IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case number: 4063/2018D

In the matter between

BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS	**PLAINTIFF**
and	
YOUNUS MOOSA N.O	**FIRST DEFENDANT** (EXCIPIENT)
MAHOMED MOOSA N.O	**SECOND DEFENDANT** (EXCIPIENT)
ADNAAN YOUNUS MOOSA N.O	**THIRD DEFENDANT** (EXCIPIENT)
AHMED MOOSA N.O	**FOURTH DEFENDANT** (EXCIPIENT)
SHELL DOWNSTREAM SA (PTY) LTD	**FIFTH DEFENDANT**
THE REGISTRAR OF DEEDS FOR THE PROVINCE OF KWAZULU-NATAL	**SIXTH DEFENDANT**

ORDER

The following order is made:

The exception is dismissed with costs.

JUDGMENT

D. Pillay J:

Introduction

[1] When a lease is renewed, is a pre-emption clause in the lease also extended? This question arises in the context of an exception to the plaintiff's declaration. The plaintiff is Bright Idea Projects 66 (Pty) Ltd t/a All Fuels ('Bright Idea'). The excipients are Younus Moosa N.O ('Younus'), Mahomed Moosa N.O ('Mahomed'), Adnaan Younus Moosa N.O ('Adnaan') and Ahmed Moosa N.O ('Ahmed'). Younus, Mahomed and Ahmed are cited as trustees of the Kunzaan Property Trust ('Kunzaan Trust'). Younus, Mahomed and Adnaan are also cited as trustees of the Adnaan Moosa Family Trust ('Adnaan Trust'). The Kunzaan Trust sold property to the Adnaan Trust. Bright Idea had a lease over the property. Shell Downstream SA (Pty) Ltd and the Registrar of Deeds for the Province of KwaZulu-Natal ('registrar') are the fifth and sixth defendants.

The facts

[2] About 11 July 2001, Caltex Oil SA (Pty) Ltd ('Caltex') as franchisor, gave Way To Trade CC t/a Margate Renault Service Station ('Way To Trade') the right to operate a Caltex Service Station on the property described as Erf 2378 Uvongo, Registration Division ET, Province of KwaZulu-Natal, in extent 4378 square meters, situated at 249 Marine Drive, Margate, KwaZulu-Natal ('the property'), currently held under deed of transfer number T31665/2015 by the Adnaan Trust.

[3] Initially, the franchise ran for five years from 1 August 2001, with the option to renew for two further periods of five years each, giving a total of 15 years, ending on 31 July 2016. The franchise included a lease over the property and the equipment on it necessary for operating a retail petrol service station. About 27 May 2002, Caltex and Way To Trade ceded the franchise to Wilnev Retailers No. 38 CC ('Wilnev').

[4] When the franchise agreement was concluded, Faux Properties CC ('Faux'), the owner of the property at the time, had a notarial deed of lease executed over the property in favour of Caltex, its successors in title or assigns. The registration of the lease was endorsed against Faux's title deed of the property on 3 August 1990 and registered on 28 August 1990 under reference number K957/90L ('Lease K957/90L'). Lease K957/90L was for a period of 20 years, from 1 November 1989 to 31 October 2009.

[5] On 15 September 1993, Faux sold the property to Primeinvest 1150 CC ('Primeinvest'). Transfer to Primeinvest was registered on 4 May 1994 under deed of transfer T11176/94. Simultaneously, Lease K957/90L in favour of Caltex was extended under notarial deed of amendment K330/94L for a further ten years from 1 November 2009 to 31 October 2019, and endorsed to that effect.

[6] On 2 November 2001, Primeinvest sold the property to the Kunzaan Trust. The transfer was registered on 13 June 2002 under deed of transfer T33738/2002, subject to Lease K957/90L, as amended under K330/94L, and extended to 31 October 2019. Between January and February 2003, Primeinvest, the Kunzaan Trust and Caltex formalised matters by concluding an agreement (Annexure 'G') to substitute the Kunzaan Trust as lessor instead of Primeinvest under Lease K957/90L.

[7] On 15 August 2005, Caltex changed its name to Chevron South Africa (Pty) Ltd ('Chevron'). During December 2011, Chevron and Bright Idea concluded a cession and assignment of their retail agreement ('the Retail Assignment Agreement') in terms of which Chevron ceded and assigned to Bright Idea all of its rights and interests in various retail agreements, including the franchise agreement. Three further agreements were concluded simultaneously, including one in terms of which Chevron

transferred to Bright Idea all of its rights and obligations in respect of Lease K957/90L, as amended.

[8] An assets sale to Bright Idea, included underground storage tanks, pumps, piping, signage, cladding and related accessories and equipment on the property. Consequently, Bright Idea became the lessee of the property with the sole and exclusive right to possess it until 31 October 2019. Furthermore, it became the sole and exclusive supplier of petroleum products intended for sale from the property to the retail sector, effective from 24 January 2012 until at least 31 July 2016.

[9] About 2 June 2015, the Kunzaan Trust, represented by Younus, and its conveyancer Paul Christiaan Preston, applied to the registrar purportedly in terms of s 78(1) of the Deeds Registries Act 47 of 1937 for the lapsing of the pre-emption recorded in condition H in its title deed. The application was falsely premised on Lease K957/90L having expired by effluxion of time on 31 October 2009, instead of 31 October 2019.

[10] Predictably, the examiner at the office of the registrar queried the application. She called for title deed T33738/2002 in favour of the Kunzaan Trust. Remarkably, the conveyancer had not lodged it with the s 78(1) application. Lodging the title deed did not clear the query. The examiner persisted:

'This lease has not yet lapsed. See endorsement thereon vide K330/94L. Lease was extended by 10 years from 2009. Reconsider this transaction. Lodge consent of Caltex Oil if necessary.'

[11] Notwithstanding these queries, on 12 October 2015, the registrar approved the application and condition H was expunged from the Kunzaan Trust title deed. Lease K957/90L was cancelled under reference number BC33332/2015.

Submissions

[12] The first to fourth defendants excepted to Bright Idea's declaration on four grounds. Only two grounds are pursued.

[13] First, the excipients deny that they breached the right of pre-emption. Even if the right existed, the pre-emption did not entitle Bright Idea to the relief of 'stepping

in'. Consequently, Bright Idea's claim for an order directing the Kunzaan Trust to sell the property to give effect to the pre-emption is not competent in law.

[14] Second, Bright Idea does not allege that its right of pre-emption is a real right. It is a personal right in favour of Caltex. Caltex was entitled to exercise it when Faux sold the property to Primeinvest. Caltex failed to do so. Bright Idea cannot assert its personal right of pre-emption against Faux's successors in title or the world at large. Consequently, Bright Idea has established no cause of action in law.

[15] At best, submitted Ms *Gabriel SC* for the excipients, Bright Idea's remedy is a claim for damages for breach of a right of pre-emption.[1] In support of these contentions, the excipients rely on *Hirschowitz v Moolman & others*;[2] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en andere*[3] and *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd.*[4]

[16] Mr *Harpur SC* submitted that Caltex was not obliged to enforce its right of pre-emption when Faux sold the property to Primeinvest. Such sale was subject to all the terms and conditions of the deed of lease, including not only the *huur gaat voor koop* principle but also the right of pre-emption in favour of Caltex. The sale of the property from Primeinvest to the Kunzaan Trust resulted in the transfer of all the rights and obligations of Primeinvest under Lease K957/90L to the Kunzaan Trust by operation of law. Importantly, the transfer of Caltex's right of pre-emption was transferred to Bright Idea with the consent of the Kunzaan Trust. The right of pre-emption endured for the currency of Lease K957/90L, which was for a total of 30 years. On the authority of *Mokone v Tassos Properties CC & another*,[5] once the Kunzaan Trust decided to sell the property during the currency of Lease K957/90L, it was obliged to first offer to sell it to Bright Idea. Having failed to do so, 'stepping-in' was the appropriate remedy.

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[1] *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 323H.
[2] *Hirschowitz v Moolman & others* 1985 (3) SA 739 (A).
[3] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en andere* 1982 (3) SA 893 (A).
[4] *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA).
[5] *Mokone v Tassos Properties CC & another* 2017 (5) SA 456 (CC).

[17] Bright Idea rejects the proposition that the right of pre-emption was not a real right. Even if it is a personal right, it is one that applies not only between the parties to the pre-emptive agreement, but also to their successors and assigns.

[18] Additionally, bad faith and collusion fortifies Bright Idea's claim to have the sale and, consequentially, the registration of transfer from the Kunzaan Trust to the Adnaan Trust set aside. Bright Idea sought an order ultimately to compel the Kunzaan Trust to offer to sell the property to Bright Idea on the same terms and conditions as the sale to the Adnaan Trust.

Approach to the exception[6]

[19] An exception is an opportunity to determine rights expeditiously. It could avoid a trial.[7] For the limited purposes of the exception, all the facts in Bright Idea's declaration are accepted as correct, unless they are manifestly incorrect or improbable.[8] However, for the exception to succeed the declaration must be excipiable on every reasonable interpretation.[9]

[20] The excipients bear the onus of showing that, notwithstanding their acceptance of the assertions in the declaration as fact, the pleadings do not disclose a cause of action;[10] and the conclusion of law contended for cannot be supported on any reasonable interpretation of the facts.

The law

[21] *Mokone* offers a complete answer to the conundrum in this case. Tassos Properties CC ('Tassos') leased premises to Ms Mokone at a monthly rental of R4 500, initially for one year ending on 28 February 2005, renewable for another year at a rental to be agreed. The lease was subject to a right of first refusal when Tassos wished to sell the premises, at a price to be negotiated. In 2006, the parties agreed to extend the lease further to May 2014. They recorded that agreement simply by

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[6] *H v Fetal Assessment Centre* 2015 (2) SA193 (CC) para 10-12; *Voges v Business Venture Investments No 1034 (Pty) Ltd* (12352/2017) [2018] ZAWCHC 72 (4 June 2018) para 9-11.
[7] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 3.
[8] *Voget & others v Kleynhans* 2003 (2) SA 148 (C) para 9.
[9] *South African National Parks v RAS* 2002 (2) SA 537 (C) at 541E-542G.
[10] *Voget* para 9.

endorsing the first page of the initial lease with 'Extend till 31/5/2014 monthly rent R5 500'. Tassos sold and transferred the premises to Blue Canyon Properties 125 CC ('Blue Canyon') in March 2010.

[22] The Constitutional Court had to answer the following questions:

(a) When parties renew a lease without saying more, are only terms that are 'incident to the relation of lessor and tenant' renewed?[11]

(b) Was the right of pre-emption contained in the lease renewed with the extension of the lease?[12]

[23] The Constitutional Court agreed unanimously that, on first principles, the issue turns on the interpretation of the words extending the lease.[13] However, a lawyer's understanding of ordinary words should not be imposed as the meaning intended by non-lawyers.[14] Furthermore, interpretation should not be prejudiced by generalisations and preconceived notions of the common law rule as favouring landlords.[15] That is, it should be interpreted without baggage, including the baggage that comes with characterising the agreement as a lease.[16] In so far as the common law rule was premised on inequitable preconceptions, it had to be developed to lay 'down a categorical substantive legal rule'.[17] Consequently, the Court unanimously held that when a lease is simply extended without more, 'all the terms of the lease, including terms that are "collateral, and not incident, to" a lease, are being extended'.[18] The party against whom a right of pre-emption operates (usually the landlord) has the option of not extending the pre-emption when the lease is renewed.[19]

[24] The point of departure was the interpretation of *Moolman*.[20] Citing Corbett JA, Madlanga J, writing for the majority in the Constitutional Court, interpreted *Moolman* to require a right of pre-emption to comply with the statutory requirements for

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[11] *Mokone* para1.
[12] *Mokone* para 15.
[13] *Mokone* paras 26, 33 and 78.
[14] *Mokone* para 29.
[15] *Mokone* paras 26, 35, 36 and 79.
[16] *Mokone* (per Froneman J, the minority) para 78.
[17] *Mokone* para 35.
[18] *Mokone* paras 36, 78. Footnote omitted.
[19] *Mokone* para 37.
[20] *Mokone* paras 57, 82.

transactions relating to land.[21] They disagreed with *Moolman* to hold that 'generally the right [of pre-emption] is capable of enforcement in a manner that complies with the formalities.'[22] Without bypassing the formalities, the 'stepping into' remedy could be accomplished consensually or coercively through the Court.[23] In upholding the validity of the pre-emption, the majority preferred the following *ratio* in *Rogers v Phillips*.[24]:

'"(N)either in terms of s 1(1) of [the Formalities Act] nor in terms of s 2(1) of [the Alienation of Land Act] does a right of pre-emption in respect of land have to be in writing in order to be valid."'[25] (Footnote omitted).

[25] Froneman J, in the minority, read *Moolman* to deal only with the 'stepping into' rights of pre-emption.[26] He pointed out that the anomaly that Corbett JA sought to address in *Moolman* was the prospect of oral agreements of pre-emption becoming enforceable.[27] The right of pre-emption is effectively a conditional sale of land, which must comply with the statutory formality of being in writing. Without a written offer to step into, 'the unilateral stepping in, even if in writing, cannot transform the resultant sale into a written sale.'[28] The requirements for a valid pre-emption needs further examination. Consequently, he considered it unnecessary and premature to dump *Moolman* on the ash-heap.[29]

[26] Obiter, the majority endorsed stepping into the shoes of a third party as a remedy recognised in *Oryx*.[30] Translated, courtesy of the majority, the *Oryx* mechanism reads:

"In the event that a seller concludes a contract of sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been between the seller and the holder of the right of pre- emption."[31]

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[21] *Mokone* para 51.
[22] *Mokone* para 63.
[23] *Mokone* para 57.
[24] *Rogers v Phillips* 1985 (3) SA 183 (E).
[25] *Mokone* para 49.
[26] *Mokone* para 82.
[27] *Mokone* para 82.
[28] *Mokone* para 82.
[29] *Mokone* para 83, 87.
[30] *Mokone* paras 56-57.
[31] *Mokone* para 56.

[27] Froneman J qualified the application of the 'stepping into' remedy to situations in which pre-emption was for the same price that the owner would accept from a third party.[32] The pre-emption invited Ms Mokone to negotiate the purchase price when Tassos wished to sell, thus distinguishing the 'stepping-into' in *Mokone* from *Oryx*.[33]

[28] The majority in *Mokone* overruled *Moolman,* but not with regard to the 'stepping-in' remedy. In the following extract Corbett JA clarifies what the dispute was and was not about:[34]

[29] '[A]nd that at common law this entitled appellant by a unilateral declaration of intent . . . to step into the shoes of Dorstfontein, with the result that an independent contract of purchase and sale would by operation of law then be deemed to have been concluded between appellant and respondents at the option price. . . . I shall furthermore accept that . . . the signing of the draft deed of sale on 10 December amounted to a written declaration of intent on the part of appellant, capable at common law of bringing about an independent contract of purchase and sale. The question is whether such a contract could be said to conform to the requirements of the Formalities Act. There are certain difficulties.'[35]

[30] Thus, the validity of the pre-emption was the crux in *Moolman*. The Appellate Division upheld that the pre-emption agreement had to comply with the statutory requirements regarding contracts of sale of land. It found that the owner had not signed any written document obliging him to sell or offer to sell his farm to the tenant.[36] This finding determined the outcome of *Moolman*, not whether the pre-emption was extended with the lease, or whether 'stepping into' was a competent remedy, both questions having been acceded to. It is this finding that the majority overruled in *Mokone*, not the endorsement for the 'stepping-in' remedy.

[31] Similarly, in *Owsianick*,[37] the debate turned on whether a valid right of pre-emption had come into existence. The owner of a cinema agreed to give the lessee pre-emption to purchase the premises for the same price she was willing to sell to any

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[32] *Mokone* para 84.
[33] *Mokone* para 85.
[34] *Moolman* at 763F-H.
[35] *Moolman* at 763F-I.
[36] *Moolman* at 767G-I
[37] *Owsianick* at 321A-B.

third party. During the currency of that lease, she concluded another lease with a third party, to commence after the existing lease expired. The lease gave the third party the option to purchase the property. In an action for an order directing the owner to offer to sell the premises to the lessee for the same price as the sale to the third party, the Appellate Division rendered split decisions.

[32] The majority decision (Botha JA) turned only on the question as to whether the pre-emptive right had come into operation. That decision determined the result of the appeal, not the competence of the remedy of 'stepping in'.[38] There was no majority decision on the legal issues raised pertaining to the remedies available to the grantee of a right of pre-emption. Specific performance was accepted to be a competent remedy.[39] Wiliamson JA agreed with Ogilvie Thompson JA that specific performance would be an appropriate remedy but declined to decide the issue. Botha JA expressed a view also in passing that our law knew of no procedure permitting the lessee or grantee of a pre-emption to step into the third party's shoes and compel the owner to sell the property to the lessee.[40]

[33] In *Oryx*, the Appellate Division did more than endorse the 'stepping-in' remedy. It also held that in the case of a double sale, the second sale will be set aside where the second purchaser was mala fide:

'Mala fides is established not only where there is an element of deceit but also where knowledge of the first sale is shown.'[41]

[34] In *Spearhead,* the issues before the Supreme Court of Appeal were:

(a) Was an option to purchase binding on the third party purchaser 'by virtue of either the operation of the rule *huur gaat voor koop* or on any other legal basis'?

(b) Did the lessee/grantee's exercise of the option against the third party purchaser give rise to a valid agreement of sale, one that was compliant with the statutory requirements, in the absence of a written deed of sale?[42]

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[38] *Owsianick* para 321A-B. also *Moolman* 767I-J.
[39] *Owsianick* at 320E-H; 327B-E.
[40] *Owsianick* at 323B-H.
[41] *Oryx* at 894C-D.
[42] *Spearhead* para 10.

[35] Applying *Shalala & another v Gelb,*[43] the majority answered both questions in the negative. Holding against the lessee, they found no 'equitable need' to postulate an *ex lege* transfer of the obligations to the purchaser.[44] They concluded:

'. . .therefore, that the obligations arising from an option to purchase the leased property, granted by the lessor, are not, by the operation of the rule *huur gaat voor koop,* transferred *ex lege* to the purchaser of the property. It follows that a lessee, seeking to exercise such an option . . . must do so as against the grantor and not against the purchaser. Where, however, there has been a transfer of the property to a purchaser with notice of the option, the lessee, having thus exercised his option, will generally be able to claim transfer of the property from the purchaser.'[45]

[36] In contrast, in her dissent, Maya JA found that the *huur gaat voor koop* had 'origins in equitable principles'.[46] Cautiously, she sought to extend notions of equity and fairness that had spawned the common law principle in the first place. She investigated whether the 'option was a material part of the lease agreement'.[47] The blanket description of an option being 'a collateral obligation' was unacceptable.[48] Instead, should be 'an integral part of the agreement if, for instance, it was an inducement to contract, or its presence had a bearing on the rent agreed upon'.[49] As discussed below, *Mokone* dispensed with the need to distinguish between collateral and integral pre-emptions.

Findings

[37] In *Mokone*, the Constitutional Court used the opportunity to refract the rights of pre-emption in a lease under the common law through the prism of the Constitution of the Republic of South Africa, 1996 to determine the spectrum of its scope. Both the High Court and the Supreme Court of Appeal had refused leave to appeal.[50] It was only with the help of pro bono counsel that this issue of pre-emption enjoyed the attention of the Constitutional Court. Despite pre-emption being an aspect of the fundamental right to property, no other court had processed it through the Constitution.

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[43] *Shalala & another v Gelb* 1950 (1) SA 851 (C) at 865.
[44] *Spearhead* para 60.
[45] *Spearhead* para 61.
[46] *Spearhead* para 13.
[47] *Spearhead* para 32.
[48] *Spearhead* paras 17-18.
[49] *Spearhead* para 16.
[50] *Mokone* para 11.

Once again, the approach in *Mokone* reignites our consciousness that there 'are not two systems of law regulating [leases] - the common law and the Constitution'.[51] All law, including the common law,[52] is grounded in the Constitution. The unhappy legal history of *Mokone* bears out the concern of progressive jurists that our legal culture and consciousness fall far short of the needs of a transformative constitutional democracy.[53]

[38] Manifestly, in this case the excipients misplaced reliance on their choice of case law. None supports either of their grounds of exception.

[39] The principles *Mokone* established apply to this case. If 'stepping-in' was constitutionally untenable, the Constitutional Court would have said so when it overruled *Moolman* on the formalities required for enforcement of a valid right of pre-emption. It had to remit the matter to the High Court to determine outstanding issues. Consequently, the Constitutional Court could not order the remedy of 'stepping-in'. Hence, its endorsement for the remedy was obiter. However, its declarator, which recognises the extension of the right of pre-emption with the lease, foreshadows specific performance as a permissible remedy. Additionally, its in principle unanimous support for the 'stepping-in' remedy would be hard to resist. Untethered by outstanding issues, the facts in this case establish a stronger foundation for specific performance in the form of 'stepping-in' than in *Mokone*.

[40] The opportunity to overrule *Mokone,* arose in *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited & others*.[54] *Tiekiedraai* involved a right of pre-emption over leased land. The High Court had granted the 'stepping in' remedy as expounded in *Owsianick*, *Oryx* and *Moolman*.[55] On appeal, the

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[51] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* (2004 (4) SA 490 (CC) para 22.
[52] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others*
2001 (1) SA 545 (CC) para 21; *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC).
[53] D M Davis and K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 403.
[54] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited & others* 2019 (7) BCLR 850 (CC) para 9.
[55] *Tiekiedraai* para 9.

Constitutional Court had another chance to consider the remedy. Unanimously, it chose not to grant leave to appeal. The interests of justice did not require consideration of novel points of law of general public importance that, although interesting and arguable, had not been contested before the High Court or the Supreme Court of Appeal.[56] Only under exceptional circumstances would the Constitutional Court '"agree to be burdened with the development of the common law as a court of first and last instance".'[57] Manifestly, the Constitutional Court was not of the view that its obiter disposition favouring the 'stepping in' remedy was wrong.

[41] Notwithstanding *Mokone*, the excipients took the extraordinary step of delivering supplementary heads of argument to produce *Spearhead* as authority for the principle that the *huur gaat voor koop* rule protects only the terms of the lease on renewal; that it does not protect collateral rights that are unconnected with the lease; and that pre-emption is a personal right, which expires or lapses if the lessee does not exercise it.

[42] Remarkably, *Spearhead* refers not even once to the Constitution. The majority applied the precedent in *Shalala*. As theoretically justifiable as its rule-choice of relying on precedent was, the Supreme Court of Appeal did not consider whether practically it was necessary to develop the common law under s 8(3)*(a)* of the Constitution. Perhaps the parties did not invite it to do so. Whatever the reason, it missed the opportunity of developing the common law under the Constitution.

[43] *Mokone* did not refer to *Spearhead*. However, it reversed the previous situation under the common law of not extending to collateral terms such as a right of pre-emption. *Mokone* overrules the majority's holding in *Spearhead* that the *huur gaat voor koop* rule protects only the terms of a lease and not collateral rights unconnected with the lease. Following upon the development of the common law in *Mokone*, distinguishing between collateral and incidental terms in a lease is no longer necessary; *all* terms are extended with the renewal of a lease. This would apply to both pre-emptions and options to purchase, notwithstanding their material differences.

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[56] *Tiekiedraai* paras 17-18, 24, 26.
[57] *Tiekiedraai* para 19 citing *Sarrahwitz v Maritz NO & another* 2015 (4) SA 491 (CC) para 21.

[44] Furthermore, pre-emptions persist even through double or multiple sales, irrespective of whether the leases are personal or real rights. Whether they exist is a matter of proof determined by interpretation and inferences from facts. Distinguishing *Mokone* on the basis that it did not involve successive purchases but a renewal of a lease does not help the excipients. Overwhelmingly, in double sales the authorities distinguish third party purchasers who knew of the pre-emption or option as having acted mala fide and fraudulently.[58] An honest second purchaser is in a tenuous position even if it did not know of the pre-emption. Equities may inform an enquiry to determine the relative hardships of each purchaser. Exceptionally, the equities must weigh most heavily in favour of a fraudulent third party purchaser to convince a court not to set aside the sale. In that event, a mala fide purchaser will not be spared of an action for damages.[59]

[45] Another factor that distinguishes this case from the others cited above is the quality and quantity of evidence. All extensions, cessions and assignments of the lease were in writing and endorsed against the appropriate title deeds when the property was sold and transferred. Such evidence puts this case beyond the controversy that arose in the precedents cited above about whether the pre-emption exists, what its terms are and, importantly, whether it complies with the formal requirements for a valid pre-emption relating to land. Furthermore, the Agreement of Substitution of Lessor (Annexure 'G') explicitly transferred the obligations of Primeinvest to the Kunzaan Trust:

'[T]he PURCHASER [Kunzaan Trust] is hereby substituted for and in the place of the LESSOR [Primeinvest] as Lessor under and in terms of the lease with effect from the date upon which the said premises are transferred into the name of the PURCHASER, of which date the PURCHASER shall advise the LESSEE [Caltex] in writing and from which date and at what place all rental payments shall be made by the LESSEE to the PURCHASER.'

[46] Proactively, all three signatories party to Annexure 'G' recorded their unequivocal intention to substitute the Kunzaan Trust as the lessor under Lease

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[58] G A Mulligan 'Double Sales and Frustrated Options' 1948 (65) SALJ at 564; E M Burchell 'Successive Sales' 91 SALJ at 40.

[59] Mulligan (above) at 565; Burchell (above) at 45.

K957/90L as amended. Irrespective of whether the right of pre-emption was real or personal, the written documents clearly evidenced the rights and obligations of the parties to each transaction. Registration and endorsement of both the lease and the title deed with Annexure 'G' in the deeds office constituted notice to third parties. Had the Kunzaan Trust elected to exclude the pre-emption, it had to do so expressly, on notice to Bright Idea and before it took transfer from Primeinvest.

[47] Not only did the excipients have constructive notice of the pre-emption under the common law, they also had statutory notice under s 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969 ('Formalities Act'). A lease of not less than ten years is valid as against a successor of the lessor, if it is either registered against a title deed of the leased land, or if the successor knew of the lease.

[48] A feature in *Mokone* akin to the facts in this case is that Blue Canyon was not 'an innocent player' as it knew of the pre-emption before it bought the premises.[60] Similarly, the ruling of mala fides in *Oryx* counts against the excipients. In *Spearhead*, the Court accepted that an option will be enforceable against a purchaser if the transfer of the property to a purchaser is with notice of the option.[61] In this case, two trustees served on both the Kunzaan Trust and the Adnaan Trust. They had to not only know about the pre-emption but must also have collaborated in having condition H expunged from the title deed. If they and their conveyancer had not known about it before, then the registrar's queries pertaining to the s 78 application should have alerted them that to undertake a careful investigation. Unsurprisingly, Bright Idea pleaded deception. Mala fides is manifest. The incomplete evidence of the examiner in the deeds office calls for explanations from the Registrar of Deeds, the conveyancers involved and the trustees of both trusts about how the pre-emption in condition H was expunged.

Costs

[49] A special order for costs would have been justified in this case in the face of clear Constitutional Court authority against the grounds on which the exception rested. Even if the excipients genuinely believed that stepping in was not an appropriate

[60] *Mokone* para 70.
[61] *Spearhead* para 61.

remedy, they have no answer to the weight of authority supporting the setting aside of the fraudulent sale and transfer of the property to the Adnaan Trust. More importantly, exceptions should be discouraged if they are likely to subvert an investigation into manifestly unlawful transactions, in this instance the expunging of condition H. However, Bright Idea seeks only costs, including costs of two counsel.

Conclusion

[50] On the facts, clear evidence supports the inference that the parties to the various transactions intended to transfer the pre-emption with the lease. Applying *Mokone* to this case, *ex lege* the right of pre-emption co-existed with the lease, notwithstanding multiple transfers of ownership in the land and rights in the lease. Additionally, the pre-emption transferred with the lease under s 1(2) of the Formalities Act. This Act dispenses with determining whether the pre-emption was a personal or real right. The 'stepping-in' remedy is competent both on the facts and on the law.

Order

[51] The following order is made:

The exception is dismissed with costs, including the costs of two counsel.

D. Pillay J

Judge of the High Court of KwaZulu-Natal

APPEARANCES

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Date of Judgment	:	12 October 2020
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