vacate immediately given that set out above, without conceding or admitting it is required to do so, hereby gives your client three months written notice to vacate the premises and to demolish the structures and remove murals in accordance with the obligations that your client has to do so.” [Emphasis added].

[22] Further e-mails were exchanged. In particular on 15 October 2012, Ranot received an e-mail from Knowles wherein he maintained that the respondent had been given three months to vacate the premises. He further indicated that all rentals would now be received without prejudice to the applicant’s alleged right to “mitigate its loss through [The respondent’s] unlawful occupation”.

[23] On 10 January 2013, Ranot received two letters directly from Annabelle Reddy, a senior legal advisor of the applicant. The

first letter concerns an allegation that the applicant had dismissed 16 members of staff at the respondent and that COSATU had

complained. The respondent maintains that this was yet another letter in a pattern of persecution calculated to pressure it into vacating the premises. The other letter received on the same day from Reddy complained that the respondent was keeping dead crocodile carcasses in storage. This letter is the subject matter of one of the applicant’s complaints in this application.

[24] On 8 February 2013, the respondent received a further letter from Knowles. In that letter, Knowles stated:

“2. This letter is written without derogating from our client’s rights arising out of our letters to you of 17 April 2009 and 10 July 2012.

3. To the extent that a lease agreement may subsist between you and our client in respect of the premises at the Sun City resort currently occupied by you, our client has instructed us to cancel that lease, which we hereby do with effect from 1 June 2013. If you do not vacate by that date, our client will take such further steps as it may be advised.”

[25] Despite having purported to cancel the lease with effect from 1 June 2013, the applicant's attorney then addressed a further letter to the respondent on 7 March 2013. In that letter, the applicant purported to give the respondent 7 day notice to cure certain alleged breaches. These alleged breaches related to the alleged storage of crocodile meat or carcasses on the premises,

alleged failure to maintain the premises, and alleged failure to remove waste from the premises, and alleged failure to prevent

offensive emissions from the premises. They are also the subject matter of this application.

[26] On 8 March 2013, the respondent provided a detailed response to the applicant's breach letter of 7 March 2013. In that letter, the respondent's defence to the assertion that there had been covenant breaches of the lease agreement were fully set out. The applicant then brought this application for eviction of the respondent.

E. THE TERMINATION OF THE LEASE BY EFFLUXION OF TIME

[27] The applicant submitted as its main claim upon which the eviction of the respondent is sought that the contract between the two parties terminated by effluxion of time on 31 July 2010. It based this submission on both clause 5 and 4 of the Schedule to the lease which provides that the lease is to be for a period of five years.

[28] It is further the applicant's submission that the period of the lease commenced on the 1st August 2005 and terminated on the 31st July 2010, but still upon expiry of the term on lease, the respondent remained in occupation of the premises. This, the applicant submitted, occurred because a month to month tenancy arose tacitly. Despite having dispatched a letter of cancellation, terminating the tenancy, the respondent refuses to vacate. The fact that the addendum was made, so it was submitted by the applicant, does not conduce to the conclusion that the lease was renewed as no new terms as envisages by clause 5 were in fact agreed upon.

[29] The respondent on the other hand submitted that there are disputes of facts concerning the issues that surrounded this application which cannot be resolved on paper. On this issue, the respondent submitted that the lease agreement (second lease) has not expired. The respondent's reasons for this proposition is that it had an option to renew the lease for two successive periods of five years after the first five year period, which it exercised by delivering this option in writing on the 13 January 2010 to the applicant's representative. The delivery of this letter was before 24 May 2010, the day when the applicant signed an addendum that gave effect to this lease agreement, which applicant at that time was threatening to cancel unless the respondent modified its BEE shareholding requirement. According to the respondent the signing of this addendum after it exercised its option to renew extended the second lease to 31 July 2015.

[30] According to the respondent applicant chose not to disclose the receipt of the option letter to the Court in its founding affidavit.

The respondent further submitted that as a consequence of the applicant's failure to deal with the option letter in the founding affidavit, the applicant has failed to make out a prima facie case in the founding affidavit that the second lease came to an end by effluxion of time.

[31] As a response to the submission by the applicant that no new terms were agreed upon, the respondent submitted that in fact, the parties did agree upon new terms. They put them into an addendum to the lease agreement which they executed after the respondent exercised the option, but before the initial period of the lease had expired.

[32] In an effort to expand on this issue further, the respondent submitted that, on a proper construction of clause 5.3 of the second lease, if the applicant failed to respond to the option letter by proposing new terms that were reasonable in the circumstances, the option was automatically renewed on the original terms and conditions. As the applicant failed to propose any new terms

other than those contained in the Addendum, there was an automatic renewal on the previous terms and conditions subject to the

modifications in the Addendum.

[33] Lastly the respondent submitted that, the lease agreement does not expressly provide that upon expiration, the lessee is obliged to vacate the leased premises. The applicant has failed to allege that it was an implied or tacit term of the lease agreement that, upon expiration of the lease, the respondent had a contractual obligation to vacate the leased premises.

Analysis

[34] The parties must agree on the period of the lease. The property cannot be leased in perpetuity. This is an essentialia of a lease agreement. (CJ Nagel; Commercial Law; 3rd edition; par 16.28)

[35] If the lease contains an option for renewal, it may be accepted that the option will be exercised. The mere hope of a renewal, not supported by an option, must be disregarded. (Minister of Water Affairs v Mostert 1966 4 SA 690 (A) 729).

[36] Whether a contract has been renewed or not is actually a question of fact and if a party can prove that the parties had reached consensus to renew the agreement for a further period, the court will be convinced that the agreement had been renewed. The parties may tacitly renew the lease agreement. A tacit renewal of a lease is traditionally known as a tacit relocation and results in a new contract, presumed to be on the same terms which are incident to the relationship of landlord and tenant but not those which are collateral to, independent of and not incident to that relationship. (Doll House Refreshment (Pty) Ltd v O'Shea 1957 (1) SA 345 (T)).

[37] Periodical leases continue in being “until terminated by due notice”. The period of notice differs according to the nature of the lease. Notice must be given to terminate the lease at the end of one of the periods and must run concurrently with one of the periods though it may be given before the beginning of the period at the end of which the lease is to terminate. If the period of the lease is a calendar month, beginning on the first day of each month, notice given on 12 December to terminate on 12 January is ineffective and so is notice given on 4 October to terminate on 24 December. The last mentioned instance shows that if notice expires on a date which is not the terminal date of one of the periods of the lease it is ineffective even if the whole of a period elapses between the date on which the notice is given and the date on which the notice purports to bring the lease to an end. In other words, when notice covering a full period is given it is the terminal date which matters, not the date on which the notice is given. (LAWSA; Volume 14(2) para 64)

[38] It is common cause in casu that the respondent timeously sought to exercise the option to renew. It is further common cause that the applicant received the option letter. Accordingly, it was incumbent upon the applicant to disclose that it had received the option letter. It should then have explained in a proper and comprehensible manner why it maintained that the option letter did not have the effect of extending the lease. This is so because Patel send the following e-mail on the same day the 13th January 2010;

“Please note that I met with Shlomi [ie. Myself] this afternoon. As we agreed, the original commercial terms of the lease would apply, including the options to renew. Shlomi may decide to pursue the matter further, which is his prerogative but as of now, the original period and terms apply”. There was never any intention on the part of Sun International to extend the lease for a further period and that should never have formed part of the discussion.

The only matters that require attention were the commitment to the empowerment requirement and the incorrect referencing. If you are happy that this has been adequately addressed, then we can finalise the agreement”. [Emphasis added]

[39] The letter of the applicant’s attorneys of record dated 10 July 2012 in my view appears to have been written in ignorance of the fact that the option to renew had been exercised by the respondent and it was already delivered to their Patel on 13 January 2010, and furthermore that, an addendum had been executed signed by the applicant on the 24th May 2010. Furthermore, the said e-mail by Patel is in itself confusing. It talks about “the original terms of the lease would apply, including the options to renew”. Yet, the applicant had up until today, not increased the rental or Shlomi, who according to this letter had some powers to pursue the matter or not, has not yet said anything.

[40] In its founding affidavit, the applicant now maintains that, after 31 July 2010 “a month-to-month tenancy arose tacitly” between the parties. Yet, in Knowles’ letter dated 10 July 2012, Knowles is very specific to note that the applicant does not acknowledge that any month-to-month tenancy had come into existence. On the applicant’s own version the lease terminated on 31 July 2010. Yet the applicant continued invoicing the respondent for rental

for more than two years after that date as though the lease was not at an end. The applicant also continued to accept rentals from the respondent.

[41] Clause 5 of the second lease provides:

“5. Option to renew

5.1 Provided that this Lease shall have remained in existence throughout the Initial Period the Lessee shall have an option to renew this Lease on the day following the expiry date of the Initial Period for a further period of 5 (five) years (“the Option Period”).

5.2 Exercise of the option shall be by written notice from the Lessee to the Lessor, to be received by the Lessor by no later than 4 (four) months before the expiry of the Initial Period.

5.3 The terms of this lease shall apply, mutatis mutandis during the Option Period (if the option is so exercised) provided further that the parties shall renegotiate the rental and any other term of the Lease deemed necessary by the Lessor in respect of the Option Period.”

[42] The essence of the applicant’s case therefore appears to be that, unless the parties “agreed on new terms”, the exercise of the option does not result in the renewal of the lease. This interpretation of the option clause is fanciful, inequitable and commercially unrealistic. On the applicant’s version, it can simply nullify the effect of the option by ignoring any letter that seeks to exercise the option.

[43] In *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd & Others* 2005 (3) SA 54 (W), the parties had entered into a ten year lease agreement. The rental for the first five years was agreed upon, but the rental for the second five year period was to be determined pursuant to a detailed rent review procedure set out in the lease agreement. The landlord failed to timeously invoke the rent review procedure before the end of the first five year period. The tenant asserted that, as a consequence of the landlord’s failure to invoke the rent review machinery, the lease ended after five years. The Court rejected the tenant’s argument.

[44] The obligation of the applicant to act reasonably and in good faith in the event that the option is exercised also finds support in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC). Everfresh had entered into a lease agreement with the former owner of a shopping centre. Clause 3 of the lease gave Everfresh an option to renew the lease on expiry, subject to agreements being reached on the rental. Sometime after Shoprite became the new owner of the centre, it sought a High Court order evicting Everfresh. Everfresh contended that Shoprite was barred from doing so because it was under an obligation under clause 3 to make efforts in good faith to reach an agreement on rental which it could not frustrate by refusing to participate. Shoprite contended in turn that clause 3 did not constitute a binding right of renewal.

[45] The facts in casu are more favourable to the lessee than the facts in *Everfresh*. In *Everfresh*, the option to renew specifically provided that the rental had to be agreed upon. In this case, clause 5.3 provides that: “the parties shall renegotiate the rental on other term of this lease

deemed necessary by the lessor”. In other words, there will only be a renegotiation of rental or other matters if the landlord “deems it necessary”. Moreover, as appears from *NBS Boland Bank v One Berg River Drive and Others* 1999 (4) SA 928 (SCA), the common law requires that the landlord must act reasonably in so deeming it.

[46] Having regard to all of the above consideration, I am of the view that the following question still needs to be answered:

- (a) Does the delivery of the option to renew entitle the respondent to an answer?
- (b) What then happens if the answer is not forthcoming?

[47] The applicants submitted it did not mention the addendum concluded in its founding affidavit because it is irrelevant. But the questions that remain to be answered in this matter are:-

- (a) Why did the applicant sign the addendum on the 24 May 2010 whereas it had purportedly terminated the lease agreement on the 17 April 2009 according to its letter dated 10 July 2012?
- (b) Why did the Annexure to the addendum “Annexure D” offered the respondent until 20 May 2010 to find a 30% black

empowerment shareholder, if the lease was terminated on 17 April 2009?

- (c) The second lease was two months away from expiration (i.e. 31 July 2010), why was it so important for the applicant that the respondent set up appropriate empowerment trust at this late hour?

[48] It is settled law that an application cannot properly be decided on affidavit if there are factual disputes which need to be resolved but which cannot or should not in the absence of oral evidence.

[49] It is further trite that a real dispute of fact can arise in one or other of the following ways:

The respondent may deny one or more of the material allegations made on the applicant’s behalf and produce evidence to the contrary, or apply for the leading of oral evidence of witnesses who are not presently available or who, though averse to making an affidavit, would give evidence if subpoenaed. The respondent may admit the applicant’s affidavit evidence but allege other facts, which the applicant disputes. The respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself giving or proposing to give evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable, or that certain facts upon which the applicant relies to prove the main facts are untrue. The absence of positive evidence directly contradicting an applicant’s main allegations does not render a case such as this free of a real dispute of fact. In other words, a respondent is entitled to seek a reference to oral evidence or to trial under circumstances where it is unable to produce affidavits containing positive allegations that prima

facie establish a defence. This requires of the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Importantly, the deponent must satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and courts should be astute to prevent an abuse of its process. It must be satisfied that there is a credible reason to believe that the respondent will be able to establish a defence. (Harms: Civil Procedure in the Supreme Court Practice B6-45; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)).

[50] On the other hand, a real dispute of fact does not arise where the respondent:

states that he can lead no evidence himself or by others to dispute the truth of the applicant's statements, but puts the applicant to the proof; or relies on a bare denial of allegations contained in the applicant's affidavits. See: Harms; Supreme Court Practice; B6-45.

[51] Even if there is an application for referral to evidence or trial the Court may elect to adopt a robust approach (avoiding fastidiousness) and decide the issues on the affidavits. Caution to this approach has, however, been voiced. A court should refrain from settling disputes of fact solely on the probabilities as they emerge from the affidavits without giving any or due consideration to the advantages of oral evidence. The field of application of the robust approach is properly limited to those cases where the allegations on the one side are so clearly false or intrinsically improbable that a Court could say that an oral hearing would not disturb the balance of probabilities, or where the respondent relies upon a bare denial. In other words, a Court should be satisfied that viva voce evidence would not disturb the balance of probabilities before it decides to resolve a dispute of fact on the papers. (Harms; Civil Procedure in the Supreme Court; B6-47).

[52] The respondent pointed to the fact that the applicant do not deny that it have received a letter in terms of which the respondent

purported to extend the lease agreement. However the applicant submits that the renewal of the lease agreement was not solely in the hands of the respondent and goes further to say, whatever the impression created to the respondent, the agreement could not have been extended as the person who received the letter that purported to extend the agreement had no authority to extend the agreement. There is therefore a clear dispute as to what the letter meant and what its effect is.

[53] The applicant recognises that the addendum was concluded, but that does not in itself indicate that the agreement was extended.

The applicant recognises that the lease agreement could only be extended in terms of clause 5 of the lease agreement. The respondent

argues that on the proper construction of clause 5.3 of the lease agreement, the lease agreement was extended. This also signify a dispute between the parties especially when taking into consideration the question that remained unanswered which have been enumerated in paragraph 47 above.

[54] All of the above considerations clearly reveal that there are disputes of facts regarding the extension or lack thereof of the lease agreement. This is a perfect case in which this Court should exercise its discretion and refrain from settling disputes of fact solely on the probabilities as they emerge from the affidavits without giving any or due consideration to the advantages of oral evidence. I fully agree with the submissions of the respondent that in this instance viva voce evidence would disturb the balance of probabilities as contained in the papers.

F. BREACH OF CERTAIN MAINTENANCE OBLIGATIONS

[55] The applicant submitted in the alternative that, the respondent is in breach of various maintenance obligations under the lease and allegedly failed to cure those within 7 days. They were briefly couched as follows:-

Breach of the duty to maintain

[56] In breach of clause 22.1, the respondent allowed the premises to fall into a state of disrepair as follows:-

- (a) The wall of the weir in the river on the premises was permitted for many months to be in a broken and unserviceable condition so that it no longer retained water. The respondent did not repair it.
- (b) For many months, the access bridge to the premises was broken and, accordingly, closed down. The respondent did not repair it.
- (c) The wooden walkway traversing the length of the premises – used by visitors as a vantage point from which to observe the crocodiles – became broken, unserviceable and dangerous. The respondent did not repair it.
- (d) The signage outside the premises was for many months in a worn and dilapidated state. The respondent neither repaired nor replaced it.

[57] The respondent contends, its reply that it denies that any of the demands of the applicant could have been validly made in terms of the lease

Breach of clauses governing the permissible use of the premises

[58] For a considerable period, in breach of the clause 4, the respondent stored on the premises the carcasses of about two hundred

crocodiles. Clause 4 does not permit crocodile carcasses or meat to be stored on the premises.

[59] The respondent said the following in reply to this point:

“4) ‘...conduct of the business of a crocodile farm, a curio and coffee shop ...’

The only stipulation regarding the crocodile farm was that we dismantle the Abattoir which has been done. Storage of carcasses has been a normal crocodile farming practice for all the crocodile farmers worldwide. Since we do not slaughter anymore, the carcasses remain carcasses and cannot be described as ‘meat’. The carcasses have a value in terms of the skin, skulls and feet for curios and are therefore in line with crocodile farming and our curio shop. There is no clause which prohibits the storage of crocodile meat or carcasses. In terms of the business, we would not agree to such a demand as it would interfere with normal crocodile farming operation.”

Breach of the obligation to remove waste from the premises

[60] The applicant submitted that Clause 22.3 provides that the lessee shall:

“at its own cost remove all of its waste and be responsible for the pest control of the premises.”

The crocodile carcasses and meat, which by its own admission the respondent has for a considerable period stored on the premises, is waste. By not getting rid of this waste, the respondent fell in breach of clause 22.3.

[61] The respondent addressed this issue as follows:

“We are attaching the Municipal Health and Environmental Services Report which was based on the inspection dated 12th February 2013. In the report various recommendations are made and regarding the carcasses, it is recommended that they not be stored on the floor but on shelves and crocs to be skinned should be first in, first out. There is no mention that there is any health hazard due to the crocodile carcasses which is further supported by the fact that there is no deadline to their recommendations. We will however, implement their recommendations as soon as possible. Mortality figures are inspected by the State Vet randomly and throughout the year.

- 8) Please refer to point 4 with reference to the Health Department’s report. The crocodile carcasses will be skinned and turned into products for the curio shop as they clearly present no health hazard. The waste resulting from the remains of carcasses will be disposed of as ‘waste’ in the prescribed manner.”

[62] The respondent as a reply submitted that 7 days was an inadequate period of time to effect the relevant maintenance. The applicant

seeks to meet these allegations by simply denying them and alleging that they are argumentative. The result is that there are no

allegations by the applicant (either in the founding or replying affidavits) that addresses the issue of the reasonableness of the applicant’s notice to the respondent. In any event, there is a dispute between the parties concerning what constitutes reasonable notice.

- [63] It is apparent that all the allegations made by the applicant are seriously contested by the respondent on factual grounds and cannot be resolved on affidavit. As an example, the applicant's complaint that the respondent has been storing crocodile's carcasses on the premises is hotly contested by the respondent by putting up an expert evidence of Mr Ranot, who deposed to an affidavit on behalf of the respondent.
- [64] The same applies to the third breach the applicant relies on. The applicant also accused the respondent of failing to fulfil its obligation to remove waste from the premises. Scrutiny of the facts upon which the applicant relies indicates that the applicant's complaint relates to the retention of crocodile carcasses and crocodile meat on the premises. The respondent's answer clearly introduces a question whether the retention of such carcasses amount to an integral part of the business of conducting a crocodile farm or not.

G.

CONCLUSION

- [65] I am of the view that the application stands to be dismissed in its entirety. Besides the fact that the applicant is approbating and reprobating, the application is riddled with a series of serious disputes of facts concerning a number of issues that are central to it. These include disputes concerning whether the respondent was in fact in breach of its obligations and whether the respondent has been given reasonable notice to cure those breaches. As correctly submitted by the respondent, all of these disputes of facts were clearly foreseeable. Many of them were prefaced in the correspondence the parties exchanged. It is plain that the applicant should have litigated by way of action and not an application. Their magnitude warrants a proper ventilation in a full trial.
- [66] I decline to consider the counter-application together with the other defences raised by the respondent in this application in view of the conclusion I have already reached above.

H. ORDER

- [67] The following order is consequently made:-

67.1 The application is dismissed with costs including costs consequent upon employment of a Senior Counsel.

A M KGOELE

JUDGE OF THE HIGH COURT

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