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CURBING THE NEGATIVE IMPACT OF FINANCIAL CHANGES ON RENT IN LEASE AGREEMENTS IN SOUTH SUDAN

INTRODUCTION

For some land owners in South Sudan, leasing out land has been the preferred alternative form of utilizing plots. The legal basis for leases is under Article 177 (6) (a) of the Transitional Constitution of the Republic of South Sudan as amended. The important features of the lease are categorically stated under the Land Act which include; the transfer of occupancy and possession for a particular period of time for valuable consideration known as rent.

Leases provide a vital source of income to lessors in form of the periodic payment of rent. The leasehold form of land ownership when properly regulated and utilized can undoubtedly be a great driver of infrastructural development.

Since the contractual arrangement between the lessor and the lessee is governed by a crucial document referred to as a lease agreement, utmost skill and scrutiny must be lent during the drafting process of the agreement. However, there is a prevailing vice of giving little attention to the covenants of Lease Agreements during the drafting stages. Practices gradually adopted, such as reliance on standardized lease agreements have relegated the process of drafting a lease agreement to a mere formality. Most drafters and parties are comfortable once the rent amount; the land specification and the rent period are clearly spelt out in the Lease Agreement. And yet external factors have to be weighed in, and close scrutiny ought to be given to other covenants and terms to ensure conformity with the parties' interests.

Additionally, several factors must be put into consideration to veneer the lessors and lessees from exposure to commercially undesirable outcomes. One of such grave factors that have characterized the South Sudan volatile economy is the financial changes such as headline inflation and currency devaluation that have affected rent.

In a report published by the World Bank in October 16, 2019, inflation is reported to have averaged 60.8% in FY 2018/19 from 121.4% in the Financial Year 2017/18 in the Republic of South Sudan.

As of January 2020, data published by Trading Economics, a global financial reporter, revealed that inflation in South Sudan stood at 36.40%

Between 2014 and 2019, the value of the South Sudanese Pound drastically dropped, whereas there was an unprecedented upsurge in prices of consumer goods in the market. Worth pointing out is the property/ real estate business was not spared by the devaluation of the South Sudanese Pound.

A simple example; Lessors previously receiving 3,000 SSP as rent in the year 2014, were bagging the equivalent of an estimated USD 1,000. As of today, the same 3,000 SSP can barely purchase a 50Kg sack of maize at the local markets. Consequently, lessors and lessees have been put at logger-heads. Some Lessees have taken to reap benefits from this economic wave by insisting to strictly implement the payment terms of the lease agreement without regard to the loss of value of the local currency. From the perspective of a Lessor, it is viewed as an economic rip-off by the lessees which must be addressed.

In as much as there is light at the end of the tunnel, as it is projected that there will be an upsurge in South Sudan's economic growth rate, the onus is on the lawyers engaged in conveyance, to put in place contingent measures within long term contracts to avoid a repetition of the scenario illustrated above.

With a primary focus on Lease Agreements, the purpose of this Article is to assist the drafters and parties to a lease, with possible remedies of addressing unforeseen economic developments in the future and other political events that may affect rent payable.

THE PROBLEM

Inflation continues to be a pressing issue to the real estate business community. In focus, lessors, with undertakings under long term contracts executed before the currency devaluation in 2015 and the subsequent severe inflation in 2016, continue to count loses. As a result of the financial setbacks and dire economic situation, lessors and lessees have been entangled in Lease Agreements with unanticipated financial consequences.

The situation is further exacerbated by the fact that numerous Lease Agreements previously drafted were without provisions envisaging future possible economic changes such as inflation that would affect the value of rent payable to a lessor.

The reason behind the lack of these provisions is, some drafters of leases continuously rely on standardized Lease Agreements without considering the prevailing market situation. Ideally, an agreement seeks to protect the parties' interests. However, if standardized contracts are relied upon, and little or no effort

is made to customize the agreement to suit the parties' needs, the very purpose of the contract is defeated *ab initio*.

WHAT ARE THE POSSIBLE SOLUTIONS

The general presumption is that Lease Agreements should speak to the client's needs and aspirations. The economic crisis in the preceding years should be borne in mind while drafting long term Lease Agreements. It is prudent for lawyers to anticipate the likelihood of future economic changes that may drastically alter the intention of parties, especially when it comes to payment terms.

The first solution is incorporating an **Escalation Clause** or **Inflation clause** to cater for inflation. The escalation clause seeks to periodically adjust the rent as close as possible to reflect the prevailing market prices.

There are three types of Escalation clauses in Lease Agreements; Graduated rent, Inflation adjusted rent provisions or Appreciation adjusted rent provisions.

The effect of the Graduated Rent clause is to periodically increase the initial rent value by a pre-determined percentage agreeable to both parties. The Graduated rent formula does not consider any market factors. Simply put, a lessor and lessee may agree on a monthly rent of 30,000 SSP per month, which shall be subject to an annual increase of 10%

Drafters can include a Price Inflation Clause. This clause is more technical and is based on the Consumer Production Index. The new rent will be computed by weighing in the prevailing market situation.

The second practicable solution is for parties to agree and include a **Renegotiation Clause** in the Lease Agreement. Should a major financial change occur, the provisions would oblige parties to get back to the drawing board and renegotiate the terms of the contract.

In the recent case of **Associated British Ports v Tata Steel UK Limited (2017) EWHC 694**, hereinafter known as the **Tata Case**, the High Court of England and Wales provided guidance on the issue of the nature and conditions for invoking Renegotiation Clauses.

The Court held that a party seeking to rely on the re-negotiation clause should demonstrate that the occurrence of the major physical or financial changes have greatly impacted their operations. Relating this test to the context of South Sudan, the lessors could argue failure to obtain value for money due to the loss of the purchasing power of the local currency, hence the need for renegotiation of the payment terms and value.

The **Tata case** further guides that the trigger point of a Renegotiation Clause that should be made as clear as possible. In the case of South Sudan, drafters and parties should look into the past history of the economy, and include the following

trigger points; an act of currency devaluation, severe inflation and changes in legislation.

The High Court of England and Wales further guides that a Renegotiation Clause should specify a time limit within which the renegotiations should take place. This is to avoid lengthy negotiations.

And finally the Courts of England advise that objective criteria to agree on the amended terms should be put in place. The test to be applied is the degree of reasonableness. In the context of South Sudan, it is highly probable that the need to reinstate parties to the previous position before the occurrence of the currency devaluation could be categorized as reasonable to invoke a renegotiation clause.

CONCLUSION

It is a universally adopted practice to incorporate Escalation Clauses and Renegotiation Clauses into agreements. The provisions give parties to a contract a leeway to reorient the contract in the event of any major physical and financial changes. And with the ever-changing clients' needs and intricacies associated with conducting business in a volatile economy/industry, the argument for these provisions has never been any stronger.

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