

**IN THE HIGH COURT OF LESOTHO**  
**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/83/2013**

**In the matter between:**

**KEL PROPERTY COMPANY (PTY) LTD**

**APPLICANT**

**AND**

**PHOMOLONG INVESTMENT (PTY) LTD**

**RESPONDENT**

**Neutral Citation:** KEL Property Company (Pty) Ltd v Phomolong Investment (Pty) Ltd [2022] LSHC 117 Com. (09 JUNE 2022)

**CORAM: MOKHESI J**

**DATE OF HEARING: 12<sup>TH</sup> APRIL 2022**

**DATE OF JUDGMENT: 9<sup>TH</sup> JUNE 2022**

## **SUMMARY**

**LAW OF CONTRACT:** *Presence of arbitration clause in the contract- whether it ousts the jurisdiction of the court to hear an arbitrable issue- Held, it does not as the aggrieved party must apply in terms of section 7 of the Arbitration Act of 1980 for a stay of proceedings pending arbitration- A party electing to abide by the contract through its conduct despite the presence of its breaches- whether later he/she can rely on the same apparent breaches when he elected to be bound, as the basis for seeking cancellation of the contract- Held in the negative.*

## **ANNOTATIONS**

## **LEGISLATION**

Arbitration Act No.12 of 1980

## **BOOKS**

Hutchison et al. the Law of Contract in South Africa 3<sup>rd</sup> Ed. P. 338 para. 13.4.4;

## **CASE LAW**

Bataung Chabeli Construction (Pty) Ltd v Road Fund (Pty) Ltd and Others C of A (C(V) 34/2020 [2021] LSCA 17 (14 May 2021)

Capital Trust Investment Ltd v Radio Design AB & Others [2002]

Capitec Bank Holding Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99; [2021]3 ALL SA 647 (SCA); 2022 (1) 2022 100 (SCA)

Motlatsi Pelesa v Ngaka Mohlouoa [2021] LSCA 19 (14 May 2021)

Ngcobo and Others v Salimba CC: Ngcobo v Van Rensburg 1999 (2) SA 1057 (SCA)

Plascon – Evan Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

Universiteit Van Stellenbosch v J. A Louw 1983 (4) 321 (AD)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SC)

## **JUDGMENT**

### **Introduction**

- [1] Parties in this matter had entered into a sublease agreement in 1989 in terms of which the respondent was to develop the applicant's land by erecting and constructing thereon a shopping centre at an estimated cost of (M1700,000.00) One Million Seven Hundred Thousand Maloti. The said sublease was registered on the 13 April 1989. The sub-lease agreement has an arbitration clause to deal with any dispute which may arise in relation to rentals payable during the subsistence of the agreement. There is a dispute as to which sublease agreement is "legitimate" as both parties attached to their pleadings what each regarded as the correct one. However, nothing turns on this as the impugned clauses about which this matter is concerned and are subject to differing interpretations by the parties, are identical in terms of their wording.
- [2] The applicant had approached this Court seeking the following declaratory reliefs:

*"1. It is declared that the respondent is in breach of the terms of the sublease agreement between the parties dated 4 April 1989 and registered in the Deeds Registry in failing to comply with the provisions of clause 12 of the agreement by failing to repair the premises and therefore that the applicant was entitled to terminate the agreement once the respondent failed to rectify its breach and the termination is hereby confirmed;*

2. *It is declared that upon the termination of the agreement the applicant was entitled to demand payment of rentals directly from the tenants of the subleased premises;*
3. *It is declared that clause 4 (ii) of the sublease agreement requires the parties at the expiration of twenty-five (25) years contemplated in clause 3 of the agreement, to review and determine by mutual agreement, to review and determine by mutual agreement the rentals payable in relation to the subleased premises and thereafter to review and determine the rentals payable by mutual agreement at the expiration of twenty (20) years following the initial period;*
4. *It is declared that the parties were obliged by the provisions of clause 4 (ii) of the sublease agreement to review and determine rentals by mutual agreement at the expiration of the initial period as envisaged in clause 3 of the sublease agreement as requested by the applicant;*
5. *It is declared that the respondent acted unreasonably in refusing, failing, and/or neglecting to comply with the demands and requests of the applicant that the parties were obliged to review and determine the rentals set out in the agreement after the expiration of the initial period of twenty (20) years following the renewal of the sublease agreement between the parties;*
6. *It is declared that if the parties did not reach a mutual agreement regarding rentals to be paid the parties were obliged to submit their dispute for determination by way of arbitration as contemplated by the provisions of the Arbitration Act of 1980 in Lesotho and therefore that it was unreasonable for the respondent to refuse to submit to arbitration in Lesotho;*

*7. Alternatively, in the event that the honourable court finds that the parties are obliged to refer their dispute on review and determination of rentals for arbitration as contemplated in clause 4(ii)(b), it is ordered that both the applicant and respondent are obliged to submit to an arbitrator appointed by the Law Society of Lesotho from one of its members who shall be a senior advocate or attorney of not less than ten (10) years practical experience within ten (10) days after such appointment;*

*8. That the applicant be granted costs of this application including costs consequent upon the employment of counsel.*

*9. Further and/or alternative relief.”*

- [3] This application is opposed. In its answering affidavit, the respondent raised issue regarding jurisdiction of this court to hear this matter in the face of the arbitration clause in the sublease agreement; that the issue of review of rentals has prescribed, a matter which was not pursued in argument. Also, an application to strike out certain parts of the applicant’s replying affidavit on account of irrelevance was not moved and was therefore not argued. In fact, per the Joint Practice Note filed of record both Counsel agreed that this matter be determined based on the written heads of argument without the need for oral submission. In the written heads of argument, only two issues are in contention, namely, (i) Jurisdiction of this court to hear this application, and (ii) the merits of this application. To be precise, only the applicant argued both issues while the respondent’s energy was devoted only on the issue of jurisdiction.

- [4] At this stage it is apposite to quote the provisions of the sublease agreement which are relevant for the determination of this matter. Of relevance are clauses 3 and 4 which provide that:

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*The sublease shall subsist for a period of TWENTY-FIVE (25) years (hereinafter referred to as “initial period”) with effect from the date on which further sub-tenants take physical occupation of the shops within the Premises.*

*Thereafter the sublessee will be entitled to renew the sublease for THREE (3) further successive periods of TEN (10) years each (hereinafter referred to as “the option periods”) upon the same terms and conditions as are recorded in this agreement, save as to rental, which shall form the subject of periodical reviews as specified in clause (4) hereinafter.*

(4)

(i) RENTAL PAYABLE DURING INITIAL PERIOD:

*(a) The commencing monthly rental shall be ONE LOTI (M1,00) per square metre of ground space in the premises actually sublet to tenants (being approximately TWO THOUSAND TWO HUNDRED AND TWENTY-FIVE (2225) square metres).*

*(b) As from 1<sup>st</sup> April, 1989, the monthly rental payable by the sublessee shall be calculated exactly as hereinafter described, save that the rate thereof shall be increased to ONE LOTI FIFTEEN CENTS (1,15) per square metre.*

(c) *The rental shall escalate at SEVEN POINT FIVE PERCENT (7.5%) per annum compounded, with effect from the anniversary of the sublease.*

(d) *The rental shall be payable monthly in advance either to the sub-lessor personally at its place of business and at such other places as the sub-lessor may from time specify in writing.*

(ii) RENTAL PAYABLE DURING OPTION PERIODS:

(a) *At the expiration of the initial period, and thereafter at the expiration of the first two (2) option periods, the rental shall be subject to review and shall be determined by mutual agreement of the contracting parties.*

(b) *In the event that the contracting parties should fail to arrive at a mutual agreement regarding the rental to be paid during any specified option period, the determination of the rental for that period shall be submitted to arbitration in accordance with the provisions of the Arbitration Act No.12 of 1980 (and any amendments or replaced thereof).*” (Emphasis added)

[5] **Jurisdiction of the court to hear the matter.**

I revert to the interpretation of this sublease agreement in due course. At this point it is apposite to deal with the question of this court’s jurisdiction to deal with this matter in the face of the above-quoted arbitration clause. But before I do that, it is pertinent to set out the legislative framework which is implicated in this matter. The Arbitration Act No.12 of 1980 (“The Act”) provides as follows:

*“Effect of arbitration agreement*

4. *Binding effect of arbitration agreement and power of Court in relation thereto –*

*(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.*

*(2) The Court may at any time on the application of any party to arbitration agreement, on good cause shown –*

*(a) set aside the arbitration agreement; or*

*(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or*

*(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.”*

[6] What this section does is to reaffirm the position that arbitration agreements lawfully concluded should be respected unless terminated by consent of parties or through a judicial decree on good cause shown where there is a dispute whether the dispute which is covered by the clause shall not be referred to arbitration or why the arbitration clause shall cease to have any effect pertaining to the issue sought to be referred. There is, however, an important issue that pertains to the procedure to be followed in order to force a party to the agreement who institutes proceedings before the courts of law to resolve arbitrable issues, and that procedure is provided for in section 7 of the Act as follows:

*“7 Stay of legal proceedings where there is an arbitration agreement.*

*(1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.*

*(2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.*

[7] It is the respondent's contention that this court does not have jurisdiction because of the existence of the arbitration clause in the sublease agreement. In support of this argument it cites the decision in **Motlatsi Pelesa v Ngaka Mohlouoa [2021] LSCA 19 (14 May 2021)** where the court emphasised that where jurisdiction does not exist, the court does not have the competency to hear the matter. The respondent further cited the case of **Bataung Chabeli Construction (Pty) Ltd v Road Fund (Pty) Ltd and Others C of A (C(V) 34/2020 [2021] LSCA 17 (14 May 2021)**. As the applicant's counsel correctly pointed out, the decision in **Pelesa v Mohlouoa** (above) has no relevance to the present case as it concerned spoliation and ownership. Importantly, it concerned non-compliance with Rule 8(19). The Court of Appeal held that non-compliance with the said rule was fatal to the appellant's case. I also agree with the applicant's submission that **Bataung Chabeli Construction (Pty) Ltd v Road Fund** (above) does not support the respondent's contention that the presence of an arbitration clause ousts

the jurisdiction of the court. Essentially what was re-stated in that case as a matter of principle, is that the courts must respect arbitration agreements where they exist.

- [8] In relying on **Bataung Chabeli Construction** case, as supporting its contention that in matters where an arbitration clause exists, the court does not have jurisdiction to hear the matter, the respondent apparently laboured under the misconception which is generated by what is said in that case, where it is said, in paragraphs 12 and 21 of the judgment:

*“[12] My view is that, if a finding that the High Court indeed had no jurisdiction, then all the other grounds of appeal will not fall for determination under this appeal. This is so because such a finding will certainly disable this court from considering the merits of the appeal and will be the end of the case. In coming to this conclusion, I derive comfort from this court’s decision in Motlatsi Pelesa and Ngaka Mohlouoa C of A (CIV) 36/20. That case was decided during this session. In that case, the court emphasised that where jurisdiction does not exist, the court cannot proceed any further...”*

After quoting the decisions which postulate that where arbitration exists the courts should respect it, the court then went on to conclude (at para. 21) that:

*“...[T]he High Court cannot be faulted for having declined jurisdiction. As already pointed out in paragraphs 12 and 13 of this judgment, without jurisdiction, this court cannot consider the merits of appeal...”*

- [9] With all due respect to the apex court, the views expressed herein are unfortunate and do not tally with the law. Clearly the apex court felt that the

presence of an arbitration clause ousts the jurisdiction of the court, this is not correct if schematic arrangement of the Act read with long line of decided cases in the Commonwealth jurisdictions dealing with similarly worded provisions.

In **Universiteit Van Stellenbosch v J. A Louw 1983 (4) 321 (AD) at 333 G – H**, stating a long-standing position of the law, said:

*“It has always been recognised that an arbitration agreement does not necessarily oust the jurisdiction of the Courts: See **The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 375**. See also **S. 3(2) of the Arbitration Act 42 of 1965**. However that may be, when a party to an arbitration agreement commences legal proceedings, a defendant who was a party to the agreement and who has entered appearance to defend and not delivered any pleadings is given the right by S. 6 of the Act to apply to the Court for a stay of the proceedings. The onus of satisfying the court that it should not, in the exercise of its discretion, refer the matter to arbitration is on the party who instituted the legal proceedings....”*

- [10] The provisions of s. 3(2) and 6 of the Arbitration Act 42 of 1965 relied upon in the above decision are worded – similarly as sections 4 and 7 of the Act. Upon reading of sections 4 and 7 of the Act, one is left in no doubt that the court has jurisdiction in matters where the agreement in contention has an arbitration clause. What must happen when a party to an arbitration clause institutes proceedings in the courts, a defendant/respondent, acting in terms of s. 7 of the Act must apply for a stay of legal proceedings pending arbitration. The party who instituted the proceedings must satisfy the court that there is no sufficient reason to refer the dispute to arbitration in

accordance with the agreement. But there is a catch. Before the defendant/respondent can apply for a stay of legal proceedings, two things must happen, namely, (i) the defendant/respondent must enter appearance to defend/notice of Intention to Oppose, and (ii) the application for stay must be lodged before “delivering any pleading or taking any other steps in the proceedings.” Failure to comply with these requirements deprives the defendant/respondent of having a recourse to arbitration, and the court will comfortably be seized with the matter despite the presence of the arbitration agreement. By the taking of a further step it is meant that:

*“[57] The reported cases are difficult to reconcile, and they give no clear guidance on the nature of the step in the proceedings. It appears, however, that two requirements must be satisfied. First, the conduct of the applicant must be such as to demonstrate an election to abandon his right to stay, in favour of allowing the action to proceed. Second, the act in question must have the effect of invoking the jurisdiction of the court.” (Capital Trust Investment Ltd v Radio Design AB & Others [2002] EWCA Civ 135 (15 February 2002) at para. 57. This decision was followed by this court in P. S Ministry of Agriculture and Food Security Cash Management Services (Pty) Ltd [2022] LSHC 68 Com (12 May 2022).*

- [11] In the present matter, contrary to s.7, the respondent delivered its pleadings, and to make matters worse, no application for stay of legal proceedings was lodged. The respondent merely contended itself dealing with issue of arbitration in its pleadings and the Heads of argument. By delivering the pleadings the respondent deprived itself of the right to raise the issue of arbitration, and it should be stated, perhaps at the risk of being repetitious,

that, that issue should only be raised and dealt with in terms of the procedure provided by s. 7 of the Act.

[12] **The Merits.**

I turn to deal with the merits. Dealing with the merits entails engaging in an interpretation of clause 4(ii) of the Sub-lease agreement. Legal principles applicable in interpreting contract were articulated in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)** at para. 18. This process entails attributing meaning to words used in a document, by taking into account the context in which they were used, the apparent purpose to which a provision in question is directed, and “by reading the particular provision or provisions in the light of the document as a whole and the circumstances attended upon its coming into existence” (**Endumeni above at para.18**).

[13] In **Capitec Bank Holding Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99; [2021] 3 ALL SA 647 (SCA); 2022 (1) 2022 100 (SCA)** at para. 25. The court emphasised the unitary nature of the process of interpreting contracts as follows:

*“...It is the language used, understood in the context in which is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context, and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words, and the place of the contested provision within the scheme of the*

*agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined...”*

- [14] In terms of clause 3, the sublease agreement subsists for twenty-five years, a period which is described as the initial period. At the expiration of the initial period, the sublessee is given an option to renew the sublease for three (3) successive periods of ten years (10) each on the same terms and conditions. The parties specifically provided, germane to the determination of the present matter, that rental payable shall be periodically reviewed in accordance with clause 4 which is now the subject of much-spirited disagreement between the parties and now the subject of this court’s interpretation. It is the respondent’s contention that review of rentals should only be carried out after the expiration of the initial period and two successive option periods. In terms of this interpretation, review should only take place after forty-five years (45).
- [15] In my considered view the correct view is that which is urged for by the applicant. Clause 3 provides that rental should be reviewed periodically by the parties. The use of the comma after the work “initial period” in clause 4 (ii) (a) and the word “and” before “thereafter at the expiration of the first two (2) options” is significant. Punctuating the first sentence in clause 4(a) (ii) (a) with comma at the end shows that a first review should be done at the expiration of the first option (i.e. at the end of 25 years) and at the end of the first two option, i.e. twenty years. The use of the word “and” before “thereafter” shows that the parties intended that during the subsistence of the sublease agreement the rental should be reviewed at least twice. The use of the word “and” in its ordinary grammatical meaning shows that the review

period after the expiration of twenty years is in addition to the first period. The word “and” is used in its ordinary sense as conjunctive or cumulative (**Ngcobo and Others v Salimba CC: Ngcobo v Van Rensburg 1999 (2) SA 1057 (SCA) at 1063 G – H**). An interpretation which is contended for the respondent would lead to insensible or unbusiness-like result and will undermine a clear purpose for which a provision for periodic review of rentals was inserted in the agreement, for it would mean that the respondent would be in occupation of the property in question for forty-five years with rental staying unchanged. This would not have been what the parties intended. No businessman in the position of the applicant would have intended such a situation. I turn to deal with prayer 1 (breach of Sublease – Agreement).

**[16] Breach of Sublease Agreement**

It is the applicant’s contention that the respondent breached clause 12 of the sublease agreement by failing to maintain the premises to the satisfaction of Maseru City Council. As proof of this, it annexed “Annexure A2” which is letter written by the applicants, on 25 May 2008, addressed to the respondent at an address in Hout Bay Western Cape. In that letter the applicant complains about unhygienic state of the premises. On 13 August 2008, the applicant addressed another letter to the respondent to the same address in Western Cape complaining about the unsightly state of the premises. The applicant further bemoans that the respondent underpays rental or makes payments erratically.

[17] The respondent denies having received the two letters referred to above as they were directed at the wrong address as its *domicilium citandi et*

*executandi* is P. o. Box 41852, Craighall, 2024 not P. O. Box 26548, Hout Bay, 7872, Western Cape. The respondent denies that the premises are in a poor state of disrepair, because if were so, the applicant would have exercised its rights in clause (13) agreement by requesting it to rectify the breach within (14) days.

- [18] There are clearly material dispute of facts regarding whether the premises are in a state of disrepair and unhygienic. The approach to dealing with these disputes was stated in **Plascon – Evan Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634 – 5**. This approach is to the effect that where in motion proceedings material dispute of facts arise on affidavits, a final order will only be granted when the facts averred be the applicant, which have been admitted by the respondent and those averred by the latter justify the order. The exception, of course, arise where the version of the respondent is so far-fetched or so clearly untenable, bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible that the court is justified in rejecting it merely on papers. On the strength of these principles, in my considered view, the version of the respondent should be preferred as it cannot be pigeon-holed into the exceptions articulated in the preceding sentences. I agree with the respondent that the two letters to which the applicant makes reference to were written ten years prior to the institution of the case, and even still, the respondent exercised the renewal option without the applicant taking any action against what clearly he considered breaches of the agreement. Given that all the letters were sent to an address not cited as the address at which the respondent's correspondence should be sent, I have no reason not to believe the respondent's version in this regard. Communication which seems to have been effective and

reached the intended party, was when it was done through the parties' legal representatives.

[19] Assuming that all the letters complaining about the respondent did reach it and that the complaints raised therein were true. It will, however, be noted that the basis of the prayer for cancellation of the agreement on account of its breach is what is contained in the letters which were authored in 2008: Annexure "A2" was authored on 25 May 2008 complaining about the filthy state of the premises; Annexure "A3" was issued on the 13 August 2008 complaining about the same issue and in addition, lack of maintenance of interior and exterior of the premises; Annexure "A4" complained about the respondent's erratic payment of rental and delay in payment of rental and the "[d]ilapidation and slovenly status of the Building and surroundings" of the subleased property.

[20] Although the sequence of correspondence is not clear, what is clear is that from 2013, despite the above complaints, the applicant wanted to increase rental payable, prompting the respondent through its counsel, on the 06 November 2013 to write a letter to the applicant reminding it that increase in rental cannot be imposed unilaterally but through mutual agreement. In the letter, the respondent's attorneys advanced the respondent's understanding of when the review of rentals payable should happen. On the 02 May 2014 applicant's attorneys wrote a letter to the respondent's attorneys based in Springs, South Africa projecting the applicant's interpretation of clause 4 (ii) (a) of the agreement, and at paragraph 4 of the same letter, proposes that the parties submit themselves to arbitration for determining rental payable. From that period the debate raged on in the correspondence between the

parties' legal representatives about the correct interpretation of clause 4 (ii) (a) and how the issue of rental should be arbitrated. In the ensuing period the applicant engaged experts on determining the market-related rentals, which report was submitted on 07 March 2017.

[21] The meeting was proposed in a letter dated 16 May 2018 by the applicant for purposes of reviewing the issue of rentals, but it appears the meeting never materialized which led the applicant, out of frustration, on the 11 July 2018 to write a letter to the respondent terminating the sublease agreement on the basis of the respondent's lack of maintenance of the premises, and failure by the respondent to attend a meeting for purpose of reviewing rentals. In response to this letter, on the 18 July 2018, the respondent's attorneys reacted to the cancellation by indicating that the applicant had not complied with clause 13 of the agreement which stated that in the event of the breach of the terms of conditions of the agreement the sublessor was obliged to notify of the sublessee of the breach and for the latter to rectify it within 14 days. The respondent's attorneys further intimated that failure by the parties to agree on rentals is arbitrable and cannot be the basis for cancellation of agreement.

[22] From the foregoing narration of facts it is clear that the applicant was prepared and willing to negotiate increasing rental despite the bitter complaints which it issued against the respondent since 2008. Up to the point when applicant's attorneys issued notice of termination, the conduct of the applicant was consistent with having no problem with the agreement enduring. I find it problematic that the same annexures referred to earlier can now be used as the reason for termination, when despite the existence of

the complaints, the applicant was prepared to have the agreement continue so long as the respondent was agreeable to increased rentals.

- [23] In my considered view the applicant had elected to abide by the agreement, and therefore it lost its right to cancel the agreement on the basis of the annexures “A2”, “A3”, “A4” and “A5”. I am fortified in this view by what is said by the learned authors **Hutchison et al. *The Law of Contract in South Africa 3<sup>rd</sup> Ed.*** p. 338 para. 13.4.4;

*“An election to affirm the contract necessarily entails the loss of the right to cancel. Thus, if the innocent party expressly or tacitly manifests an intention to abide by the contract despite the breach, he or she waives the right to cancel on account of that particular breach. A tacit election not to cancel the contract may be inferred from the conduct of the innocent party (for example, if despite knowledge of the breach he or she insists on performance, or accepts a performance that is subsequently made, or continues to use one that has already been made). Even if the innocent party has no actual intention of waiving the right to cancel, if by words or conduct he or she creates in the mind of the other party the reasonable impression that he or she has elected to affirm the contract, the innocent party may be estopped from asserting the right to cancel.”*

- [24] To my mind the conduct of the applicant alluded to above shows clearly that it had elected to affirm the agreement. This election precluded it from cancelling the agreement. Furthermore, the applicant ought to have complied with clause 13 and issue necessary notices, instead of going straight to cancellation.

- [25] **Unreasonableness in refusing to submit to arbitration**

It is common ground that the parties had been at loggerheads regarding, among others, review of payable rental and how the issue should be arbitrated in terms of clause 4(ii) (b) of the sublease agreement. Responding to request for referral to arbitration, the respondent's attorneys, on the 31 July 2014, wrote to the applicant's attorneys, expressing their client's discomfort having the matter arbitrated in Lesotho. The respondent went further and proposed that two arbitrators one chosen by the applicant and the other by the respondent. In the said letter it even acknowledges that its "2 arbitrator" proposal will be expensive. It should be noted that this proposal is not provided by the agreement.

[26] Section 10 of the Act provides that where the parties to an arbitration have not expressly stated in the agreement, reference shall be to a single arbitrator. In my considered view, therefore, when the respondent proposed, contrary to the expressed intention, to have the dispute arbitrated by two arbitrators, it was acting unreasonably. The proposal's unreasonableness is even amplified by the fact that in the letter proposing the appointment of two arbitrators, the respondent acknowledges that the proposal is expensive, but nonetheless still insists on it.

[27] **Costs**

I have not found any reason why in this case the costs should not be made to follow the event, as it is ordinarily the case, especially when the applicant is a substantially successful party.

[28] In the result the following order is made:

- (i) Prayers 1 and 2 of the Notice of Motion are dismissed.
- (ii) The application is granted as prayed in terms of prayers 3, 4, 5, 6 and 7 of the Notice of Motion
- (iii) The applicant is awarded the costs of suit.

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**MOKHESI J**

**For the Applicant: Mr. Q. Letsika from Mei & Mei Attorneys**

**For the Respondent: Adv. R. Setlojane instructed by T. Matooane & Co. Attorneys**