

SUBLESSEE BECOMES OWNER OF LEASED LAND: WHERE DOES THIS LEAVE THE LESSEE'S RIGHTS?

Harbour Arch Investment Holdings (Pty) Ltd v Capital Propfund 4 (Pty) Ltd (437/2020) [2021] ZASCA 108 (5 August 2021)

An owner cannot be a lessee of his own land and our law holds that a merger of rights occurs in such an instance. This obvious outcome becomes challenging, however, when it is the sublessee that acquires the leased property, as the enquiry arises whether the merger affects the underlying lease of the land only, or does it include subsequent rights that may exist in terms of a sublease agreement in which the owner of the land (and seller thereof) were not involved.

Our Litigation Team was successful in this Appeal Court judgment where they represented the sublessee.

The Judgment can be viewed [here](#).

FACTS

In 1996 Transnet Ltd concluded a 30-year Notarial Land Lease Agreement (the "land lease") with RPP Developments (Pty) Ltd ("the lessee") in respect of a portion of commercial land on the Culemborg foreshore area in Cape Town. The lease was effective from 1 September 1996 until 31 August 2026.

Subsequent to the conclusion of the land lease, the rights and obligations of the lessee were consecutively assigned to others, and was held by Capital Propfund 4 Pty Ltd (Propfund 4) at the time when these facts occurred. The lessee, in turn, assigned certain rights to third parties in terms of leases assignment agreements, by virtue of the lessee's right to sublet any portion of the leased premises without the consent of Transnet.

In 2008, Harbour Arch was assigned the rights and obligations as sub-lessor under a lease assignment agreement (the "Lease Assignment Agreement"). It then concluded tenant agreements with various tenants who occupied different portions of the property. The agreement between Propfund 4 and Harbour Arch was to the effect that the rights of this lessee (Propfund 4), together with the tenant leases that were in place at the time, were assigned to Harbour Arch as a going concern for a purchase price of R 325 million..

Clause 18.1 of the lease assignment agreement included a recordal of Harbour Arch's intention to construct additional floor space on the property. In terms of clause 18.3 Harbour Arch had to pay to Propfund 4 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 Harbour Arch, of the development rights provided for therein to construct additional lettable area, it would be obliged to submit architectural guidelines to Propfund 4 for approval by Transnet to ensure synergy of the architecture of the planned development with the existing property.

In April 2018, prior to Harbour Arch exercising its development rights, it acquired ownership of the property. The deed of transfer in terms of which ownership of the property was transferred from Transnet to Harbour Arch explicitly recorded that the notarial deed of lease (the land lease recorded against the property) had lapsed due to merger.

In June 2018 Harbour Arch advertised that it was planning to construct additional floor space on the property. Propfund 4 requested information pertaining to the proposed development. The request was refused on the basis that it had no obligation to provide details of the proposed development to Propfund 4 as it had since become the owner of the property.

Propfund 4 thereupon brought an application in the High Court, Cape Town seeking a declarator:

- (i) that the lease assignment agreement was still of full force and effect;
- (ii) for enforcement of the payment obligation provided for in clause 18.3 of the lease assignment agreement; and
- (iii) that Harbour Arch was obliged to furnish to it information relating to the proposed development.

Harbour Arch 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.

The High Court upheld the 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 Lease Assignment Agreement. It held that the lease assignment agreement made no provision, expressly or tacitly, for its termination upon merger of the land lease with ownership of the property. The Court declared that the Lease Assignment Agreement was of full force and effect and that Harbour Arch was liable to compensate Propfund 4 for the proposed additional floor area on the property.

Harbour Arch appealed. It argued 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 lease assignment agreement, but was a right consequential to its ownership thereof. Propfund 4, on the other hand, continued to maintain that Harbour Arch's ownership of the property only affected the land lease and not the tenant leases. The argument is that clause 18.3 of the lease assignment agreement concerned the tenant leases and that it survived the merger.

HELD

- The parties were in agreement that, on Harbour Arch's acquisition of the property, its rights and obligations as a *sub-lessor* under the *land lease* were subsumed by its ownership rights.
- 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 the rights and obligations under an existing lease agreement are subsumed by the rights and obligations that arise when the lessee becomes owner of the leased property.
- In the present matter the question was more tricky. The enquiry was whether the provisions of clause 18.3 of the *lease assignment agreement* survived the termination of the *land lease*. In other words, did the lease assignment agreement continue to exist independently even after the sale of the leased property to the sublessee?
- Our courts have held that such an outcome, i.e. that an additional arrangement or agreement continues to exist after the merger (*confusio* of rights of a lessee and owner), is possible where that was the express intent of the parties as shown in their pre-existing agreements.
- In the present matter, however this was not shown, and the appeal therefore had to succeed. This was because:
 - In clause 18 of the sublease agreement (the lease assignment agreement) where the parties made arrangement for payment should the sublessee add additional development and floor area to the premises, there was no indication whatsoever that there was an intention that the payment obligation

would be applicable even when the sublessee (Harbour Arch) built additional floor space as the owner of the property.

- And, clause 18 of the sublease agreement described the entity responsible for the payment as the sublessee “or its successors-in-title to the LAND LEASE”. Clearly the successors-in-title to whom the payment obligation was applicable were limited to the successors under the land lease.
- In addition, Propfund 4 could only transfer to Harbour Arch - under the lease assignment agreement - such rights and obligations as it held under the Land Lease. As a lessee under a fixed term land lease with Transnet, although renewable, Propfund 4 could not, under clause 18, create for itself a perpetual benefit to receive payment against all future sub-lessors of the property.

CONCLUSION

Consequently the appeal was upheld.