CIV/APN/454/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MOHATO SEHAHABANE APPLICANT

and

JAWBEC ENTERPRISERS 1ST RESPONDENT
THE OCCUPANT (PLOT NO.13291-149 LEKHALOANENG (UPPER THAMAE) 2ND RESPONDENT

JUDGMENT

CORAM : HON. JUSTICE S.N. PEETE

DATE : 19th June, 2002

On the 2nd day of November, 2001, my Brother **Lehohla J.** granted an interim order couched as follows:-

"**IT IS HEREBY ORDERED THAT**

1. *That a rule nisi is hereby issued returnable on the 9th day of November 2001 calling upon the Respondents to show cause, if any, why*

   (a) The rules of service of this Honourable Court shall not be dispensed with on the grounds of urgency.

(b) The sub-lease agreement between 1st Respondent and Applicant shall not be cancelled.

(c) 2nd Respondent shall not be ejected from Applicant's business premises at-

Plot No.13291-149 situated at Lekhaloaneng Maseru Urban Area, District of Maseru.

(d) 1st Respondent shall not pay costs of suit.

(e) Further and or alternative relief.

2. *That prayer 1 (a) operate immediately as an interim relief."*

In his founding affidavit, the applicant avers that on the 15th September 1986 he registered a sub-lease no.19860 between himself as sub-lessor and the first respondent as the sub-lessee. The duration of the said sub-lease was fifteen (15) years subject to renewal for a further period of five (5) years. In terms of this original sublease, the sub-lessee was to erect certain structures or a commercial building complex at an estimated cost of M40,000.00. It is common cause that the premises were a "*urban tenement*" (importance of this description will become apparent later in the judgment). Under clause 8 of the original sub-lease it was provided that-

"The sub-lessee shall not sublet the premises or any part thereof, nor cede or assign or mortgage or pledge any of its rights under this Sub-lease, on any conditions whatsoever or for any reason whatsoever without the sub-Lessor's prior written consent (which consent shall not be unreasonably withheld)."

Under clause 10 the sub-lessee was to be responsible for prompt payment of electricity, water etc.

Under clause 13 (the Forfeiture clause – **lex commissoria**) it was provided that

> *"In the event of breach of any term or condition of this Contract, the Sub-lessor will be entitled to cancel the Sublease forthwith and to resume possession of the Premises, without prejudice to any claim which he may have against the Sub-Lessee for damages resulting from such breach of contract; provided that the Sub-Lessee shall not be deemed to be in default until after the expiration of THREE (3) months written notice calling on him to remedy the breach complained of.*
>
> *In such event the Sub-Lessee shall forfeit all claims to further compensation in respect of the construction costs of the Premises."*

Under clause 12, the sub-lessee also undertook not to contravene or permit contravention of any law, by-law or statutory regulations or conditions of any licence (including trading) relating to or effecting the occupation of the Premises.

In 1998 when the sublease had run twelve (12) years, the political riots interrupted business; and it was only on the 14th October 1999 that a new sublease was again entered into between the applicant and the 1st respondent. In this sub-lease it is stated as follows-

"WHEREAS

A. The contracting parties had entered into an Agreement of Sublease in respect of the under-mentioned property, which agreement was registered in the Deed Registry under No.19860 on 15th September 1986.

B. The contracting parties have mutually agreed to cancel the aforesaid Agreement of Sublease.

C. The Contracting parties have agreed to enter into a new Agreement of Sublease in replacement of their former contract."

The new Sublease states at clause 4

"This sublease shall be deemed to have commenced on 1st April 1999 and shall subsist until 28th October 2007."

Clause 9 also stipulated that

"The sublessee shall not further sublet the property or any part thereof nor cede or assign or mortgage or pledge any of its rights under this Agreement on conditions whatsoever or for any reasons whatsoever without the Sub-lessor's prior written consent (which consent shall not be unreasonably withheld).

The sublessee also undertook to effect prompt payment of all charges for electricity, water and sanitation. In the event of the sub lessee's default the sub-lessor was to be entitled but not obliged to effect payment of any overdue amounts and to recover the same from the sublessee.

Clause 14 (*Forfeiture clause* – **lex commissoria**) states

> *"**Breach***
>
> *In the event of breach of any term or condition of this Contract, the Sub-lessor shall be entitled to cancel the sub-lease forthwith and to resume possession of the property, without prejudice to any claim which he may have against the Sub-lessee for damages resulting from such breach of contract; subject to the proviso that the Sub-lessee shall not be deemed to be in default until after the expiration of 3 (three) months written notice calling for the remedy of the breach in question."*

The applicant seeks to aver that when he signed the new sublease in May 1999 at Welkom his attention was not brought to the fact that in fact a new lease was been entered into, the original 1986 sublease being cancelled. He does however accepts that the "*1999 agreement was binding on me since I had signed it.*" He contends however that he was not made aware of the existence of the Resolution of the 18th May 1999 which reads as follows:-

"IT WAS RESOLVED THAT:

1. *That the Company should enter into an agreement with Mohato Sehahabane in terms whereof-*

   1.1Agreement of Sublease No.19860 registered on 15th September 1986 in respect of Plot No. 13291-149, Upper Thamae, Maseru Urban Area, is cancelled;

   1.2A new Agreement of Sublease is concluded with him with effect from 1st April 1999, which substantially accords with the terms and conditions heretofore existing but amending the prescribed rental payments and consolidating the term of the Sublease into a fixed period;

2. *That the Company should sell its rights, title and interest in an to the new Sublease Agreement to Qoaling Investments (Pty) Limited for the sum of M3 040 566.63 payable in monthly instalments of M20 000.00 each with effect from 1st April 1999, during the first year, escalated at 10% per annum acompounded on each anniversary of the effective date;*

3. *That William Bruce Creighton be and is hereby authorized on behalf of the Company to sign all such documents as may be required for the aforesaid purposes (including Land Act applications).*

In all truth, the Resolution did not bind the applicant as the Sublessor, it merely directed that the first respondents should sell its rights, title and interest in an to the new Sublease to Qoaling Investments (Pty) Ltd for the sum of M3, 040, 566.63.

The resolution dated 1st May 1999 could only be read subject to clause 9 of the New Sublease which stipulated that the sublessor's written consent was necessary before the Sublessee could further "cede or assign ... any of its rights under the Sublease."

In passing it should be noted that under common law a renewal of a lease involves the creation of a new lease rather than the continuation of the old one – **Grotius** 3.19.2; **Voet** 19.2.9.**Dollhouse**, 1957 (1) SA 345; **Cope v Zeman** 1966 (1) SA 431; Lawsa – Vol 14 $ 192.

On the 1st May 1999 a sublease was entered between the 1st respondent and Qoaling Investments (Pty) Ltd and the applicant avers that he had never at any time allowed the Respondent to cede or otherwise alienate its rights to a third party as applicant's written consent was necessary to any of the said acts. This according to applicant, amounts to a breach of clause 9 of the principal sublease. To this the respondent responds by stating this to be a blantant lie and attached to his answering affidavit a "Consent" document which the applicant on the 10th December 1998 signed and it reads:

CONSENT

"I, THE UNDERSIGNED

MOHATO SEHAHABANE

OF P.O. BOX 354, MASERU LESOTHO

Being the Lessor of Plot No.13291-149, hereinafter referred to as the

"Plot" and registered in the Deeds Office at Maseru, Lesotho under No.13291-149,

AND FURTHER having sublet the aforesaid Plot to Jawbec Enterprises (Pty) Ltd.

DO HEREBY CONSENT to Jawbec Enterprises (Pty) Ltd. Selling its right title and interest in the existing sublease to QOALING INVESTMENTS (Pty) Ltd. Provided the existing conditions of Lease between the said Lessor and Lessee are incorportated into the sale."

More important is the fact that the applicant has not sought to deny the authenticity of his apparent signature on the "consent" document. **Ex facie**, it appears as his when one compares his signatures in the original and principal subleases and from his affidavits in this application. The requisite written consent was therefore obtained from the applicant before the first

respondent as a sub-lessee sought to sell or alienate his rights under the 1999 sublease.

The applicant further states in his affidavit that the first respondent has breached clause 13 in that the` Trading Laws have been contravened The Court is not referred to any Trading Law or Regulations.

More importantly, the applicant avers that the 1st respondent has breached clause 11 of the sublease which stipulates that the sub-lessee shall be responsible for the prompt payment of all charges of electricity pertaining to the property in that they have failed to make prompt payment of electricity bills. Relevant here is the proviso in clause 11 which stipulates that in the event of the sublessee's default the sublessor "will be entitled (though not obliged) to effect payment of any overdue amounts and to recover the same from the sub-lessee." Applicant states that the first respondent is owing electricity charges amounting to M97,362.27 whereas Qoaling Investments is owing M13,907.61; he further alleges that the occupants of the premises have also tampered with electric apparatus to enable them to use electricity illegally. This is all hearsay and unsubstantiated.

In the answering affidavit, the first respondent states that despite the apparent breaches the applicant is not entitled to cancel the sublease unless three months written notice has been given to the first respondent to remedy the breach. "Applicant has failed to give such notice and therefore he has no right whatsoever to request the Honourable Court to cancel the aforesaid sublease", he submits.

Clause 14 of the 1999 Sublease reads-

> *"In the event of breach of any term or condition of this Contract, the Sub-lessor shall be entitled to cancel the sub-lease forthwith and to resume possession of the property, without prejudice to any claim which he may have against the Sub-lessee for damages resulting from such breach of contract; subject to the proviso that the Sub-lessee shall not be deemed to be in default until after the expiration of 3 (three) months written notice calling for the remedy of the breach in question."*

Law

This type of clause is known as "**forfeiture clause or lex commissoria**". It operates once there has been a breach of the clauses of the sub-lease. It is for the applicant to allege and prove breach; for example he can allege the following-

(a) that there existed in the sublease a clause that provides that the sublessee shall not have the right to cede or assign his rights and obligations without the prior written consent of the sublessor.

(b) that the sublessee without first having obtained a written consent from the sublessor, ceded his rights or assigned his rights and obligations to a third party.

(c) that he has given lessee the requisite notice to remedy the breaches.

Under common law, in the absence of an agreement to the contrary, a lessee of an urban tenement (*praedium urbanum* i.e.one utilised for business or trading) may grant a sublease of the property without the consent of the lessor – **Swarts v Landmark** (1882) 2SC5; **Singer v Combrick,** 1950 (1) SA 764 at 769; **Kerr**, Law of Lease, page (1976) 147 – Kerr argues that a new sublease creates a fresh contract between the lessee and the sublessee "in which the lessee is a lessor and sublessee is a lessee and there is no "*vinculum juris*" between the original lessor and the sublessee. He goes further to state that if the lessee cedes or transfers his rights only, he is not absolved from his obligations under the original lease - **Floral Displays** – 1965 (4) SA 99; **Reeders** – 1907 TS 647; **Voet** 19.2.1.

Under common law "*cession*" and "*assignment*" are distinguished even though Kerr contends that some legal drafsmen of statute and of lease agreements often use them synonymously. "*Cession*" means transference only of rights under the contract, and not of obligations thereunder (**Floral Displays** (*supra*) at page 150-1. The principal lessor may therefore – if there is no specific clause to the contrary – be bound under the common law to allow the cessionary to exercise the rights which the lessee had and had ceded to him.

In the **Floral Display**'s case, **Miller J.** went further to state that cession is a juristic act which differs in concept and in nature from that of subletting under a lease and that

> *"when a lessee sublets the leased premises he enters into a contract of lease with a sublessee who (then) becomes his tenant while the lessee remains bound, as such, in all respects, to the lessor (p.100)*

Subletting may therefore not require the consent of the lessor.

A different *scenario* comes about where the lessee cedes or transfers his rights under the lease to a third party whereby he divests himself of such rights by a dispositive act which in no sense can be said to be the same as the act by which he sublets the premises. A prohibition against cession in a lease agreement does not take away the lessee's common law right of subletting an urban tenement. The lessor who seeks to deprive the lessee of its common law (residual) rights must therefore stipulate clearly that such right could not be exercised without his consent. **Cairns v Playdon** – 1948 (3) SA 99.

Clause 9 of the Sublease Agreement between Applicant and 1st respondent reads-

> *"The sub-lessee shall not further sublet the property or any part thereof, nor cede or assign or mortgage or pledge any of its rights under this Agreement, on any conditions whatsoever or for any reason whatsoever, without the sublessor's prior written consent (which consent shall not be unreasonably withheld)."*

The applicant submits that his inquiries at the Ministry of Trade and Industry revealed to him that the 1st respondent had sublet the premises to Qoaling Investments (Pty) Ltd and he has attached the sublease agreement between 1st respondent and Qoaling Investment (Pty) Ltd. This sublease was to subsist "for a period of two (2) years, eleven (11) months and twenty nine (29) days" and has no option for renewal. The applicant says that this subletting was done without either his knowledge or consent.

Secondly the applicant argues that the 1st respondent has breached clause 11 of the Sublease Agreement which reads-

> *"The Sub-lessee shall be responsible for the prompt payment of all charges for electricity, water, and sanitation pertaining to the property and shall likewise be responsible for the payment on the due date there of all ground rent, assessment rates and other official levies applicable to the Property.*
>
> *In the event of the sub-lessee's default the sublessor will be entitled (though not obliged) to effect payment of any overdue amounts and to recover same from the Sub-lessee."*

I will assume in applicant's favour that clause 11 was breached by the 1st respondent because it imposed a contractual obligation upon the 1st respondent to pay the electricity bills and this could not be ceded to Qoaling Investment (Pty) Ltd. The 1st respondent has annexed a "Consent" document to his answering affidavit refuting the applicant's allegation that he had "never at any time allowed Respondent to cede or otherwise alienate its rights to a third party". In the consent document dated 10th December 1998 the applicant states that "he consents to Jawbec Enterprises (Pty) Ltd selling its right, title and interest in the existing sublease to QOALING

INVESTMENT (Pty) Ltd provided the existing conditions of lease between Lessor and Lessee are incorporated into the sale".

Under clause 14 the parties have agreed that the sublessee shall not be deemed to be in default until after the expiration of three months written notice calling for the remedy of the breach in question.

Having elected to cancel the lease agreement because of the breaches complained about, the applicant ought to have communicated this "notice of rescission" to the 1st respondent in a clear and unequivocal manner – **Erasmus v Pienaar** - 1984 (4) SA 9 at 16-17; **Chesterfield Investments (Pty) Ltd v Venter** – 1972 (2) SA 19.

In **Oatoria Properties (Pty) Ltd v Maroun** 1973 (3) SA 779 it was held by **Potgieter JA** that clause 11 was a **lex commissoria** or forfeiture clause (and a clear departure from the common law) whereby the lessor explicitly reserved the right to cancel the lease on a breach of a material condition and that once there was such a breach, the materiality of the breach was irrelevant and the Court should not enquire into the conscionableness or unconscionableness thereof.

Lex commissoria confers a right to cancel upon fulfillment of a condition; and *"....the investigation whether the right to cancel came into existence is purely an investigation whether a condition – as emerging from the language of the contract .... has in fact been fulfilled".* - **Rautenbach v Venner** 1928 TPD 26.

The obligation to pay electricity bills is a very material obligation because the main purpose for which the property was leased is "*commercial purposes only and for no other*" and without continuous supply of electricity and water this paramount purpose would be defeated (see **Maroun**'s case (supra) at page 786).

The 1st respondent indeed concedes that this obligation (while the sublease with the applicant lasted) could not be ceded to Qoaling Investment (Pty) Ltd. Non-payment of electricity (regardless of the sublease with Qoaling Investment (Pty) Ltd constituted a breach of a material provision of lease.

The final and critical issue however is whether the applicant has shown that he made a written notice to the 1st respondent calling for remedy of the breaches in question. The best way of doing this would be achieved by personally visiting the leased property and leaving a written notice at the leased premises and recording and witnessing such delivery. In fact on the 2nd November 2001 an interim order in these proceedings was delivered in a similar manner. No satisfactory explanation (save to say that 1st respondent exists in name only and has since stopped operating) has been proferred. If he wishes to cancel the lease agreement he had the burden to trace the lessee- **Miller vs Dickson** – 1971 (3) SA 581 where **Rumpff JA** held at p.587-88 that

> "... *in law, in the absence of an agreement to the contrary, a party who exercises his right to cancel must convey his decision to the other party and that cancellation does not take place until that happens*" –

In **Swart vs Vosloo** 1965 (1) SA 100 (A.D.) **Holmes J.A.** held that a lease is a mutual contract (a *concursus animorum contrahendi*) and that if one party wishes to exercise his right to cancel this mutual contract he must convey his decision to the mind of the other, unless they have agreed otherwise.

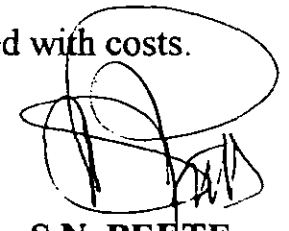
Clause 14 – Breach – makes no provision about how and where the written notice should be communicated to the lessee. The court cannot re-write the contract of lease. It became the duty of the sublessor once he had elected to cancel, to bring the written notice to the sublessee. **Wessels J.A.** also continued to state that

> *"... our law requires a party who elects to exercise a right of cancellation to notify the defaulting party of his decision to terminate the contract.*
>
> *... and that if a party relies upon an intimation contained in a legal process, such intimation operates to terminate the contract if it is brought to the notice of the defaulting party by the actual service upon him of the process embodying the intimation*" at page 115, and that
>
> "*the landlord may select any one of a number of methods of communication which will, to his mind, in the particular circumstances be best suited to the achievement of his purpose i.e. to discharge his contractual duty of making it known to the lessee that the lease is terminated.*" at p.116.

In present case, the right to cancel can only be enforced only after the lessee has been rendered "*in mora*" through a written notice delivered to the lessee at the premises under the sublease.

In conclusion I hold that assuming in applicant's favour that there has been material breach of the clauses of the Sub-lease Agreement, the right to cancel can only be enforced only after it is shown that a written notice calling upon the first respondent was made; this is lacking.

The application is therefore dismissed with costs.



S.N. PEETE

JUDGE

For Applicant : **Mr Matooane/Ms Ramafole**

For 1st Respondent : **Mr Daffue** (instructed by Webber Newdigate)