

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2010/17427

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: 219.
29.2013	
DATE	SIGNATURE

In the matter between:

PANGBOURNE PROPERTIES LTD

First Plaintiff

FORTRESS INCOME 3 (PTY) LTD

Second Plaintiff

and

YOUR LIFE (PTY) LTD

First Defendant

J.H. WOOLF

Second Defendant

J U D G M E N T

LAMONT, J:

[1] The plaintiffs sue the two defendants for payments of monies they claim are due to them. The first defendant has become insolvent and I postponed the action against it. The action proceeds currently against the second defendant only.

[2] An order was made by another Court that issues raised by the second defendant concerning *locus standi* be considered separately from the other issues.

[3] Although the issue is identified in the order as one relating to *locus standi*, in fact, the issue relates to whether or not the plaintiffs each have a cause of action against the defendants and whether those causes of action had arisen prior to institution of action.

[4] The matter is best analysed by initially considering the obligations of the first defendant to its landlord. The second defendant is a surety and co-principal debtor for those obligations and has identical (for present purposes) obligations to the landlord.

[5] The first plaintiff, the owner of the leased premises, concluded a lease with the first defendant for the period 1 September 2008 to 31 August 2010. The first defendant failed to pay the rental due and the lease was duly cancelled on 9 May 2009 by way of first plaintiff's election to cancel the lease expressed in the summons which was served on the first defendant on that date. As at the date of cancellation the first defendant was indebted for arrear

rental. Notwithstanding the cancellation of the lease and its obligation to vacate the leased premises the first defendant did not do so until 18 September 2009.

[6] The first defendant became obliged to pay the landlord:

6.1 arrear rental

6.2 damages, including for the period of holding over and the unexpired period of the lease.

Those claims would put the landlord in the same position it would be in had the lease run its course. For some time there has been a debate about whether damages for holding over are to be characterized as rental or damages for holding over (see for example *SAPRO v Schlinkman* 1948 (2) SA 637 (A) and *Arenson v Bishop* 1926 CPD 73). This debate was resolved in *Hyprop Investments (Pty) Ltd v NCS Carriers and Forwarding CC and Another* [2013] JOL 30246 (SGC). All claims apart from rental constitute damages.

[7] On cancellation a single claim arises for the arrear rental and damages. See *Symmonds v Rhodesia Railways Ltd* 1917 AD 582 at 587 and Christie: The Law of Contract in South Africa 6th ed page 573.

[8] The landlord is required to sue for all its damages in one cause of action. See *Symington v Pretoria-Oos Privaat Hospitaal Bedryf (Pty) Ltd* 2005 (5) SA 550 at 563

[9] The landlord, if he cedes a unitary debt is not entitled without the consent of the debtor to cede part of the debt.

[10] On the breach of the lease by the first defendant and the cancellation thereof, the first plaintiff (the landlord) became entitled to claim the arrear rental and damages (for the holding over and the losses suffered over the unexpired period of the lease).

[11] On 9 September 2009 the first plaintiff and the second plaintiff entered into a contract, "the sale agreement," in terms whereof the first plaintiff agreed to sell the property letting enterprises conducted by it in respect, *inter alia*, of the leased premises as well as the leased premises itself, the contracts of the business and all claims, rights, interests and other assets relating to the premises and/or the contracts of the business as at the effective date which was 1 October 2009.

[12] The sale agreement contains of the following terms:

"2.1 The purchaser hereby purchases the businesses as a going concern from the seller, with effect from the effective date, from which date all risk and benefit attaching to the businesses shall vest in the purchaser."

The effective date was 1 October 2009. The businesses are identified as being:

"1.2.3 ... The property letting enterprises conducted by the seller in respect of each of the properties, including the properties itself

the contracts of the businesses and all claims, rights, interests and other assets relating to the properties and/or the contracts of the businesses but excludes any liabilities ..."

Clause 12.3 provides:

"12.3 Upon the effective date, the purchaser shall automatically and irrevocably be deemed to have obtained:

12.3.1 Cession and transfer of the seller's rights and claims in relation to or in connection with the properties against any local and/or other competent authority or party; and

12.3.2 Cession and transfer of all deposits (if any) paid to the seller by the current tenant/s ... in terms of the lease agreements."

Clause 14 provides:

"14. Without derogating from the provisions of clause 12.3:

14.1 As between the seller and purchaser, from the effective date, the purchaser shall be entitled to the rights and be liable for the obligations of the seller arising under or by virtue of the contracts of the businesses and the purchaser hereby indemnifies and holds the seller harmless against any claims of any nature whatsoever ..."

Clause 15 provides:

"15. It is recorded that by operation of law the purchaser will be substituted for the seller as the lessor under the lease agreements with the effect from the transfer date and accordingly as between the seller and the purchaser from the transfer date the purchaser shall be entitled to the rights and be liable for the obligations of the seller arising under or by virtue of the lease agreements."

Clause 18 provides:

" ...

18.4 *The adjustment account shall reflect as:*

18.4.1 *Payable by the purchaser:*

18.4.1.1 *Rentals in respect of the properties paid by tenants thereof to the purchaser in arrear for periods before the transfer date; and*

...

18.4.2 *Payable by the seller*

...

18.4.2.2 *Any rentals or other amounts paid and/or payable by any tenant(s) in respect of the properties in advance of the effective date for periods beyond that date ..."*

[13] The plaintiffs' counsel submitted that the contract was ambiguous and I allowed evidence to be led. It appears to me however that the contract is unambiguous and that the evidence which I allowed to be led is irrelevant.

[14] The first plaintiff sold a business to the second plaintiff (clause 2.1) with effect from the effective date. The business included the letting enterprise of the property including the properties, contracts of the business and all claims, rights and interests and other assets relating to the properties and/or the contracts of the businesses (clause 1.2.3). The effective date was 1 October 2009. The clear and unambiguous terms of the contract stipulate that with

effect from 1 October 2009 every asset, right and claim of the business vests in the second plaintiff. This view is corroborated by the risk, ownership and occupation clause (clause 12) which stipulates that all the risks and benefits of ownership with effect from the effective date vest in the second plaintiff.

[15] The provisions of clauses 14, 15, 17 and 18 which deal with the rights of the first and second plaintiffs *inter se* were submitted to have an impact upon the clear wording of the clauses referred to above which vested rights in the second plaintiff. Clauses 14, 15, 17 and 18 expressly provide that they apply as between the first and second plaintiffs only as opposed to between the first and second plaintiffs and third parties. In terms thereof there is to be an adjustment between the plaintiffs in respect of monies collected by the second plaintiff which were due to the business prior to the effective date and monies which were collected by the first plaintiff and which were due to the business after the effective date. This is the mechanism which the first and second plaintiffs have used to ensure that the income generated by the business is paid to the particular plaintiff, who is entitled thereto in terms of the sale agreement. From the perspective of third parties it will be business as usual with the business collecting debts. This makes commercial sense and corroborates my view that the clauses are not intended to impact upon the rights between the business and third parties. (This type of clause is not unusual see for example *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at 498).

[16] I find that each and every claim of the business vested in the second plaintiff with the effect from the effective date (1 October 2009).

[17] I now consider the impact of the prior cession of claims vesting in the first plaintiff to its banker and the cession of claims vesting in the second plaintiff to its banker.

[18] A mortgage bond had been passed over the leased premises prior to the conclusion of the lease agreement. Under and in terms of the mortgage bond registered by the first plaintiff over the leased premises:

"1.1 As additional security for the mortgagor's indebtedness to the bank the mortgagor hereby cedes to the bank all its existing and future rights arising out of:

1.1.1 leases

...

1.1.4 any other contract or circumstance present or future relating to the mortgaged property."

The consequence of this cession is that the right to sue did not vest in first plaintiff at the time the action was instituted by the first plaintiff. See Picardi at 496.

[19] This bond was cancelled when the property was transferred to the second plaintiff on 1 October 2009. At that moment the rights ceded to the bank became vested in the first plaintiff and remained with the first plaintiff until transfer to second plaintiff in terms of the sale agreement with effect from the same day.

[20] The property was transferred to the second plaintiff on the effective date, being 1 October 2009 from which date the second plaintiff was the owner of it. At the time the property was transferred to the second plaintiff a new mortgage bond was registered over it in favour of the second plaintiff's banker. The second plaintiff immediately transferred rights to its banker by reason of the terms of the bond. That bond contains the following clause:

"6.1 As additional security for the debtor's indebtedness from time to time to the bank the debtor cedes to the bank all rights which the debtor may at any time have arising out of:

6.1.1 the lease in respect in respect of the property or any other contract from which revenues are derived in respect of the property.

...

6.1.4 any other contract, act, fact or circumstance relating to the property without limitation."

The consequence of this cession is that the rights to sue did not vest in the second plaintiff at the time of its joinder to the action.

[21] Subsequent to the registration of the bond and on 27 October 2011 the second plaintiff's banker and the second plaintiff concluded the following re-cession contract:

"2. RECESSION

We ... recede to [second plaintiff] all the cedent's rights obtained in terms of the original cession in and to all amounts of money due to the cedent, but only insofar as the defaulting tenant [first defendant] is concerned and to all the cedent's rights of action

arising thereunder under or in terms of the lease agreement executed by the defaulting tenant in respect of the property.

...

- 3.3 *This recession shall irrespective of the date of signature thereof be effective from 1 October 2009 and shall remain effective for the period of the legal proceedings referred to in paragraph 1.5 [the current litigation] above whereafter, once terminated, the cessionary shall be deemed to have receded the claims back to the cedent as originally envisaged in the bond."*

[22] From 27 October 2011 backdated to take effect from 1 October 2009 second plaintiff became vested with all the claims the first plaintiff had originally had against the second defendant.

[23] It is now possible to identify which entity was the first defendant's landlord at each particular time in respect of the claim due by the first defendant to its landlord.

23.1 First plaintiff was the owner of the leased property at the time it let it to the first defendant (before September 2008).

23.2 At that time the right to receive rental from the tenant had been ceded to the first plaintiff's banker.

23.3 The first defendant failed to pay rental, was in breach of the lease which was duly cancelled by the first plaintiff (on 9 May 2009).

23.4 In consequence, the first defendant became liable to pay monies for the unpaid rental, period of holding over and losses suffered to put the lessor in the position it would have been in had the lease run its course. That claim was due to be paid to the first plaintiff's banker.

23.5 The first plaintiff instituted action against the first and second defendant for payment of those amounts at a time when the right it purported to exercise had been ceded to the first plaintiff's banker.

23.6 The first plaintiff after institution of action and during 9 September 2009 agreed to sell and deliver the property constituting the leased premises to the second plaintiff and also ceded to second plaintiff all its right, title and interest in and to and all any claims which could be made under and in terms of the lease with effect from the effective date.

23.7 The property was transferred to the second plaintiff on 1 October 2009 who became the owner thereof.

23.8 Immediately prior to transfer and on October 2009 the cession in favour of first plaintiff's bankers ceased and any rights which the banker had previously had vested in the first plaintiff.

23.9 At the time of the transfer of the immovable property to the second plaintiff all claims the first plaintiff had against the first and second defendant vested in the second plaintiff.

23.10 Simultaneously with the transfer and the acquisition of those claims on 1 October 2009 the second plaintiff ceded all of those claims to its banker.

23.11 The claims which vested in the second plaintiff's banker were constituted by the totality of the claims made by the first plaintiff in the action namely arrear rental, holding over and damages for the unexpired period.

23.12 On 27 October 2011 the second plaintiff's bankers re-ceded all the claims held by the bank to the second plaintiff with effect from the date of the original cession.

[24] It is now possible to consider whether or not at the time each plaintiff sued the claims forming the subject matter of the action vested in such plaintiff.

[25] The first plaintiff instituted action during May 2009 at a time when the cession in favour of its bankers was operative. On 14 September 2010 the second plaintiff was joined as the second plaintiff on an unopposed basis pursuant to an order of court. At the time of joinder any claim vested in

second plaintiff had been ceded to its banker. The pleadings were amended. The first plaintiff's claim became for arrear rental (Claim 1) and for damages for the first defendant holding over during the period May to September 2009 (Claim 2). The second plaintiff's claim became a claim for damages it alleged it had suffered for the unexpired term of the lease agreement on the basis that the first defendant vacated the leased premises on 18 September 2009 with some 12 months of the lease agreement run and the damages being calculated on that basis.

[26] At the time the first plaintiff instituted proceedings its right to payment did not vest in it. Such right vested in its banker pursuant to the cession. Subsequently its right was ceded to second plaintiff. In consequence of the cession first plaintiff currently has no claim to enforce. It did not have it originally and still does not, albeit for different reasons. On any basis any claim of first plaintiff against second defendant must fail.

[27] The second plaintiff claims damages arising out of the lease agreement. At the time this claim was made the right vested in the second plaintiff's banker pursuant to the cession. That cession was subsequently undone with retrospective effect. The re-cession took place after the action had been instituted. The fact that in its terms it was backdated to a time prior to the date of institution of second plaintiff's action does not change the fact that the cession existed when action was instituted. The second plaintiff throughout was allowed by its banker to collect rental due from the debtors. Neither the banker nor the second plaintiff disclosed the existence of the cession to the

debtors. The first defendant knew its creditor as second plaintiff not the banker.

[28] The second plaintiff alleges that it suffered damages for losses sustained over the unexpired period of the lease. It does not claim that first plaintiff had suffered those damages and that it was enforcing that claim as same had been ceded to it. The second plaintiff never suffered damages. It could only ever enforce the claim of the first plaintiff. Hence this claim cannot succeed.

[29] The second plaintiff did in the alternative to the first plaintiff's claims seek to enforce first plaintiff's claims for rental and damages for holding over. Those claims currently vest in it although on the analysis *supra* they did not at the time of joinder but now by a fiction (because of the date of the re-cession) it is alleged they did exist in the hands of second plaintiff at the time of joinder.

[30] Insofar as the second plaintiff's action is concerned the question is whether or not the second plaintiff whose cause of action vested in its banker at the time it joined the first plaintiff's action should be allowed to continue to litigate for a debt which is currently enforceable at its instance.

[31] The submission was made that by permitting the joinder of the second plaintiff and by reason of all the subsequent steps taken by the second plaintiff, second defendant must be taken to have waived its right to rely upon this issue and/or that the mere fact that the second plaintiff had been joined removed from the second defendant the right to raise this issue.

[32] The general approach is that a cause of action must exist at the time of institution of the action. See *Philotex (Pty) Ltd and Others v Snyman and Others* 1994 (2) SA 710 (T) at 715.

[33] An amendment is allowed if exceptional and unusual circumstances exist. Causes of action which have arisen after the issue of summons have been allowed to proceed where for example those causes of action are joined to the existing ones in the same action. Amendments are allowed without deciding the substantive issue. What is required is that the pleadings contain a cause of action which in term contain a justiciable issue after the amendment has been allowed. The authorities which have allowed amendments entitling a plaintiff to prosecute an action which it did not have at the time of institution of action given an indication of the attitude of the Courts to the substantive issue. It is useful to have regard to such cases for that reason.

[34] The issue in the context of amendment has been considered and the relevant authorities collected by Harms *Civil Procedure in the Supreme Court* B-543 Note 30, Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* 5th edition page 686 and by Belinda van Heerden in an article entitled *Legal Proceedings after Cession of Personal Rights: Some Perennial Problems* The South African Law Journal Volume 112 Part 3 August 1995 at page 379. All the authorities support a decision in exceptional and unusual circumstances to allow the amendment to permit a plaintiff who at the time of

instituting action did not have a cause of action to proceed to judgment if the rights vest in him prior to judgment. It is suggested that there be a re-consideration of the approach to avoid formalism and prejudice to a plaintiff subject to none being suffered by the defendant.

[35] The pleadings before me have already been amended to set out the various claims of the parties. I am required to decide the issue of whether or not judgment can be given for second plaintiff not just the issue of whether a proper and just ventilation of the issues requires the recognition of a plaintiff's right to obtain judgment for a claim which currently vests in it even if it did not so vest at the time action was instituted. In general the cause of action must have subsisted when summons was issued. In the absence of special circumstances the plaintiff will not be allowed to establish a cause of action which arose later. See the authorities cited *supra* and those collected in *Erasmus Superior Court Practice B1-157*.

[36] In this particular case there are special and unusual circumstances. The second plaintiff has had the right to re-cede with effect from a date prior to institution of action. The only prejudice the second defendant has if the second plaintiff is allowed to proceed is that a claim which always vested in someone will not be dismissed. I do not need to reconsider the suggestion set out in 35 in the light of this finding.

[37] I must exercise a discretion in making a decision whether or not to allow the second plaintiff to proceed. See *Du Toit v Vermeulen* 1972 (3) SA

848 (A) at 857A. I exercise that discretion in favour of the second plaintiff and find that the second plaintiff is entitled to proceed to seek judgment against the second defendant even though at the time it instituted action the retrospective cession did not exist. In exercising the discretion I take into account:

1. The second defendant suffers no prejudice.
2. The second defendant was indebted to someone at the time action was instituted although it was not the second plaintiff. The existence of the cession was not disclosed to either the first defendant or second defendant and they accordingly must have believed that the creditor was the second plaintiff not the banker.
3. The retrospective re-cession by a fiction vests the claim in the hands of the second plaintiff from a time prior to the second plaintiff joining the action.
4. It appears to me that it is counterproductive, highly technical and a waste of costs to non-suit the second plaintiff at the present time in these circumstances.

[38] I am comforted in this approach by the recent decision of *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 473 (SCA). In that matter a plaintiff only (by cession) acquired the right to sue after action had been

instituted. The court granted relief to the plaintiff that fact notwithstanding. No comment was made of the current issue. The issue cannot have been absent from the mind of the judges as *Philotex (supra)* was cited to them and as the issue concerned *locus standi*. The facts in that matter are similar to the facts in the present matter. It accordingly appears to me although it did not say so that the Supreme Court of Appeal considered the issue and decided not to non-suit the plaintiff.

[39] I accordingly find that the first plaintiff currently has no rights to enforce and that the second plaintiff insofar as it enforces the rights pleaded and founding claims 1 and 2 is entitled to seek to recover the debt from the second defendant. The second plaintiff has no right to enforce claim 3 as presently pleaded against the second defendant.

[40] There is a counterclaim which has been made against the first plaintiff. The parties were agreed that I should not make orders dismissing actions or claims but should only make rulings reflecting the findings which I have made.

I accordingly make the following rulings:

1. The first plaintiff has ceded any right, title and interest in and to the claim it seeks to prosecute against second defendant in claims 1 and 2 to the second plaintiff.

2. The second plaintiff is currently vested with the claims in respect of which it has made claims namely claims 1 and 2 against second defendant. The second plaintiff is entitled to prosecute such claims against the second defendant whether or not such claims vested in it at the date of institution of the action of the second plaintiff.
3. The claim the second plaintiff prosecutes in claim 3 does not vest in the second plaintiff as currently pleaded. The second plaintiff accordingly has no enforceable claim against second defendant for claim 3.
4. The second defendant has been successful in its opposition to the first plaintiff's claims 1 and 2 and the second plaintiff's claim 3. It has been unsuccessful in relation to the second plaintiff's claims 1 and 2 made in the alternative.

[41] It appears to me that although on the face of it the parties have been equally successful in their opposition to each other's contentions. I find that the second defendant was entitled to have the question of whether or not notwithstanding the recession the second plaintiff was non-suited at the time it instituted action decided and that its opposition to plaintiff's claims was reasonable.

[42] In these circumstances it appears to me that the second defendant has achieved greater success than the plaintiffs have and accordingly that the costs should be awarded against the plaintiffs.

[43] It is convenient to collate all the orders in one place and for that reason I repeat the orders made earlier against the first defendant. I make the following orders:

1. The action against the first defendant is postponed *sine die*.
2. The costs of that action are reserved.
3. The first and second plaintiffs' actions against the second defendant are postponed *sine die*.
4. The first and second plaintiffs are jointly and severally to pay the costs of the appearance before me. The remaining costs are to be costs in the cause.


 C. LAMONT
 JUDGE OF THE SOUTH GAUTENG
 HIGH COURT, JOHANNESBURG

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DATE OF HEARING	:15 – 16 August 2013
DATE OF JUDGMENT	:03 September 2013