CASE NO. 3492/97

IN THE HIGH COURT OF SWAZILAND

IN THE MATTER BETWEEN

E.B. INVESTMENTS	APPLICANT
VS	
HESTER LOUBSTER TRUST	1st RESPONDENT
HESTER MARIA PETRONELLA LOUBSTER	2nd RESPONDENT
CORAM	S.B. MAPHALALA - A J
FOR APPLICANT	W.K. KLEVANSKY
FOR RESPONDENT	N. KADES

JUDGEMENT

The applicant is the registered owner of Portion 649 of farm no. 188, Dalriach , situated in the District of Hhohho (The Castle). The first respondent is Hester Loubster Trust, a trust constituted in terms of the laws of the Kingdom of Swaziland, carrying on business of the aforesaid premises. The second respondent is Hester Maria Petronella Loubster who is the sole trustee of the first respondent, resident at the aforementioned castle.

On the 15th December 1994, and at Mbabane, Swaziland the applicant and the first respondent entered into an agreement of lease ('The Agreement") in terms of which the applicant as lessor, leased the Castle to the first respondent as the lessee, The first respondent duly took occupation of one of the apartments on the leased premises.

In these proceedings applicant claims an order for ejectment from the said immovable property of the two respondents and further that the respondents pays the costs of this application.

In applicant's founding affidavit, which was deposed to by one Karl Grant, a Director of applicant. The applicant deposed in its founding affidavit that on the 27th January 1997 the second respondent, on behalf of the first respondent gave notice of intention by the first respondent to renew the lease in terms of clause 3 of the agreement. In terms of the lease clause 2 thereof, the lease would run for a period of three years commencing on the 1st December 1994 and terminating on the 30th November 1997. In terms clause 1 (b) thereof, the lessee was permitted and obliged to occupy one of the leased apartments on the leased premises.

In terms of clause 3 thereof:

'If the lessee shall still be in occupation of the leased premises by virtue of this lease, the lessee shall be entitled to renew this lease for a further period of 3 (three) years giving written notice of renewal to the lessor not later than the 3rd day of May, 1997".

In terms of clause 4 (d) thereof,

"If the lease is renewed, the rental and escalation thereof shall be subject to negotiation between the lessor and the lessee and should they fail to reach agreement, such rental shall be determined by arbitration".

The applicant avers that the option to renew, as embodied in the aforesaid clause 3, is neither binding on the applicant nor enforceable by the respondent, unless and until the parties shall have agreed upon the rental payable during the renewal period or failing such agreement, unless the said rental had been determined by arbitration. The applicant at no stage agreed to a renewal of the lease, nor were there any negotiations or agreement reached as to rental payable in respect of the renewal period nor has any arbitration taken place or even, for that matter, been arranged or convened in order to determine such rental. In the premises the lease has not been renewed beyond the 30th day of November, 1997 nor has the applicant ever agreed to such renewal and/or agreed on any rental in respect of such renewal period and/or arbitration in respect thereof, nor does applicant in all the circumstances accept the first respondent's attempt to renew. On or about the 14th March, 1997, the applicant in writing conveyed to the respondents that it did not recognize the first respondent's purported renewal, as appears from paragraph 3 of the letter marked annexure "EB4". On the 28th November, 1997 the applicant inter alia gave written notice to the respondents to vacate the leased premises not later than 30th November, 1997. A copy of the letter is marked annexure "EB5". The lease not having been renewed, the respondent right to occupy the leased premises or any part thereof in terms of the agreement terminated on the 30 November, 1997. Despite demand the respondent have wrongfully and unlawfully failed, refused or neglected to vacate the premises and restore same to the applicant.

The answering affidavit filed on behalf of the respondents it was admitted that applicant is the owner of the property in question. The answering affidavit of the first and second respondents is deposed by the second respondent where she related in great detail the recent history of the relationship between the respondent and the applicant and she attempted to bring to the attention of the court acts of harassment made by the applicant to evict respondent. She avers that as it appears from the documents in case number 12/96 which was heard before this court, she, on the 5th January 1996 acting on behalf of the first respondent launched an urgent application to interdict the applicant and the respondent Karl Grant, from "inter alia, entering the leased premises for any purpose other than to inspect same in terms of the lease agreement, and interdicting and restraining applicant and Karl Grant, from interfering or in any way interrupting the operation of the hotel business known as 'The Castle" carried on, at the aforesaid leased premises. Despite the opposition of applicant and Karl Grant, who filed answering affidavit, the court, after hearing argument, granted a final interdict in that matter and awarded costs against applicant and Karl Grant on the attorneys and own client scale. She went on to aver that on the 13th November, 1995 she

received a letter (annexure HL2) from applicant's attorneys of record to first respondent, it purported to cancel the lease on that date. As appears from annexure "H" to the said application and been received by her for the King's office indicating that the leased premises were to be vacated at the end of November, 1997 and that there was now a new landlord of the premises. She drew the attention of the court to the contents of paragraph 10.4 of the founding papers in case no. 12/96 and the answer thereto in paragraph 7.10 and 7.11 of the respondent's answering affidavit therein attested to by Karl Grant wherein he admits that he had informed her that he had sold the property to an undisclosed purchaser. It subsequently transpired that the aforesaid purchaser is the King of Swaziland and, indeed, it was only after an order was made calling upon the deponent Karl Grant, to the sale of the leased premises and failing which he would be committed for contempt of court that the aforesaid document was eventually produced. She submitted further that, in the circumstances, that it is quite clear from the contents of these proceedings that applicant is no longer the owner of the leased premises and as such has no locus standi to bring these proceedings and it will argued in limine accordingly. I must say at this juncture that when the matter came for arguments this point was not raised by respondent's counsel and the tenor of the arguments from both sides was that for present purposes it was the applicants and the respondents who are disputants in this matter.

To revert back to the second respondent's answering affidavit she submits that on the 15th November,

1995 and in case no. 2698/95, applicant issued summons against the first respondent for payment of the sum of E72,344-00 being in respect of arrears rentals. In spite of its contention of the 13th November 1995 as witnessed in annexure "HL2", that it had cancelled the agreement of lease, applicant has continued to accept rental from the first respondent who continued to occupy the premises and denies that applicant has any right to cancel the lease. As appears from paragraph 10.1 of the answering affidavit of the applicant in case no. 12/96, applicant states that it has cancelled the lease on the basis that first respondent is in arrears with its rental and that such cancellation is in terms of clause 14 of the lease. There appears to be numerous correspondences from applicant's attorney and respondents attorney relating to the issue. Finally she avers that applicant has misinterpreted the contents of the paragraph quoted by it in that the aforesaid interpretation is misleading and not in accordance with the contents of the lease, annexure "EB3". In the circumstances she denies that the option to renew is neither binding nor enforceable unless and until the parties shall have agreed upon the rental payable during the renewal period. In any event, such rental on applicant's version has been determined. She submits further on the alternative, that should it be found that applicant's interpretation of the aforesaid clauses is correct, that she submit that having exercised the option to renew the lease that the onus lies on applicant to suggest a rental and in the event of the parties failing to agree upon such rental that the matter should be referred to arbitration. The applicant has failed to disclose the letter of the 7th August, 1997 annexed marked HL5 addressed by applicant's previous attorney, Robinson Bertram, to first respondent as appears from that letter it was applicant's case that the agreement that the option to renew in terms of paragraph 3 of the said lease has been properly been exercised, that applicant has accepted that this is so and has in the circumstances demanded payment of rental of E44,000-00 due as it alleges from 1st August, 1997.

These are the facts before me. The matter came before me for arguments on the 29th June, 1998 where Mr Klevasky for the applicant filed from the bar applicant's heads of argument which I must say have been very helpful. The applicant's contention is that the option to renew embodied in clause 3 of the lease is neither binding on the applicant nor enforceable by the first respondent "...unless and until the parties shall have agreed upon the rental payable during the renewal period or failing such agreement, unless the rental has been determined by arbitration "

Clause 3 of the lease must be read together with clause 4 (d) of the lease, which reads as follows:

Renewal

3. "If the lessee shall still be in occupation of the lease, the lessee shall be entitled to renew this lease for a further period of 3 (three) years by giving written notice of renewal to the lessor not later than the 31st day of May, 1997".

Rental

4(d) "If the lease renewed the rental and escalation shall be subject to negotiation between the lessor and the lessee and should they fail to reach agreement such rental shall be determined by arbitration in terms of the arbitration law in force in Swaziland on the basis of what is a reasonable rental for the leased premises at the time".

The applicant contended further that, at no stage did it agree to a renewal of the lease nor were there any negotiations or agreement reached as to rental payable in respect of the renewal period nor has any arbitration taken place, or even, for that matter, been arranged or convened in order to determine such rental. Mr Klevasky submitted that in so far as Clause 4(d) does not specify the rent, but stipulates that rental and escalation shall be subject to negotiation between the lessor and the lessee, such provisions are invalid and of no force and effect. An option to renew must contain the essential elements of the lease so that if the lessee exercises the option, a lease is concluded. Thus an option to renew which does not specify the rental, but stipulates that the lease will be renewable at a rental to be mutually agreed upon if exercised by the lessee will not result in a lease because agreement on rent is an essential element of the lease, and until agreement has been reached on it no lease is concluded. A fortiori an option entitling a

lease to renew upon terms to be arranged, if exercised by the lessee, will not result in a lease (refers to Landlord and Tenant, 2nd W. E Cooper page 347, Lawsa, Vol 14p 174) with further regard to the further requirement under clause 4 (d) that if agreement is not reached.

"Such rental shall be determined by arbitration in terms of the arbitration law then in force in Swaziland on the basis of what is a reasonable rental for the leased premises at the time"

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The applicant states that the respondents have misconceived the law with regard to the essential elements which an option to renew must contain and more particularly in regard to the stipulation of the rent, and in the premises, no onus lies on the applicant to suggest a rental as alleged by the respondent in clause 25.3 or to negotiate. Further in so far as the applicant's then attorneys advised the respondent's attorneys of record on the 14th March,

1997 and 29th November, 1997 that the first respondent's purported exercise of an option was of no legal force and/or effect, and/or that the applicant maintained his position that it would not agree to renew the lease under any circumstances, it was incumbent upon the respondent, on proper construction of the lease, if it desired arbitration proceedings to "activate" such arbitration delivery of an arbitration notice during the currency of the lease. This has not been done and the applicant maintains that the first respondent, by failing to activate arbitration proceedings cannot rely on arbitration provisions of clause 4(d) of the lease or contend that the lease has been renewed. Applicant further contended that the arbitration provisions of clause 4(d) relating to "reasonable rental" are vague and unenforceable in so far as such provisions deal with the concept of reasonable rental. The applicant further averred that, in so far as:

4.5.1 it is the owner of the premises

4.5.2 the respondent is in possession of the premises, it is entitled on the facts to possession of the premises (referred to the case Graham vs Ridley 1931 T. P. D. 476)

This is the applicant's case. Mr Klevasky when the matter came before me on the 29th June 1998 submitted essentially the same arguments as are reflected in his heads of argument.

Mr Kades for the respondent did not file heads of argument but made submissions from the bar. His view is that this matter is very simple. One has to look at the founding affidavit of the applicant to see that the applicant has no case. The applicant blows hot and cold. The applicant has taken the view that the lease was cancelled but if you want to renew you must do what the lease asks you to do. That in terms of the lease agreement the second respondent is not the lessee but it is the trust. She is not a party to the lease personally. Mr Kades took the court to the various papers filed of record to buttress his arguments. He further took the court through the case of Letaba Sawmills (EDMS) BPK vs Majovi (EDMS) BPK 1993 (1) S.A. 768 more particularly at page 773 in which the option is set out in English which states at clause 3.1 the lessee shall exercise the right to renewal by giving to the lessor notice in writing of intention to review the lease agreement at least 6 months prior to the termination of the agreement. That this clause is identical to the one in the case in casu. Further it states the rental payable by the lessee to the lessor shall be negotiated between the parties subject to the rental being fixed between the limits of market related prices for timber, if the lease is renewed and rental and escalation shall be subject to arbitration between the lessee and the lessor and should they fail to reach agreement such rental shall be determined by arbitration. Mr Kades submitted further that the mention to "an arbitrator in terms of the arbitration law of Swaziland and the arbitrator must determine the rental as reasonable rental at that time". That this is a perfectly good arbitration clause. There is a long line of decided cases in 1980's and culminating in the Letaba Sawmills Case (supra) which was decided in the early

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1990's which lay down the law perfectly clearly that where rental is determinable by reference to a

specific procedure there is a valid lease and valid option and in the present case the respondent has exercised the option. He argued that the applicant relies on a lease that has been cancelled and on the other hand he says the respondent should get out of the premises because the lease has lapsed.

Mr Kades further submitted that respondent has exercised an option what more were they supposed to do. They have been tendering a rental and it has been rejected every month. That respondents have done whatever they could do. There was a valid lease at the time respondents exercised the option to renew and that these proceedings are premature and do not relate to reality. Before the lease expired they had exercised the option to renew.

This is the respondent's case.

I have reviewed the papers before me very carefully and have also considered the helpful submissions by both counsels in this case. I have also considered the decided cases cited by counsel in support of their contentions. The crisp legal issue before me is whether or not the option to renew by the respondents as embodied in annexure EB3 valid and enforceable. It is trite law that a lessee who wishes to exercise his option to renew must communicate to the lessor his acceptance of the latter's offer (refer to Landlord and Tenant BT W.E. Cooper (2nd ED) and the cases cited there at). The lessee must communicate his decision during the period stipulated in the lease or if no period is stipulated, before the lease has been lawfully terminated or has lapsed through effluxion of time. In the present case the lessee exercised the option to renew more than a year of the expiry of the lease and it communicated its option in writing as evidenced by annexure EB3. It is clear therefore and it is beyond doubt that the respondent exercised the option within the period prescribed by the lease. The next step is to determine whether the option itself was vague and thus invalid and unenforceable as contended by the applicant. The law on the subject is succinctly outlined by author W.E. Cooper in his book "South African Law of Landlord and Tenant (2nd ED) at page 317" an option to renew must contain the essential elements of a lease so that if the lessee exercises the option a lease is concluded. Thus an option to renew which does not specify the rent but stipulates that the lease will be renewable at a rent to be actually agreed upon if exercised by the lessee, will not result in a lease because agreement on rent is an essential element of a lease and until agreement on rent has been reached on it no lease is concluded. The learned author cites the cases of Biloden Properties (Pty) Ltd vs Wilson 1946 N. P. D. 736 and the South African Reserve Bank vs Photocraft (Pty) Ltd 1969 (1) SA. 610 © in support of this statement. However, in the most recent case of Letaba Sawmills (Pty) (supra) decided in 1993 the court was faced with a similar situation as the court in the present case. In that case the facts show that in June 1984 the appellant concluded a contract of lease with the respondent in terms of which a certain plantation was leased to the appellant for a period of nine years and eleven months. The contract also granted the appellant the option to renew the lease for a further period of nine years and eleven months. The appellant applied in a provincial division for an order declaring the lease valid, and the respondent opposed it. The dispute revolved around the validity of the said option is valid, as a whole was invalid in terms of the provisions of section 3 (d) of the Subdivision of Agricultural Land Act 70 of 1970 which prohibits leases of agricultural land for periods exceeding 10 years unless the

minister concerned consents thereto. It was common cause that clause 3 (which contains the option) was separable from the rest of the contract, so that the lease was valid even if the option was not. Clause 3 inter alia specified that the rental for a further period had to be negotiated afresh between the parties subject to rental being fixed within the limits of market related prices for the timber on the leased property and rental payable in respect thereof (clause 3.2.) and that in the event of the parties being unable to reach agreement on the said rental, it has to be determined by arbitration (clause 3.3.). According to the appellant, the above provisions were so vague as to be unenforceable, thus rendering the option invalid. The appellant's application was dismissed by the court a quo. On appeal it was held that it was clear that clause 3.2 had stood on its own (that without clause 3.3.) the option would have been void. An agreement to negotiate and agree upon a rental was unenforceable and would result in the invalidity of the option, and if it made no difference that the parties had circumscribed the envisaged agreement by limiting the ambit of the negotiations and the resulting agreement. Further, it was held that the parties were entitled to

agree that a rental had to be determined by arbitration, and if clause 3.3. had stood alone, the option would have been valid. It was furthermore, inter alia found by that court further, that it was clear that the parties had intended to fix the limits of the rental with reference, firstly, to the price of timber on the open market and that there was accordingly no room for the argument that the content of the provision referring to "market related prices" was not determinable.

After reviewing the ratio in this case I am in total agreement with Mr Kades assertion that the present case is at fours with the Letaba Sawmills case. It is my considered view that clause 3 read with clause 4 (d) do not create any vagueness as to render the option to renew void and unenforceable. The lessee in the present case acted within the ambit of the lease. agreement, which is a document that outlines the rights and obligations of the parties to the lease agreement. The lessee acted within the prescribed time as provided for by the lease agreement. What more was the lessee expected to do after it had exercised the option.

The lessor on the other hand did all possible to thwart lessee's rights under the lease. The lessor cannot now come before court and blow hot and cold and challenge the option on one hand yet on the other rely on the purported cancellation which was communicated months after the notice to exercise the option was communicated to the lessor. I agree entirely with Mr Kades that the issue of paramount importance in this case is to determine whether or not the option to renew is valid. I have held that it is valid and thus the lease is in force.

In the result, I dismiss the application with costs. Costs of Senior Counsel to be exempt from the normal taxation of counsel fees provided in the rules.

S.B. MAPHALALA

ACTING JUDGE