APPEAL CASE NO. 23/98

IN THE MATTER BETWEEN:

E.B. INVESTMENT LTD APPELLANT

AND

HESTER LOUBSER TRUST 1st RESPONDENT

HESTER MARIA PETRONELLA 2nd RESPONDENT

LOUBSER

CORAM : SHEARER, A. J.A.

SHREINER, A. J.P.

VAN DEN HEEVER, A. J. A.

FOR APPELLANT : MR SMITH

FOR RESPONDENT : MR

JUGMENT SHEARER, A. J. A.

The appellant is the registered owner of Portion 649 of farm No. 188, Dalriach, situated in the district of Hhohho, the property being known as 'The Castle". The second respondent is the sole trustee of the first respondent.

On the 15lh December 1994 the appellant and the first respondent entered into an agreement of lease in terms of which the latter leased that property from the former for a period of three years. The intention was plainly that the first respondent would conduct a hotel business on the property and that, with certain restrictions, eventuated. The lease however records that there were apartments on the premises and that the

"LESSEE shall be permitted and obliged to occupy one of the apartments herself at the original rent of E2 000-00 per month, and records that the apartment was "at present occupied by the Lessee".

It contemplated that a "restaurant or dining room and kitchen and swimming bath" would be completed and a liquor licence granted in respect of the premises. Until then the original rent would be payable and thereafter the rental would be E44 000 per month with annual escalations of 12% and then 15%. The second respondent was to devote her full time to the operation of the said premises whether as apartments or as a hotel".

Clause 3 of the lease gives the lessee a right of renewal. If still in occupation of the relevant premises by virtue of the lease.

"the lessee shall be entitled to renew this lease for a further period of three years by giving written notice of renewal to the lessor not later than the 31st May 1997".

This was purportedly done in a letter dated 27th January 1997 on notepaper headed "The Castle", the body of which reads

"In terms of clause three (3) of the lease agreement between EB Investments Limited and The Hester Loubser Trust, we hereby give notice that we will remain in occupation of the above premises for a further period of three years and continue operating the business of the Castle Hotel accordingly".

It was signed by the second respondent "for The Castle Hotel".

Some point was made in the present appeal by Mr. Smith for the appellant that the renewal lacked clarity as to the identification or the status of the person signing and was therefore ineffectual to renew the lease. In my judgment it is necessary to say no more than that the lease itself was identified; the letter was written on the notepaper of the business conducted on the leased property, and the signature was that of the second respondent, the trustee of the lessee. There is, and can be, no substance in the point. Indeed, the correspondence between the parties after the renewal notice makes it clear that the appellant had no doubt as to the identity of the party responsible for that.

In the period between the commencement of the lease and the notice of renewal the relationship between the parties has been tinged with acrimony, an acrimony which has apparently increased with subsequent legal skirmishes, the last of which resulted in a judgment of the High Court, which is the subject of the present appeal. The appellant sought an order to the ejectment of the first respondent from the relevant property. This was based on the submission that the lease had expired on 30th November 1997, as Clause 3 of the agreement created no enforceable right of renewal, because clause 4 of the lease created no effective machinery for fixing the rental during the renewed period of three years. Clause 4 (d) reads –

"If the lease is renewed the rental and escalation shall be subject to negotiation between the Lessor and Lessee and should they fail to reach agreement such rental shall be determined by arbitration in terms of the Arbitration Law then in force in Swaziland and on the basis of what is a reasonable rental to the leased premises at that time",

It was contended that the word "reasonable" in itself was too vague to create binding rights and obligations. The Learned Judge in the High Court dismissed the application with costs, relying on reasoning in the case of Letaba Sawmills (Edms) Bpk v Majovi

(Edms) 1993 (1) S.A. 768, a matter concerned with a somewhat similar provision, save that rental was to be negotiated between the parties on the basis of "market-related prices for timber," and if no agreement was reached, to be fixed by arbitration, the arbitrator to proceed on the basis of "a reasonable rental at the time". The analogy is a good one and the judgment is a persuasive one.

Before I proceed to deal with the main submissions of Mr. Smith, who appeared for the appellant, it is necessary to delve more deeply into the turbulent history of the relationship between the parties. On the 3rd of October 1995, the appellant concluded a Deed of Sale with the King of Swaziland, the purchase price of the relevant property, "The Castle", being fixed at E8 000 000-00. On the 23rd of the same month the appellant brought an action for eviction, alleging that the liquor licence had been granted and asserting that rental in terms of clause 4 of the lease had not been paid in full, the shortfall being E77 344-00. Rental on this scale would only be payable once the structural attractions had been effected in terms of

clause 1 (a) of the lease and a hotel liquor licence granted in respect of the premises. I will refer to that question later in this judgment.
In a letter dated 13th November 1995 the attorneys for the appellant wrote to the first respondent (for attention of 2nd respondent) that the agreement of lease was cancelled. In a letter dated the following day "The Ring's Office" wrote saying that the representative of the appellant had given that Office information to that effect and recording that the 1st respondent must vacate by the 1st December 1995.

As late as the 19th August 1997, the first respondent's Attorneys wrote to those of the appellant recording several causes of complaint and allegations that the appellant had not yet complied with the pre-conditions for the payment of the a monthly rental of E44.000.00 and its subsequent escalations. It records that the parties contemplated that the additional constructions would be completed within six (6) months of date of the lease. The first time that the appellant contended that these had been completed was 2 ½ years after the date of the lease (and that was the first time it claimed a rental of E44,000.00

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from the Lessee). The first respondent's attorney also records a number of respects in which he contends that the structural obligations of the Lessor had not been fulfilled by the 9th August 1997.

It must be remembered that there was another pre-condition to the increase in rental - the liquor licence. This is the allegation, apparently uncontroverted by the appellant, that the previous liquor licence inherited from the appellant under which the first respondent traded seemed to be irregular, because when renewal was sought, it was found that there was no record of such licence in the records of the Liquor Licensing Board. It is therefore by no means clear on the papers that the increase in rental has ever come into force in terms of the lease. When the first respondent itself made application for a liquor licence, this was allegedly opposed by the appellant.

I have already dealt with Mr. Smith's contention that the notice of renewal was defective because the representative capacity of the signatory was not clear. His further argument was that Clause 4 (d) was ineffective in providing the machinery by which the rental for the renewal period could be fixed. He submitted that, even if it were effective, the onus was on the lessee to initiate the negotiations. This argument has to be considered against the following background:

1. The appellant was, for obvious reasons, anxious to cancel the lease and had recently refused the first respondents tenders of rental. Its attitude was therefore that it did not recognise the renewal, and was therefore not prepared to negotiate;
2. The first respondents had made tenders of rental, however inadequate, but largely based on the considerations I set out with regard to the liquor licence. Implicit in a tender, however inadequate, is the assertion that the amount tendered is a "reasonable rental."

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I think it is clear on the papers that the appellant is not prepared to negotiate. That, however, is a hazardous attitude.

The second submission is that the words "reasonable rental" are too vague to create an enforceable test. I have dealt with that question; Allied to that submission is one that the Arbitration Laws of this contrary do not provide an effective machinery for the solution of a problem such as the present one. I have had regard to the appropriate legislation and in the event of a deadlock as to the identity of the Arbitrators if provides the effective solution in a single arbitrator.

Because of the history of the matter and the obvious deduction from the facts that the present lease is inhibiting a lucrative sale, it seems to be in the parties interests to find an alternative way of solving their dispute.

I am, of course, only concerned with the facts of the dispute on the papers and the arguments placed before me, and for the reasons I have given, the order I propose is that the appeal be dismissed with costs.

SHEARER A. J. A.

I agree

BROWDE J. A.

I agree

VAN DEN HEEVER A. J. A.

Delivered in open court on the 18 June 1999