IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

MAHLB-000437-10

Cumberland Hotel (Pty) Limited **Applicant**

And

MAA Enterprises (Pty) Ltd **Respondent**

Mr. Osei-Ofei (with Ms O. Kealotswe) for the applicant
Ms TB Mooketsi for the respondent

J U D G M E N T

DINGAKE J:

1. This is an opposed application for the eviction of the respondent from the rented premises, namely Shop No. 2, Plot 474/5/6 Khama 1 Avenue, Lobatse.

2. I heard the matter on the 30th November, 2010, and at the end of the submissions, I granted the applicant the orders sought and promised to give my full reasons in due course.

3. These are my reasons.

4. By way of background, it bears stating that by notice of motion dated 2nd August, 2010, the applicant approached this court for the following relief:

(i) Cancellation of the Lease Agreement entered into between the applicant and the respondent sometime during June 2006 is hereby confirmed;

(ii) Ordering the respondent to vacate the premises, namely (**Shop 2 Cumberland Complex**), **Plot 474/5/6, Khama 1 Avenue, Lobatse** within three (03) days of the making of an order to that effect;

(iii) Ordering and directing the Deputy Sheriff in the event of the respondent failing to vacate the premises within Three (03) days of the making of this order, to evict the respondent from the premises;

(iv) Ordering the respondent to pay the costs of this application on an attorney and own client scale.

(v) Such further and/or alternative relief as this Honourable Court may deem fit."

5. The application is supported by the founding affidavit of Darren Clark, who avers that he is the general manager of the applicant.

6. The application is opposed and the respondent has filed an answering affidavit deposed to by Bachchw Miah in his capacity as the managing director of the respondent.

7. The applicant filed a replying affidavit to the respondent's answering affidavit on or about the 1st of September, 2010.

8. In this application, there are sufficient common cause facts to dispose of the application in its entirety.

9. It is common cause that:

1. Sometime in June 2006 the applicant and the respondent executed a sublease agreement (hereinafter referred to as "the agreement") in which they became sub-lessor and sub-lessee respectively as more clearly indicated in annexure "A" of the founding affidavit of Darren Clark, the General Manager of the Applicant company.

2. In terms of Clause 2 of the agreement the duration of the initial sub-lease was from 1st May 2006 to 29th April 2010.

3. The rental payable was BWP 3,000.00 (Three Thousand Pula) per month with an annual escalation of 5% in respect of the first year and 10% per annum in respect of subsequent years.

4. Pursuant to the afore-mentioned agreement, the applicant gave the respondent vacant possession of the premises, which respondent occupied to date.

5. On the 26th January 2010 the applicant wrote a letter to the respondent indicating that the agreement would not be renewed on its expiry date, and that it will terminate on the 30th April, 2010.

6. On the 9th February 2010 the respondent wrote a letter to the applicant indicating that it was not aware that it was required to give six (6) months notice if it intended to renew the lease.

7. On the 5th May 2010 the applicant responded by reminding the respondent that the agreement expired on the 30th April, 2010, and that the respondent should "**stop trading immediately and begin to vacate the premises** ……"

8. On the 14th June 2010 the applicant wrote yet another letter to the respondent giving the respondent 7 days notice to vacate the premises.

9. The respondent declined to vacate the rented premises because, in its view, there were still some outstanding issues to be resolved by the parties.

10. On the basis of the aforesaid common cause facts, the question that falls for determination is whether the applicant is entitled to the order it seeks on the basis that the lease agreement was terminated by the effluxion of time?

11. The parties' position on the question whether the lease was capable of being renewed and/or whether the respondent is entitled to be compensated for improvements to the rented premises are diametrically opposed.

12. The applicant contends that on the basis of the sublease, Annexure "A" to the applicant's founding papers, the lease was for a fixed period of time. It run from the 1st of May, 2006, to the 29th of April, 2010.

13. The applicant contends further that the lease did not make any provision for renewal.

14. On the question of compensation for improvements the applicant contends that if the respondent had any claim against it, it should have counter sued, which it did not. It also contends that the motion proceedings are inappropriate for a claim in damages.

15. The respondent, on the other hand, concedes that the lease did not expressly provide for renewal but contend that it was an implied term of the lease that renewal of the lease was permissible.

16. According to counsel for the respondent, the reason for saying that there was an implied term to renew the lease is that the respondent sometime in February 2010 wrote a letter to the applicant, as a follow up to earlier meetings between the parties, indicating that it was not aware of the requirement that if the respondent wished to renew the lease it must give six months notice to that effect.

17. According to the respondent, Annexure "C" to the applicant's founding affidavit, being a letter dated 9th February, 2010, written by the respondent to the applicant "showed clearly that the applicant had all along haboured the intention to renew the lease".

18. On the question of compensation, the respondent relies on Annexure "MAA6" to the respondent's answering affidavit which is a letter to the applicant listing the improvements to the rented premises and the corresponding prices.

19. It seems to me that the resolution of this matter is not complicated at all.

20. An examination of the sublease, Annexure"A" to the applicant's founding affidavit clearly shows that the lease was for a fixed period of time. Nowhere does the lease provide for the option to renew.

21. Clause 2 of the sublease provides that:

> "*DURATION OF LEASE:*
>
> *Notwithstanding the date of signing hereof the lease shall be for a period of 4 (four) years, commencing on 1st May 2006 and terminating on 29th April 2010."*

21. The rationale and boundaries of implying a term in a contract was stated by Van Winsen JA in **South African Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598** at page 615:

> *"A term in sought to be implied in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. See Delmas Milling Co. Ltd. v. du Plessis 1955 (3) S.A. 447 (A.D.)"*

22. In my respectful view, Clause 2 referred to above is clear. There are no ambiguities in it. There is nothing in the language of the said clause to justify any contention that it was an implied term that the lease could be renewed.

23. In my mind, to read any implied term in clause 2 quoted above would be to do unjustifiable violence to the clear language of the parties. The parties expressly left no room to suggest that renewal was permissible. It would be unreasonable and totally unjustifiable to imply renewal in contradiction to the express term of the agreement.

24. The law on implied terms was stated with breathtaking clarity in the cases of **Pan American World Airway Inc v SA Fire and Accident Insurance 1965 (3) 150 and TGB Drill Contractors (Botswana) (Pty) Limited v NDB [1987] BLR 116**.

25. In the case of **Pan American World Airway Inc** cited supra, at page 175 C, the court stated the position of the law as follows:

> *"When dealing with the problem of an implied term, the first inquiry is of course whether regard being had to the express term of the agreement there is any room for importing the alleged implied term".*

26. In the case of **TGB Drill Contractors (Botswana) (Pty) Ltd. v. National Development Bank** the court stated that:

> *"In order to decide whether a term is to be implied in a written contract, the express terms of the contract must first be examined. The express terms may deliberately exclude the possibility of implying terms of a particular type. Nor can a term be implied on any question to which the parties have applied their minds and for*

which they have made express provision in the contract, so that it is quite evident that no term can be implied in contradiction of an express term of the contract."

27. It is also trite law that in a written contract the intention of the parties is to be gathered from the contract itself, not outside, unless there is ambiguity in the language employed by the contract.

28. If any authority is needed for the above settled position, I need only refer to the often quoted case of the **Bytes Technology Group v Game Management Services [2003] 2 BLR 148 A-B** where the court stated that:

> "*The common fundamental principle to be distilled from these authorities which have been hallowed by longstanding judicial tradition, is that once a contract has been reduced to writing and the language used is free from ambiguity, the common intention of the parties must be gathered from the language used. Extraneous circumstances surrounding and preceding the making of the contract cannot be used to aid the exercise of interpreting the contract. The court must do its best to deduce the common intention of the parties from the language used by the parties."*

29. Having regard to the authorities stated above, it would be wrong to use the correspondence of the parties of January/February, 2010 to interpret the contract entered into in 2006, whose terms are crystal clear.

30. The principle that a written contract that is not ambiguous cannot be interpreted by recourse to other extraneous evidence or documents was stated by Watermeyer JA in the case of **Union Government v Vianini ferro-Concrete Pipes (Pty) Ltd 1941 AD 43 at p47,** when he stated that:

> *"Now this court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may be contents of such document be contradicted, altered, added to or varied by parole evidence."*

31. On the issue of compensation, the respondent stands on a much weaker footing. Firstly, the respondent has not made any counterclaim and can therefore not be entitled to the relief sought. Secondly, even if it had, motion proceedings would have been inappropriate to claim damages, as each head/item claimed had to be proved by credible and cogent evidence.

32. On one or all of the above grounds alone, I would dismiss the claim for compensation.

33. On the issue of costs, the parties provided in the sublease agreement that in the event of the sublessor taking action in terms of Clause 18.1.5,

the sublesee shall be obliged to pay the costs of such action including legal costs at attorney and own client scale.

34. In the result:

1. Cancellation of the Lease Agreement entered into between the applicant and the respondent sometime during June 2006 is hereby confirmed;

2. The respondent shall vacate the premises, namely (**Shop 2 Cumberland Complex**), **Plot 474/5/6, Khama 1 Avenue, Lobatse** within seven (7) days of the making of this order;

3. In the event of the respondent failing to comply with this order by vacating the premises within the period stipulated in paragraph 2 above, the Deputy Sheriff is in that event hereby authorized to evict the respondent from the premises forthwith;

4. The respondent shall pay the costs of this application on an attorney and own client scale.

DELIVERED IN OPEN COURT THIS 6th DAY OF DECEMBER, 2010.

OBK DINGAKE
JUDGE

SEGOPOLO & COMPANY – PLAINTIFF'S ATTORNEYS