THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 437/2020

In the matter between:

HARBOUR ARCH INVESTMENT HOLDINGS (PTY) LIMITED **APPELLANT**

And

CAPITAL PROPFUND 4 (PTY) LIMITED **RESPONDENT**

Neutral citation: *Harbour Arch Investment Holdings (Pty) Ltd v Capital Propfund 4 (Pty) Ltd* (case no 437/2020) [2021] ZASCA 108 (05 August 2021)

Coram: PETSE DP, DAMBUZA, MBATHA JJA, POTERILL and POYO-DLWATI AJJA

Heard: 20 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 05 August 2021.

Summary: Contract – acquisition by sub-lessee of immovable property previously rented by it– sub-lessee's contractual obligations under a leases assignment agreement subsumed by ownership rights – payment obligation under leases assignment agreement for further development on leased property accordingly terminated.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Saldanha J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and is replaced with the following:

'The application is dismissed with costs'.

JUDGMENT

Dambuza JA (Petse DP, Mbatha JA, Potterill and Poyo-Dlwati AJJA concurring)

Introduction

[1] In 1996 Transnet Ltd concluded a 30-year Notarial Land Lease Agreement (the land lease) with a corporate entity known as RPP Developments (Pty) Ltd, in respect of a portion of commercial land which was owned by Transnet in Culemborg near the Cape Town Harbour (the property). The lease was effective from 1 September 1996 until 31 August 2026. Subsequent to the conclusion of the land lease, the lessee's rights and obligations thereunder were consecutively assigned by the respondent's successors-in-title to the appellant's predecessors-in-title in terms of leases assignment agreements. The lessees had a right to sublet any portion of the property without the consent of Transnet. Consequently, the appellant's predecessors-in-title, as sub-lessors under the assignment leases, then concluded tenant agreements with various tenants who occupied different portions of the property.

[2] In 2008 the respondent, as Transnet's lessee under the land lease, concluded a leases assignment agreement with the appellant (then known as Edge Company).[1] In terms thereof the respondent's rights and obligations under the land lease, together with the tenant leases that were in place at the time, were assigned to the appellant as a going concern at a purchase price of R235 million.[2] Clause 18.1 of the leases assignment agreement was a recordal of the appellant's intention to construct additional floor space on the property. In terms of clause 18.3 the appellant had to pay to the respondent an amount of money, computed on a specified formula, for the additional floor space. Clause 18.4 provided that in the event of the exercise, by the appellant, of the development rights provided for therein to construct additional lettable area, it would be obliged to submit architectural guidelines to the respondent for approval by Transnet to ensure synergy of the architecture of the planned development with the existing property.

[3] On 11 April 2018, prior to the appellant's exercise of the development rights, ownership of the property was transferred to it. The deed in terms of which ownership of the property was transferred from Transnet to the appellant explicitly recorded that '[by] virtue of this transfer condition 3 has lapsed by reason of merger because the lessee has become the owner of [the] lease property'.[3] In June 2018 the appellant advertised that it was planning to construct additional floor space on the property. The respondent requested information pertaining to the proposed development. The request was refused by the appellant

[1] The Notarial Deed of Assignment was registered in the office of the Registrar of Deeds Cape Town on 12 January 2010.

[2] Essentially, the leases assignment agreement was a sale agreement in terms of which the appellant bought the letting business from the respondent. The appellant's previous names were: Edge Retail Property Holdings (Pty) Ltd and Culemborg Investment Properties (Pty) Ltd.

[3] Condition 3 reads as follows: 'Subject to a Notarial Deed of Lease K766/1997L to Rap Developments (Proprietary) Limited number 1978/003380/07 which has been amended to include Lease Area Number 19 annexed to Notarial Deed of Amendment and Assignment Lease K40/2010L, which lease has been assigned o Culemborg Investment Properties (Proprietary) Limited, Registration Number 2001/024389/07 under Notarial Deed of Assignment of Lease K41/2010L, which Lease is for 30 years from 1st September 1996'.

on the basis that it had no obligation to provide details of the proposed development to the respondent as it had since become the owner of the property.

[4] The respondent brought an application in the Western Cape Division of the High Court, Cape Town (the high court), seeking a declarator that the leases assignment agreement was still of full force and effect and enforcement of the payment obligation provided for in clause 18.3 of the leases assignment agreement. It also sought an order declaring that the appellant was obliged to furnish to it information relating to the proposed development. The appellant opposed the application on the basis that the payment obligation terminated once it became the owner of the property and that its development rights now emanated from its ownership of the property.

[5] The high court upheld the respondent's application on the basis that the merger of the land lease and the ownership of the property had no bearing on the payment obligation stipulated under clause 18.3 of the leases assignment agreement. It held that the leases assignment agreement made no provision, expressly or tacitly, for its termination upon merger of the land lease with ownership of the property. The court then declared that the leases assignment agreement was of full force and effect and that the appellant was liable to compensate the respondent for the proposed additional floor area on the property. This appeal, against that order, is with the leave of the high court.

[6] In this appeal, the appellant insists that once it became the owner of the property its right to develop it further no longer arose from the provisions of the land lease or the leases assignment agreement, but was a right consequential to its ownership thereof. The respondent, on the other hand, maintains that the

appellant's ownership of the property only affected only the land lease and not the tenant leases. The argument is that clause 18.3 of the leases assignment agreement concerned the tenant leases and that it survived the merger.

[7] The parties are in agreement, however, that on the appellant's acquisition of the property its rights and obligations as a sub-lessor under the land lease were subsumed by its ownership rights.

[8] The principle of merger or *confusio* of contractual rights and obligations is an established principle in our law of contract. In relation to a lease contract a merger occurs when rights and obligations under an existing lease agreement are subsumed by the rights and obligations arising from the acquisition by the lessee of the leased object.

[9] The issue before us, ie whether the provisions of Clause 18.3 of the leases assignment agreement survived the termination of the land lease or could be exercised independently thereof, confronted this Court in *Grootchwaing Saltworks Limited v Van Tonder*.[4] In that case the plaintiff company had exercised an option to buy the land which it had been leasing from the defendant, Mr Van Tonder. Under the lease it had enjoyed certain rights, including a right of way over, and the right to erect buildings on an adjoining, unleased portion of land, which was also owned by the defendant. Following its purchase of the leased land the plaintiff maintained that those rights survived the merger that resulted from its acquisition of the land. Innes CJ approached the issue as follows:

[4] *Grootchwaing Salt Works Ltd v Van Tonder* 1920 AD 492.

'Now *confusio* in the sense with which we are concerned is the concurrence of two qualities or two capacities in the same person, which mutually destroy one another. In regard to contractual obligations it is the concurrence of the creditor and debtor in the same person and in respect of the same obligation. The typical example of *confusio* and the one mainly dealt with in the books is the case of a creditor becoming heir to his debtor or *vice versa.* But the same position is established whenever the creditor steps into the shoes of his debtor by any title which renders him subject to his debt and it is common cause that *confusio* takes place between lessor and lessee when the latter acquires the leased property. As to the consequences of *confusio* there can be no doubt that speaking generally it destroys the obligations in respect of which it operates. A person, he says (referring to *Porthier Verbintenissen,* para 642), can neither be his own creditor nor his own debtor. And if there is no other debtor then the debt is extinguished'.

[10] As to whether the rights and obligations created in the lease agreement could survive termination thereof and be capable of being exercised independently of it, the learned Chief Justice said:

'. . . it is clear that if the contract shows that the parties intended that these rights should be granted to the lessee in his capacity as such and should be exercisable only during the currency of the lease, then they cannot be exercised after its termination. The inequity would be, not in giving equity to that position but in forcing one of the parties to recognise rights which he never intended to constitute'.

[11] This remains the approach to interpretation of legal documents in our law today. This Court has repeatedly outlined the process of interpreting contracts as attributing meaning to the words used by the parties to the agreement, taking into account the context in which the agreement was concluded.[5]

[5] *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA); *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019]1 All SA 291(SCA); 2019 (3) SA 398 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA).

[12] In this case the leases assignment agreement must be the starting point for determination of the intention of the parties in relation to the provisions of clause 18.3. Clause 18 of that agreement provides, in material part, that:

'18 ADDITIONAL BULK

18.1 It is recorded that:

18.1.1 EDGE COMPANY intends constructing additional floor area on the LAND in addition to the existing floor area- which has been constructed on the LAND.

18.1.2 Successors-in-title of EDGE COMPANY to the LAND LEASE could in future construct additional floor area on the LAND in addition to the existing floor area which has been constructed on the LAND.

18.2 IFOUR PROPERTIES, as soon as practically possible after this agreement has become unconditional, will procure a certificate by an architect reflecting the existing floor area which has been constructed on the LAND, and will provide EDGE COMPANY with a copy thereof.

18.3 If any additional floor area is constructed on the LAND by EDGE COMPANY or by any of its successors-in-title to the LAND LEASE, the EDGE COMPANY, or any such successor-in-title to the LAND LEASE (as the case may be) will pay to IFOUR PROPERTIES [the respondent's successor-in-title], within 14 days after the building plans for such additional floor area have been approved by the local authority concerned (and EDGE COMPANY or such successor-in-title is obliged to inform IFOUR PROPERTIES thereof forthwith), an amount (plus value-added-tax) equal to 10% of such additional floor area multiplied by R2,000.00 per sqm (excluding value- added-tax).

18.4 . . .

18.5 EDGE COMPANY [appellant's successor-in-title] undertakes in favour of IFOUR PROPERTIES as follows:

18.5.1 EDGE COMPANY will at all times keep IFOUR PROPERTIES fully informed (including access to all relevant applications, submissions, drawings, plans, books, records and documents in the possession of EDGE COMPANY or under its control) of any steps (including rezonings and removal of restrictions) taken (or intended to be

> taken) to procure rights to increase the permissible floor area of the PROPERTY or to design and/or construct floor area on the PROPERTY in addition to the existing buildings, structures, erections and improvements forming part thereof'.

[13] In clause 18.3 the parties regulated two aspects in relation to the payment for additional development on the property. First, by use of the words: '[i]f any additional floor area is constructed on the land . . .' they specified when the payment obligation would be effective. In this case, by that time the appellant had become the owner of the property. Nothing in the words used by the parties in clause 18.3 or anywhere in the leases assignment agreement shows an intention by the parties that the payment obligation would be applicable even when the appellant built additional floor space as the owner of the property. In any event the appellant could not exercise the development rights in respect of the property as both the sub-lessee and owner thereof at the same time. For this reason alone, the respondent's contention that the payment obligation survived the merger is untenable.

[14] Second, in clause 18.3 the parties described, with specific reference to the land lease, the entity responsible for the payment - as 'Edge Company or its successors-in-title to the LAND LEASE'. The contention by the respondent that the reference in the clause to 'successors-in-title' showed an intention that the payment obligation should be exercisable independent of the land lease ignores the express reference, in the description of the sub-lessor, to the land lease. In terms thereof the successors-in-title to whom the payment obligation was applicable were limited to the successors under the land lease. There could be no successors-in-title to the land lease after termination thereof.

[15] In addition, the argument by the respondent that the parties were entitled to quantify the potential income from the property at the conclusion of the agreement does not take the respondent's case any further. The parties agreed on a conditional payment as stipulated under clause 18.3.

[16] Furthermore, the respondent could only transfer to the appellant under the leases assignment agreement such rights and obligations as it held under the land lease. As a lessee under a fixed term land lease, although renewable, the respondent could not, under clause 18.3, create for itself a perpetual benefit to receive payment against all future sub-lessors of the property.

[17] Consequently the following order is granted:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and is replaced with the following:

'The application is dismissed with costs'.

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N DAMBUZA

JUDGE OF APPEAL

Appearances:

For the Appellant:	B MANCA SC
Instructed by:	STBB Attorneys, Cape Town.
	EG Cooper Majiedt, Bloemfontein.
For the Respondent:	P LOUW SC
Instructed by:	Kokinis Inc, Johannesburg.
	McIntyre van Der Post, Bloemfotein.