

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

CASE No : 1341/10

In the appeal of:

ASHRAFF DAWOOD MOHAMED

First Plaintiff

GAVIN NEVILLE CROOKES

Second Plaintiff

DAWOOD MOHAMED

Third Plaintiff

vs

BP SOUTHERN AFRICA (PTY) LIMITED

Defendant

JUDGMENT

VAN ZÿL, J.,

1. The three plaintiffs are the trustees of the Ashwood Trust. In that capacity they instituted action against the defendant claiming damages following the alleged termination of an agreement of sub-lease, by virtue of alleged material breaches by the defendant of the terms thereof. The defendant has excepted to the amended particulars of the plaintiffs' claim on the grounds that it lacks averments necessary to sustain a

cause of action. That is the issue which now requires decision.

2. The dispute between the parties concern the rights the plaintiffs claim to have acquired as against the defendant relevant to the latter's occupation of premises situated at 89 Playfair Road, North Beach, Durban. According to the particulars of claim and pursuant to a notarial deed of sub-lease registered in the office of the registrar of deeds on 15 May 1990, the defendant sub-leased the premises from North Beach Garage (Pty) Limited for the period from 12 February 1989 to 11 February 2009.
3. The plaintiffs allege that the lessor subsequently ceded its rights in and to the sub-lease to Ambit Properties Limited in terms of a notarial deed of session registered on 30 January 2004. Ambit Properties Limited in turn ceded its rights so acquired to the Ashwood Trust, herein represented by the plaintiffs, in terms of a notarial deed of session duly registered on 14 March 2005.
4. In the exception the defendant attacks the entitlement of the plaintiffs to claim against it on the basis that the plaintiffs' claims are based upon "*an expired lease*". In setting out details of its approach in the course of the exception, the defendant draws attention to the background to the sessions referred to above.

5. The “*expired lease*” is a reference to the original notarial lease No. 14/1957L (“*the main lease*”), granted by the then Durban City Council for a period of thirty(30) years from 19 October 1956, but renewable for a further three(3) successive periods of twenty(20) years each, to Playfair Garage (Pty) Limited and subsequently, after its liquidation, transferred to North Beach Garage (Pty) Limited under a notarial cession of lease registered during 1961.
6. In developing his argument counsel for the excipient, to which and as is done in the pleadings, I will for convenience refer to as the defendant, submitted that the particulars of claim does not allege that the main lease was duly renewed at the end of the initial thirty year period during 1986, or thereafter.
7. On behalf of the defendant a distinction was drawn between the plaintiffs title as cessionary and as lessor. Counsel for the defendant submitted that the plaintiffs failed to allege or demonstrate in the pleadings that their title as cessionary (as opposed to lessor) was not defective. Effectively the argument is that if the main lease failed, so would the sub-lease upon which the plaintiffs rely in their damages claim against the defendant.
8. Counsel for the plaintiffs countered that it was unnecessary for

the plaintiffs' cause of action against the defendant to allege in detail the mechanics of sustaining the main lease. But, so counsel submitted, it could in any event be inferred from the particulars of claim, as well as the annexures thereto, that the main lease remained extant and in full force and effect.

9. In developing the argument on behalf of the plaintiffs counsel drew attention to various references which, so it was submitted, were consistent with the continued existence of the main lease. These included the allegation in paragraphs 5 and 6 of the particulars of claim that on or about 22 September 2004 the Ashwood Trust purchased from Ambit Properties (Pty) Limited "*its right of leasehold*" to 89 Playfair Road. It was submitted that such reference inevitably implied that the main lease continued in existence.

10. Counsel for the plaintiffs also drew attention to a similar reference in paragraph 8.4, dealing with the terms of the sub-lease concluded in 2004 between North Beach Garage (Pty) Limited and the defendant and wherein the latter undertook to ensure due compliance with the terms and conditions of "*the principal lease*". This is a reference to original notarial lease No. 14/1957L ("*the main lease*"), granted by the then Durban City Council and the continued existence of which the exception questions. Counsel submitted that the reference in paragraph

8.4 of the particulars of claim, especially when read with Clause 21 of the sub-lease to the defendant (annexure “C” to the particulars of claim) and headed “*NON CONTRAVENTION OF THE MAIN LEASE*”, are consistent only with the continuance of the main lease.

11. Attention was also drawn to annexure “E” to the particulars of claim. This is a consent document alleged to have been duly signed on behalf of the defendant on the 13th January 2005 and wherein the defendant acknowledged notice of the sale and transfer of rights from Ambit Properties Limited to the Ashwood Trust, including the rights flowing from the main lease in terms of the notarial deed of lease registered under number 14/1957L. It was submitted that reliance in the particulars of claim on such consent was also consistent only with the continuance of the main lease.

12. In the view I take of the matter and insofar as it may be material to the plaintiffs’ cause of action against the defendant based upon alleged breach of the terms of the sub-lease, the plaintiffs have impliedly alleged that the main lease continues in existence and must therefore have been renewed from time to time in accordance with its terms. Certainly that is an interpretation that may be applied to the particulars of claim, read with the annexures thereto.

13. The purpose of an exception that a pleading lacks averments necessary to sustain an action is to dispose of the need to go to trial and present evidence. It is therefore necessary that the pleading excepted to must be unambiguous. Where ambiguity exists, that means that the exception can only succeed if, on each possible interpretation thereof, no cause of action can be shown to exist. If this is not possible then the pleading may be open to exception on the ground that it is vague and embarrassing, but not on the ground that no cause of action is disclosed.
14. That being so where, as here, the averment claimed by the defendant to be vital to the plaintiffs' cause of action may reasonably be implied, there is no room for exception on the ground that the plaintiffs particulars of claim do not disclose a cause of action.
15. But, even if I were mistaken in the conclusion which I have reached in this regard then Ms Olsen, who appeared for the plaintiffs, sought to rely upon a further impediment to the granting of the exception. In the alternative counsel submitted that the averment relevant to continued existence of the original notarial lease No. 14/1957L (*"the main lease"*), as granted by the then Durban City Council, is irrelevant to the plaintiffs'

cause of action as against the defendant. Consequently and even if it were to be found that the plaintiffs had made insufficient averments in this regard, it would be of no consequence.

16. Counsel submitted that the plaintiffs merely had to allege and prove at the trial that they were party to a sub-lease agreement with the defendant, the terms of which the latter had breached. This was because a lessor is obliged to protect the lessee from eviction, but may in law let property to which it has no title. A lessee is not at liberty to question its lessor's title.

17. Accordingly, so counsel for the plaintiffs argued, there was no merit in the distinction which counsel for the defendant sought to draw between the position of a cessionary, which had to allege and prove that it had acquired a legitimate title and a lessor who had no need to prove its title.

18. Whilst counsel for the defendant's exposition of the law in regard to the position of a cessionary is in principle sound, it has no relevance to the position of the plaintiffs with regard to the rights conferred by the original notarial lease No. 14/1957L (*"the main lease"*), as granted by the then Durban City Council, or indeed the extensions or transfers, or failure to extend or to transfer such rights.

19. Essentially the plaintiffs rely upon the cession to them of the rights flowing from the sublease, as concluded between the defendant and North Beach Garage (Pty) Limited during 1990 and in respect of which adequate averments of transfer by cession to the plaintiffs are made in the pleadings.

20. It follows that even if plaintiffs' main contention were to fail, namely that the allegation regarding the extension and transfer of the original notarial lease No.14/1957L, as granted by the then Durban City Council, may be implied in the particulars of claim, then the exception still cannot succeed because such allegation is not material to the plaintiffs' cause of action in any event.

21. There does not appear to be any compelling reasons why costs should not follow the result.

22. The exception is dismissed, with costs.

VAN ZÿL, J.

APPEARANCES:

For Defendant/Excipient: Adv L E Combrink
Instructed by Eversheds,
c/o Tomlinson Mnguni James Inc
of Pietermaritzburg (Ref: R
Wills/mp/64E0074/10).

For First Second & Third
Plaintiffs/Respondents : Adv Ms L K Olsen
Instructed by Von Klemperers of
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Klemperer).

Date argued : 16 November 2011

Judgment delivered on : 7 March 2012