THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 288/2017

In the matter between:

OCEAN ECHO PROPERTIES 327 CC **FIRST APPELLANT**

ANGELO GIANNAROS **SECOND APPELLANT**

and

OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED **RESPONDENT**

Neutral citation: *Ocean Echo Properties 327 CC v Old Mutual Life Assurance Company (South Africa) Limited* (288/2017) [2018] ZASCA 09 (01 March 2018)

Bench: Ponnan and Willis and Saldulker JJA and Mothle and Hughes AJJA

Heard: 22 February 2018

Delivered: 01 March 2018

Summary: Exception to plea – upholding an exception disposes of the pleading, not the action or defence – ordinarily therefore the court should grant leave to amend and not dispose of the matter – an excipient has a duty to persuade the court that upon every interpretation which the plea can bear no defence is disclosed - tacit agreement pleaded constitutes a termination of the written agreement, not a variation thereof.

ORDER

On appeal from: Western Cape Division, Cape Town (Hlophe JP, Henney & Cloete JJ sitting as full court):

(1) The appeal succeeds with costs.
(2) The order of the full court is set aside and replaced by:
‘(a) The appeal succeeds with costs.
(b) The order of the court below is set aside and substituted with:
“The exception is dismissed with costs.”’

JUDGMENT

Ponnan JA (Willis and Saldulker JJA and Mothle and Hughes AJJA concurring):

[1] This is an appeal against a judgment granted in the Western Cape Division of the High Court, Cape Town by Le Grange J against the appellants, Ocean Echo Properties 327 CC (Ocean Echo) and Mr Angelo Giannaros, in favour of the respondent, Old Mutual Life Assurance Company (South Africa) Ltd (Old Mutual), in an action brought by the latter, as plaintiff, against Ocean Echo, as the first defendant and Mr Giannaros, as the second.

[2] Old Mutual’s case was founded against:
(a) Ocean Echo upon a written agreement of lease concluded on 11 November 2008 in terms of which Old Mutual let to Ocean Echo business premises described as Shop 3

Cartwrights Corner, situated at the corner of Darling and Adderley Streets, Cape Town (the premises); and

(b) Mr Giannaros upon a deed of suretyship executed by him on 29 October 2008 in terms of which he 'bound himself as surety and co-principal debtor . . . to [Old Mutual] for the due and proper fulfilment of all the obligations of [Ocean Echo]' under the lease agreement.

[3] Asserting that Ocean Echo was in arrears in respect of payments due under the lease agreement, Old Mutual caused summons to be issued against both appellants. The plea raised by the appellants to the summons was, inter alia, that:

'The [Defendants] admit having entered into the lease; however aver that the lease was tacitly terminated upon the Defendant's vacating the [premises] in December 2011, at which time the [Defendants] were not in arrears in respect of rent, rates or any other charges. The Plaintiff was well aware that the [Defendants] had vacated the [premises], as the Plaintiff began receiving rental, rates and other expense payments from the new tenant, Nandipha Solomon. The Plaintiff no longer sent the Second Defendant rental statements, but sent such statements to Solomon. By allowing Solomon occupancy and use of the [premises] and by receiving rental, rates and other payments from Solomon, the Plaintiff acknowledged a tacit lease between itself and Solomon.

. . .

The [Defendants] were neither tenants nor occupants of the [premises] during the period for which the alleged arrears are claimed. The tenant during this period, Nandipha Solomon is liable for the arrears, as per her tacit lease with the Plaintiff.

. . .

The Second Defendant admits having signed the surety as averred, however points out that the suretyship terminated upon tacit termination of the lease agreement in December 2011.

. . .

Neither the First nor Second Defendant can be held liable for Solomon's obligations as per the tacit lease with the Plaintiff.'

[4] The plea was met with the following exception:

'1. The Plaintiff's claim against the First Defendant is for arrear rental and other charges ("the Arrears") due to the Plaintiff by the First Defendant in terms of a written agreement of lease ("the Lease").

2. All of the Arrears arose during the period of the Lease.

3. The Lease contains, inter alia, the following provisions:

3.1 The First Defendant is precluded from giving up possession of the leased premises, or any part thereof, without the Plaintiff's prior written consent (clause 13.1).

3.2 The Lease contains all of the terms and conditions of the agreement between the Plaintiff and the First Defendant and there are no understandings, representations, promises, warranties or the like between the Plaintiff and the First Defendant relating to the leased premises (clause 22.1).

3.3 No alteration, variation of or addition to the Lease shall be of any force or effect unless it is reduced to writing and signed by both the Plaintiff and the First Defendant (clause 22.2).

3.4 No relaxation or indulgence which the Plaintiff may show the First Defendant shall in any way prejudice the Plaintiff's rights in terms of the Lease, nor shall any acceptance of payment of any amount due to the Plaintiff in terms of the Lease prejudice the Plaintiff's rights or operate as a waiver or abandonment of such rights or estop the Plaintiff from exercising any rights enjoyed by the Plaintiff in terms of the Lease (clause 22.3).

4. The Defendants, in terms of the Plea –

4.1 Aver that the First Defendant vacated the leased premises; and

4.2 Rely on alleged tacit termination of the Lease.

5. The alleged vacation of the leased premises is subject to the provisions of clause 13.1 and requires the Plaintiff's written consent.

6. The alleged tacit termination of necessity amounts to an alteration or variation of the Lease, specifically the period of the Lease and, as such, is subject to the provisions of clause 22.2 of the Lease.

7. The purported tacit termination is accordingly contrary to the express provisions of the Lease.

8. In the circumstances the Defendants' Plea is excipiable in that it fails to disclose any defence to the Particulars of Claim.'

[5] Le Grange J:

(1) upheld the exception;

(2) struck out the appellants' plea; and

(3) granted judgment in favour of Old Mutual against the appellants jointly and severally for payment of the sum of R457, 816.07 together with interest at the rate of

two per cent per month from 1 August 2013 to date of final payment and costs on the scale as between attorney and client.

[6] The learned judge thereafter filed written reasons for judgment. In sum, those were:

'[2] The Plaintiff took exception to the above mentioned Plea, on the basis that it was bad in law as the tacit cancellation was contrary to the terms of the written Lease Agreement which contained the non-variation clause.

[3] At the hearing on 28 April 2015, the Defendants' legal representative failed to appear. The contention, in essence, was that the [Defendants] would not be able to lead any testimony at the Trial in support of the Plea. In the absence of the [Defendants] and their legal representative, the excipient demonstrated that no defence was therefore disclosed. In the result, Judgment was granted against the [Defendants] in which the exception was upheld and the defence struck out.'

Le Grange J subsequently granted leave to both appellants to appeal to the full court of that division.

[7] The appeal was dismissed with costs by the full court. Henney J (Hlophe JP and Cloete J concurring) held:

'[27] An informal vacating of the premises without prior written consent is not a cancellation of the agreement, but a variation of the prohibition of the conduct described in clause 13.1. I once again agree, because no prior written consent was given by the Respondent before the Appellants gave up occupation or possession. This fact is not in dispute. Vacating the property or giving up occupation or possession without written consent translates into an alteration or variation of the agreement that itself shall not be of any force or effect unless it is reduced to writing and signed by both the Respondent and the Appellants as required by clause 22.2.

[28] Furthermore, I also agree that any acceptance of payment of rental, rates and other payments from Solomon does not constitute acknowledgement by the Respondent of a tacit lease with Solomon. Clause 22.3 of the lease expressly states that the acceptance of payment by the Respondent of amounts due under the lease shall not prejudice the Respondent's rights or operate as a waiver or abandonment of such rights or estop the Respondent in exercising any rights enjoyed by the Respondent in terms of the lease. I agree, because even though it had been proven that the Respondent has accepted payment from another party other than the

Appellants, such payments in terms of clause 22.3 would not affect the rights of the Respondent.'

[8] Preliminarily, it is necessary to observe that it is unclear upon what basis Le Grange J dealt with the case in the manner he did. Having upheld the exception and struck out the plea he proceeded to enter judgment for Old Mutual, instead of granting leave to the appellants, if so advised, to amend their plea.[1] The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence.[2] An unsuccessful pleader is given the opportunity to amend the plea, even when the plea has been set aside because it does not disclose a defence.[3] The rationale for this seems to be that although the defence contained in the pleading may be bad the pleading as such continues to exist.[4] Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is a good reason that the pleading cannot be amended.[5] No 'good reason' was evident or asserted in this case. In those circumstances, counsel for Old Mutual conceded that, irrespective of the merits of the exception, Le Grange J ought not to have proceeded to enter judgment against the appellants. It follows that paragraph 3 of his order cannot stand and accordingly falls to be set aside.

[9] Since these are proceedings on exception, Old Mutual has the duty as excipient to persuade the court that upon every interpretation which the plea can reasonably bear, no defence is disclosed.[6] The main purpose of an exception is to avoid the leading of unnecessary evidence.[7] By the nature of exception proceedings the correctness of the facts averred in the plea must be assumed.[8] Because Old Mutual chose the

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[1] *Group Five Building Ltd v Government of the RSA* 1993 (2) SA 593 (A) at 601H-604A. D R Harms SC, Civil Procedure in the Superior Courts (looseleaf) issue 54 at B23.11
[2] *Group Five* at 601H-604A.
[3] *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (A) para 32.
[4] *Constantaras* para 32.
[5] Harms *supra* fn 1.
[6] *Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters* [2013] 2 All SA 692 (SCA) para 7; *Lewis v Oneanate* (*Pty*) *Ltd and another* 1992 (4) SA 811 (A) at 817F–G.
[7] *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706D-E.
[8] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3 - 10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4

exception procedure – instead of having the matter decided after the hearing of evidence at the trial - it had to show that the plea is (not may be) bad in law.[9]

[10] In the view that I take of the matter, Le Grange J may have been justified in declining to decide the matter on exception. It is neither necessary nor desirable that I come to a final conclusion on the matter. It suffices for present purposes to say that I am driven provisionally to accept that Ocean Echo has surpassed the threshold set on exception. It may be that at the trial stage the court, from such evidence as to context (*KPMG Chartered Accountants v Securefin Ltd and another* 2009 (4) SA 399 (SCA) at paragraph 39)[10] as is permissible to be adduced, may be in a better position than I am to finally determine the matter. In my view the plea, although elliptic, is reasonably capable of an interpretation that sustains a defence.

[11] A useful starting point is the observation by Botha JA (*Ferreira & Another v SAPDC (Trading) Ltd* [1983] 3 All SA 346 (A) at 356) that:

'From *Neethling's* case I venture to abstract this principle: while an oral agreement varying (at least materially) the terms of a contract of the kind in question is not permissible, there is no objection to allowing proof of an oral agreement relating to the cancellation of the contract by which its terms as such are not placed in issue'.

Accordingly, what is before us on appeal is one question, and one question only; whether the tacit agreement as pleaded constitutes a cancellation of the lease agreement or merely a variation thereof. If the latter, it would be ineffective according to our law by reason of it not having been reduced to writing and duly signed. Both courts below approached the matter on the basis that the plea is an ineffective (in law) verbal variation of the lease agreement. In that, I remain far from persuaded that they were correct, for I conceive that they may have mischaracterised the nature and effect of the tacit agreement raised by the plea.

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[9] *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11; *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A) para 7.

[10] Also reported at [2009] 2 All SA 523 (SCA).

[12] *Ferreira* was concerned with whether an oral agreement as pleaded constituted a cancellation of a suretyship undertaking or merely a variation of its terms. Botha JA stated (at 358):

'. . . the true view, I consider, would be that the oral agreement terminated the operation of the contract, with all its terms, *in futurum*, so as to preclude the coming into being of any further obligations, while leaving intact obligations that arose from the past operation of the contract, with all its terms. In other words: the oral agreement would have extinguished the contract as a source of future obligations while keeping alive obligations already accrued by virtue of its operation in the past. This would not in any way involve a variation of the terms of the contract. Consequently the oral agreement as interpreted in the Court *a quo* would not offend against s 6 of Act 50 of 1956'.[11]

[13] Those observations are particularly pertinent to a contract that gives rise to continuing obligations. The agreement of lease in the present case is such a contract. When such a contract is cancelled by agreement, the cancellation more often than not operates *in futurum* only, ie obligations already accrued remain enforceable, but the operation of the contract ceases as far as future obligations are concerned. To allow evidence of such an agreement does not open the door to let in any dispute as to the terms of the original contract; these remain certain and unaffected by any possible dispute as to the fact or the contents of the subsequent oral agreement. The effect of the oral agreement is to keep alive an obligation already incurred, whilst terminating the operation of the contract in respect of obligations that would otherwise have arisen in the future. To that extent it is an agreement for the cancellation of the contract *in futurum* only, and not a cancellation *ab initio*. Such an agreement does not constitute a variation of the terms of the contract, as such, and accordingly it is valid and can be proved without doing violence to the requirements of the original contract.[12]

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[11] Section 6 of Act 50 of 1956 provides:
'No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety...'

[12] *Stadium On Main Investments (Pty) Limited v Dr A Ahmad* WCHC case number 3742/2010 11 May 2010.

[14] Moreover, our law recognizes that agreements can be concluded tacitly to replace previous agreements.[13] The non-variation clauses on which reliance was placed by Old Mutual, do not preclude the application of this principle. As Harms JA put it in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 12.

'[T]he principle [that is of the effect of a non-variation clause in a contract] does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate.'

It follows that a contracting party, when faced with a breach of the contract by the other party, must elect whether to terminate or to enforce the contract. Once an election is made, the party is bound by it.[14] Whether or not there has been such an election to cancel is a factual issue.[15]

[15] I thus consider that the effect of the tacit agreement pleaded by the appellants in this case, would have the effect of terminating the operation of the contract *in futurum*, so as to preclude the coming into being of any further obligations, while leaving intact obligations that arose from the past operation of the contract, with all its terms. In other words: the tacit agreement if proved would have extinguished the contract as a source of future obligations whilst keeping alive obligations already accrued by virtue of its operation in the past. This would not in any way involve a variation of the terms of the original lease agreement. I thus conceive that the tacit agreement so interpreted would not offend against the non-variation clauses in the lease agreement.

[16] I stress that these are not firm findings. Much will depend on the acceptability and admissibility of the evidence. But that will only be known once the appellants have been given an opportunity to adduce evidence. By allowing the exception Le Grange J deprived them of that opportunity. In short, it may not have been an issue that readily lent itself to fair resolution by way of exception.

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[13] *Klub Lekkerrus/Libertas v Troye Villa (Pty) Ltd and others* [2011] 3 All SA 597 (SCA) at 598.
[14] *Klub Lekkerrus/Libertas v Troye Villa* para 27.
[15] *Peters & others NNO v Schoeman & others* 2001 (1) SA 872 (SCA) para 12.

[17] In the result:

(1) The appeal succeeds with costs.

(2) The order of the full court is set aside and replaced by:

‘(a) The appeal succeeds with costs.

(b) The order of the court below is set aside and substituted with:

“The exception is dismissed with costs.”’

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellants:	P J Tredoux Instructed by: J M B Gillan Attorneys, Cape Town Webbers Attorneys, Bloemfontein
For Respondent:	H Murray SC Instructed by: Walkers Inc. Attorneys, Cape Town Claude Reid Attorneys, Bloemfontein