



SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 01 March 2018

STATUS Immediate

Ocean Echo Properties 327 CC & another v Old Mutual Life Assurance Company (South Africa) Limited (288/2017) [2017] ZASCA

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) upheld an appeal by the appellants, Ocean Echo Properties 327 CC (Ocean Echo) and Mr Angelo Giannaros against a judgment of the Full Court of the Western Cape Division of the High Court, Cape Town (the court a quo) in favour of Old Mutual Life Assurance Company (South Africa) Limited (Old Mutual). Old Mutual had sued Ocean Echo, on the strength of a lease agreement and Mr Giannaros, on the strength of a suretyship for arrear rentals. They pleaded that the lease agreement had been terminated by virtue of a tacit agreement. Old Mutual excepted to the plea. That meant that Old Mutual had the duty as excipient to persuade the court that upon every interpretation which the plea could reasonably bear, no defence had been disclosed.

The dispute between the parties which gave rise to this appeal emanates from the following factual background. On 11 November 2008 Ocean Echo entered into a lease for a business premises with the respondent in Cape Town. The second appellant, Mr Giannaros, executed a deed of suretyship on 29 October 2008 in terms of which he bound himself as surety and co-principal debtor to the respondent for the due and proper fulfilment of all the obligations of Ocean Echo under the lease. The lease agreement provides, inter alia, that Ocean Echo is precluded from giving up possession of the leased premises without the respondent's prior written consent; that no variation of the lease shall be of any force or effect unless reduced to writing; that the lease contains all of the terms and conditions of the agreement; and that no acceptance of payment of any amount owed to the respondent will prejudice the respondent's rights in terms of the lease. In December 2011, Ocean Echo vacated the premises. The respondent began invoicing for and receiving rental, rates and other payments in respect of the property from a 3rd party. At the time of vacating the premises, Ocean Echo was not in arrears in respect of any payments due under the lease.

On 9 October 2013 Old Mutual instituted action against the appellants for arrears in the amount of R457,816.07. The appellants' plea was met with the exception that the terms of the lease explicitly precluded the tacit termination relied upon.

The court at first instance upheld the exception, struck out the appellants' plea and granted judgment in favour of Old Mutual against the appellants jointly and severally. The appellants were granted leave to appeal to the full court of the Western Cape division of the High Court. The full court dismissed the appellants' appeal with costs.

The SCA observed that the trial court had erred in entering judgement in favour of the respondent instead of granting leave to the appellants, if so advised, to amend their plea. The upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. In the absence of a good reason why the pleading could not be amended, leave to do so is a matter of course.

The SCA further held that the respondent did not persuade the court that the appellants' plea is bad in law. The SCA reasoned that the plea is reasonably capable of an interpretation that sustains a defence. The tacit agreement pleaded by the appellants in this case, if proved, would have the effect of terminating, not varying, the lease agreement and would accordingly not be hit by the non-variation clause. The SCA accordingly allowed the appeal with costs.