IN THE COURT OF APPEAL OF LESOTHO

C OF A (CIV) 5/2014

In the matter between:

FUN FOODS (PTY) LTD **APPELLANT**

and

MORUO DEVELOPMENT LIMITED **RESPONDENT**

CORAM: HOWIE, JA
MAJARA, JA
LOUW, AJA

HEARD : 4 APRIL 2014
DELIVERED : 17 APRIL 2014

SUMMARY

Extension agreement subsequent to end of sublease of business premises – sublessee given time to stay in occupation while finding buyer for its business – whether sublessor made performance by sublessee impossible thereby breaching extension agreement.

JUDGMENT

HOWIE, JA:

[1] The term of the parties' sublease of the Maseru premises in which the appellant, as sublessee, operated a fast food business under franchise, expired early in 2013. The parties nonetheless agreed that the respondent would permit the appellant to continue in occupation of the premises until 30 June 2013 so as to enable the appellant to secure a buyer of its business who would be acceptable to the franchisor and the respondent and become the new sublessee. (For convenience I call that agreement "the extension agreement").

[2] On 24 June the appellant introduced two prospective buyers to the respondent for its approval. By letter to the appellant dated 25 June 2013 the respondent, after listing information it required the two persons to produce, stated that it did not think that there was sufficient time in which approval could "reasonably be considered" and affirmed that the appellant would have to vacate the premises on 30 June.

[3] Receipt of the letter prompted the appellant to apply to the High Court for a rule nisi ordering the respondent's specific performance of the extension agreement on the ground that the respondent was in breach of the agreement by making it impossible for the appellant to introduce potential buyers and

thereby evincing the intention not to be bound by the extension agreement.

[4] Pursuant to argument on the return day, the High Court (Chaka-Makhooane J) dismissed the application, hence the appeal.

[5] The appellant's case for breach of the extension agreement was set out in the founding affidavit in the following paragraphs:-

> 7.2 The Applicant has done all that is within its powers to acquire such buyer as contemplated in the agreement but the Respondent has however made it impossible for the Applicant to finalize a deal with such buyers as it (Respondent) has said to all prospective buyers suggested by the Applicant that the said shops have been sublet to other unknown individuals and has suggested that there are other interested franchises who are willing to occupy the same shop space
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> 7.3. By so doing I aver that the Respondent has breached the agreement that was entered into with Applicant. The said agreement was valid, the terms of which were certain and clear, the court should therefore enforce the contract because the legal remedy of monetary damages will not adequately compensate the Applicant in view of the provisions of the sublease agreement, in particular clause 20 thereof.

[6] I think that counsel for the respondent was correct when he argued that the allegations in support of the pleaded breach were contradicted by facts asserted in the opposing affidavit (which on the Plascon Evans approach were decisive) or constituted inadmissible hearsay. That must inevitably dispose of the case as founded on the quoted paragraphs.

[7] Counsel for the appellant was therefore driven to rely on the letter of 25 June as the sole basis of the appellant's case.

[8] The letter was referred to in the founding affidavit not as allegedly constituting a breach on its own but as part of the narrative which led up to the application to the court below. At most it was introduced as evidence of the respondent's alleged intention to ensure that the appellant did not secure a buyer/tenant before the stipulated deadline.

[9] The letter reads:

> With reference to your email dated 24 June 2013 regarding approval of new tenants and owners of the Steers and Debonairs shops in the Pioneer Mall, we would require the following information as part of our approval process:
>
> a) What is the structure in which they propose to take over the businesses;
> b) Company documents (if registered as a company);
> c) Passport copies of all directors (partners if a partnership);
> d) Latest audited financial statements of their business/company alternatively of the individuals not older than 31/03/2012;
> e) 3 (three) references for credit and character reference for their company, or three each for the individuals;
> f) LRS tax clearance certificates for the company/business and/or individuals; and
> g) Approval of the Franchisor.
>
> We are of the view that there is insufficient time for this process to be completed fully by 30 June 2013 when your agreement ends. In the circumstances your request for approval of new tenants cannot reasonably be considered now.
>
> Therefore we reiterate that your agreement ends on Sunday, 30 June 2013 when you must vacate the premises.

[10] The context in which the letter must be read and understood was this. The extension agreement provided an opportunity until no later than 30 June for the appellant to find a buyer for its business and for the respondent to be introduced to a potential tenant of the premises. Plainly, the respondent would need to know of the commercial probity and financial soundness of anyone whom the appellant introduced. Were the introduction to be made too near the deadline for a proper investigation to be made and an informed conclusion to be drawn, it was implicit in the extension agreement that the respondent could not be compelled to accept persons introduced in the absence of information as to their suitability in the respects referred to.

[11] Up to 24 June the appellant had failed to succeed in introducing anyone acceptable to the respondent. On that date it sent the respondent an email message (copied to the franchisor) stating that a Mr. Zhai and a Mr. Jooma had agreed to buy the appellant's business. They wished to arrange an introductory meeting. The writer of the message went on to describe them as "well established business people long service in Lesotho and with a solid reputation and sound financial standing."

[12] In an answering email message the franchisor said that it had not yet met with the proposed buyers and therefore no change of ownership could be finalised until they had been interviewed and approved. In connection with that process it required a copy of the sale agreement and a copy of a signed lease of the premises.

[13] The opposing affidavit was deposed to by the respondent's managing director, Mr. Bothma. He said that he met with Messrs. Zhai and Jooma on 24 June. They had not yet met with the franchisor. He asked them for documents to confirm their identity, reputation and financial standing. They were unable to provide any. He said they should bring the required documentation and meet him on 28 June. (This was the last business day before the deadline.) He then wrote the letter under consideration.

[14] The appellant filed a replying affidavit. It did not deny that the respondent had asked MessrsZhai and Jooma to bring the required documentation on 28 June or that such documents

were reasonably necessary. All that the appellant stated in this regard was that it did not know what had transpired between MessrsZhai, Jooma and the respondent.

[15] The inference from that alleged and unexplained ignorance is that the prospective buyers had no interest in telling the appellant what had happened or the appellant had no interest in finding out.

[16] It was not alleged by the appellant that it attempted to comply with the respondent's requirements.

[17] The respondent, for reasons already explained, was entitled to the opportunity to implement an approval process before deciding whether to accept MessrsZhai and Jooma. They had not yet been assessed by the franchisor and they had brought no documentation which the respondent required and which it was reasonable to demand. If the truth was that there was indeed inadequate time to implement such a process before expiry of the appellant's term of occupation then that had to redound to the appellant's disadvantage. It also means that the letter of 25 June

did not constitute contractual breach when it warned that reasonable consideration was not possible.

[18] If, on the other hand, there was sufficient time (and the letter did not exclude the possibility that there was) the appellant failed to take the available opportunity. Again, the blame for the failure of the introduction must fall on the appellant. Instead of using the opportunity the appellant chose to focus on launching this litigation.

[19] The letter of 25 June was therefore in neither word nor effect a statement that the respondent intended not to comply with the extension agreement and therefore it did not constitute a breach of the agreement. It follows that the application to the High Court was rightly dismissed.

[20] In the result the appeal fails and it is dismissed, with costs.

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C.T. HOWIE
JUSTICE OF APPEAL

I agree

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N.J. MAJARA
JUSTICE OF APPEAL

I agree

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W.J. LOUW
ACTING JUDGE OF APPEAL

For the Appellant	:	Adv. K.E. Mosito K.C. Adv. M. Rafoneke
For the Respondents	:	Adv. P.J. Loubser