THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 377/09

In the matter between:

JAN ANTONIE LOMBAARD	Appellant

and

DROPROP CC	First Respondent
DROPATHY PREETHEPAUL	Second Respondent
DHARUMDAW PREETHEPAUL	Third Respondent
OMESH PREETHEPAUL	Fourth Respondent

Neutral citation: ***Lombaard v Droprop*** **(377/09) [2010] ZASCA 86 (31 May 2010)**

Coram: NAVSA, HEHER, MHLANTLA, MALAN and SHONGWE JJA

Heard: **17 May 2010**

Delivered: **31 May 2010**

Corrected: **4 August 2010**

Summary: Whether the description of the immovable property was sufficient and adequate in terms of S 2(1) of the Alienation of Land Act 68 of 1981 ─ Practice ─ whether this court can exercise its discretion to refer the question of a dispute of fact back for the hearing of evidence

when such point was not canvassed or considered by the court a quo, nor was it raised by the legal representatives.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Ndlovu J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

Navsa and Malan JJA (Mhlantla JA concurring):

[1] This is an appeal against a judgment of the Durban High Court (Ndlovu J),[1] in terms of which an application by Mr Jan Antonie Lombaard, the appellant, to compel a close corporation, Droprop CC and its members, to transfer immovable property to him, was dismissed with costs. The present appeal is before us with the leave of the court below. The corporation is referred to as Droprop.

[2] In the notice of motion the property sought to be transferred was described as Portion 526 (of 432) of the Farm Melkhoute Kraal No 789, Registration Division FT in the Durban entity, Province of KwaZulu-Natal, in extent 2,0797 hectares as more fully appearing on FT diagram number 782/1998. Mr Lombaard claimed the relief referred to in the preceding paragraph on the basis of an agreement of sale pursuant to the exercise of an option to purchase contained in a lease agreement between him and Droprop.

---

[1] Reported as *Lombaard v Droprop CC* 2009 (6) SA 150 (N).

[3] Ndlovu J found for the respondents on two grounds. First, he held that the agreement of sale resulting from the exercise of the option was invalid because the third respondent, notwithstanding that he was a member of Droprop, had signed the lease on its behalf without written authority. Second, the court below found that the description of the property sold did not comply with the requirements of s 2(1) of the Alienation of Land Act 68 of 1981 (the ALA), in that the land in question was not identified with reasonable certainty and that the purported sale was therefore invalid.

[4] Before us, in view of the decision of this court in *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC & another* (275/09) [2010] ZASCA 16 (18 March 2010) (SCA) the respondents correctly abandoned reliance on the first ground. However, Droprop and its members raised a further defence to Mr Lombaard's claim, which hitherto has not received sufficient attention as an issue between the parties, namely, whether the agreement correctly reflects the intention of the parties. In his founding affidavit, Mr Lombaard contended that he was the head lessee of the property described in the notice of motion and that by virtue of the exercise of the option contained in the lease agreement he was entitled to demand transfer. In resisting the claim Droprop stated that the lease agreement and consequently any sale pursuant thereto was not for the entire property but for a limited demarcated area, identified on a map attached to its answering affidavit. It referred to the negotiations preceding the conclusion of the lease and to other tenants who during the period of the lease occupied other portions of the property. Further particularity in this regard and Mr Lombaard's reply will be dealt with later in this judgment.

[5] We intend to deal first with the question whether the description of the property complies with the provisions of the ALA. The following is the material part of the letter purporting to exercise the option to purchase:

'Kindly take note that as of date hereof I hereby give notice to you of my exercise of the Option to acquire the above property as contained in Clause 5 of the attached "Head Lease".'

Clause 5 of the lease provides:

'The TENANT has an option to purchase the property in the second year of occupation for a sum of R3 000 000.00, with a yearly escalation of 12%, if the option to purchase is not exercised within the specified period. This option to purchase is valid for a period of FIVE years only.'

[6] The exercise of the option to purchase is not contested by Droprop on the basis of the manner in which it was exercised, but rather on the alleged inadequate description of the property in the lease, which is set out hereunder:

'CERTAIN PORTION 526 OF LOT 432 OF THE FARM MELK HOUTE KRAAL NO 789.'

[7] The description of the entire property in the deeds register is the following:

'PORTION 526 (OF 432) OF THE FARM MELK HOUTE KRAAL NO 789, Registration Division FT in the Durban Entity, province of KwaZulu-Natal.'

[8] The court below held that the insertion of the word 'certain' in the description of the property sold:

'may sometimes refer to what is uncertain, what is unsure, what is indefinite, what is imprecise, depending of course on the context in which the word is used in a particular text. In determining such context . . . one cannot help but consider as well the surrounding circumstances, including *ex post facto* behavior and conduct of either party relative to the envisaged agreement.'[2]

He added:

'In my view, the use of the word "certain" in the description of the property in the head lease did create confusion and ambiguity as to the precise piece of land which was leased to the applicant. The intention of the parties is of no relevance for the compliance with section 2(1) of the Act. . . . That being the case, it could not be said that such description identified the leased property with reasonable certainty, given proof that this was not the same description as in the title deed. However, having considered the matter I am inclined to conclude, on the probabilities, that the word "certain" in the present context could only mean that the property which was the subject matter of the head lease was not the entire property as described in the title deed but only part thereof. Indeed, on the face of it, it would have made no logical sense to have included a word in the head lease which was not there in the description of the property in the title deed without intending to reflect a deviation from the original description of the property in terms of the title deed.'[3]

---

[2] Para 35.

[3] Para 41.

[9] In coming to this conclusion the learned judge relied on *Cromhout v Afrikaanse Handelaars en Agente (Edms) Bpk* 1943 TPD 302 and *Lugtenborg v Nichols* 1936 TPD 76. He chose not to follow *Blundell v Blom* 1950 (2) SA 627 (W) and *Van Niekerk v Smit* 1952 (3) SA 17 (T), both of which found that the prefixing of the word 'certain' did not by itself vitiate an otherwise adequate description of the property.

[10] The descriptions of the properties sold in those cases were all different and each dealt with its own set of facts. However, we agree with the approach in *Blundell v Blom* above where Millin J at 630 stated:

> 'the primary meaning of the word "certain" is something definite, something prescribed, something determined, fixed or settled.'

It follows that the description in the lease is of a specified property, namely, portion 526 of lot 432 (cf P M Wulfsohn *Formalities in respect of Contracts of Sale of Land Act (71 of 1969)* 1980 p 112-3).

[11] The fact that the description of the property in the lease, and consequently the agreement of sale, does not correspond precisely with the title deed description is of no consequence just as the omission of the extent of the property does not affect the matter. See *Blundell v Blom* above at 630-1 and *Van Niekerk v Smit & others* above at 20 E-H. The property was thus sufficiently described to render the agreement of sale concluded when the option was exercised, at least on the face of it, valid. To hold otherwise would mean that the words 'of portion' must be read into the description of the property sold before the figures '526'. There is no compelling reason to do so. The description of the property is unambiguous and speaks for itself. Thus, in this specific regard, no evidence ought to be admitted to interpret the wording. See R H Christie *The Law of Contract* 5 ed (2006) p 204-205 and the authorities there cited.

[12] A party seeking to resist enforcement of a contract is not precluded, in appropriate circumstances, from raising a defence that the written record is not the true contract between the parties. As foreshadowed in para 4 above Droprop's answering

affidavit is replete with detailed allegations contesting the assertion that the head lease and the agreement of sale entitled Mr Lombaard to claim transfer of the entire property. The diagram annexed to the answering papers shows the portion allegedly leased by the appellant at the lower end. It is depicted as being surrounded by blocks with a wire mesh fence around its perimeter. A shaded area on the diagram indicates an area formerly occupied by Indiba Investments but which was vacant at the time of the proceedings. The area alleged by the respondent to be the part of the property leased to Mr Lombaard contained a building which Droprop erected partially and which Mr Lombaard had agreed to complete. This area was sublet by Mr Lombaard to Nyathi Textiles in terms of a written lease containing the identical description of the property as the one in the head lease.

[13] The principal deponent to Droprop's answering affidavit stated emphatically that he had personally negotiated the lease to Mr Lombaard of *only* the limited portion of the property referred to in the preceding paragraph. In substantiation of this assertion he referred to a portion of the property adjacent to the part leased to Mr Lombaard, which had been let by Droprop to Execucrete. Two large red silos approximately 10 meters high were constructed on this portion. The letter by Mr Lombaard exercising the option to purchase is dated 12 November 2007. According to Droprop, Execucrete had been in occupation of part of the property in terms of a lease agreement since at least April 2006. Mr Lombaard neither objected nor complained about the lease of that portion to Execucrete, which one would have expected had he been the tenant of the entire property.

[14] In the very first paragraph of his replying affidavit, in which he deals substantively with the allegations by Droprop, that only part of the property had been leased,

Mr Lombaard stated the following:

'In this regard I have been advised, which advice I verily believe, that the wording of the written agreement is binding upon the parties and that this Honourable Court is not permitted to consider, in the instant circumstances, extrinsic evidence of the alleged intentions of the parties.'

[15] In the next two paragraphs the following appears:

'I am advised, which advice I believe, that the people negotiating the lease have no input in this dispute in view of the clear and unequivocal wording of the lease. In this regard I therefore submit that these aspects have been raised by the Respondents in order to create confusion in this Court and as a red herring.

The whole portion of the land forms part of the lease and the option. In view of the irrelevance of the negotiations in light of the relevant legal principles set out above, I do not attach affidavits of the relevant witnesses.'

[16] In subsequent paragraphs Mr Lombaard makes the following point:

'Should the version of the Respondents be believed, this Court would be required to in fact rectify the express terms of the agreement by inclusion of additional words therein which never formed part of the agreement.

No rectification by the Respondents has been sought in these proceedings. I therefore submit that the Respondents are bound by the terms of the written agreement.'

[17] Mr Lombaard engages in very limited terms with the alleged lease of portion of the land by Droprop to Execucrete:

'[I] never deemed it necessary to protest to such action as I, at that relevant time, was not in a position to purchase the property and exercise the option. The presence of the other party on the premises only becomes an issue once I exercise the option.'

This, of course, does not answer the specific allegation, that one would have expected Mr Lombaard as lessee of the entire property to object to other tenants on the property leased by him.

[18] It is crystal clear from what is set out above that Mr Lombaard, advised by his legal representative, deliberately chose not to engage on material and extensive allegations that the lease and sale agreement was not a correct reflection of the intention of the parties.

[19] The court below noted that neither party had applied for rectification or for a referral of the matter for the hearing of oral evidence. It was only in this court and late in the day that Mr Lombaard applied for the matter to be referred to evidence and only if it

were to be found that Droprop had set out facts on which it would have been entitled to rectification.

[20] In *Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd* 2009 (3) SA 447 (SCA) para 13 Streicher JA stated:

'A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be rectified agreed. For this reason a defendant who contends that an agreement sued upon does not correctly reflect the agreement between the parties may raise that contention as a defence without the need to counterclaim for rectification of the agreement.'

And in *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824B-C Miller JA said:

'Indeed (leaving aside cases in which the contract is by law required to be in writing), a defendant who raises the defence that the contract sued upon does not correctly reflect the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by the plaintiff as it stands to be corrected.'

[21] In *The Law of Contract* the following appears:[4]

'A document that is invalid because it fails to comply with the statutory requirements cannot be validated by rectification, and even if this rule leads to anomalous results it must be maintained so that the statutory requirements are not subverted. Nevertheless rectification can be granted if the written contract as it stands complies with the statute . . .'

[22] It should be repeated that the respondents' failure to plead rectification, in terms, was premised on the over-confident view they held that the agreement of sale was invalid for lack of compliance with statutory formalities. Because they considered the sale to be invalid the respondents were under the impression that the agreement of sale could not be rectified. In fact the third respondent stated expressly:

---

[4] At p 334 and see Wulfsohn p 219 and *Magwaza v Heenan* 1979 (2) SA 1019 (A) 1030D-G.

'Also, the subject matter of the sale, that is, the land being sold must be identifiable with reasonable certainty from the agreement itself. If this description is not sufficiently precise, the agreement may not be rectified to reflect the real intention of the parties, if any.'

However, the basis on which this averment was made was that the agreement was invalid because the description of the land sold was inadequate. This, we have found, was not the case and the agreement of sale relied upon by the appellant may indeed be rectified. The respondents have, in our view, pleaded sufficient facts to raise the defence of rectification. The appellant chose not to respond to the factual allegations that support this defence. As can be seen from what is set out above, Mr Lombaard was adamant, because of a mistaken view of the law, that evidence was inadmissible in relation to the defence pleaded by the respondents.

[23] In *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] 2 All SA 512 (SCA) para 12 Heher JA said:

'Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C. . . . (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)'

He continued at para 13:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits

himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[24] The allegations made by the respondents in the answering papers cannot be rejected out of hand. If anything, they provide ample factual details substantiating their defence. As things stand presently, the probabilities favour Droprop. Mr Lombaard has ignored the detailed allegations at his peril. The warning words of Heher JA, albeit relating to a bare or general denial in the answering papers, also apply where a defence is raised in the answering papers that calls for a response and should have been heeded. Since the respondents' defence cannot be said to be without substance and since Mr Lombaard failed, in the court below, to avail himself of the right to have the matter referred to oral evidence or to call for Droprop's members to be cross-examined in terms of the Uniform Rules of Court and further, since the court could not be satisfied of the inherent credibility of Mr Lombaard's factual averment the application was bound to fail.[5]

[25] In resolving to refer a matter to evidence a court has a wide discretion, to be exercised according to the principle explained by Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396 E-G:

'It is the respondent who would fail on the disputed issue if it fell to be decided on the papers; an oral hearing is being granted at its instance, in order to afford it an opportunity of altering, if it can, the incidence of the probabilities as they emerge from the papers, and of displacing the inference which flows from the signed document. Thus, as matters now stand, the applicant needs no oral evidence to strengthen its case; it will need such evidence only if and when the respondent creates, prima facie, a balance of probability in its favour. There is no reason why I should compel anyone to testify. What I should do is give the respondent the opportunity which it has sought, and to give the applicant an opportunity of answering, if he wishes the case made out by the respondent.'

[5] See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (A) at 634E-635D.

[26] An order to refer a matter to oral evidence presupposes a genuine dispute of fact (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Ripoll-Dausa v Middleton NO & others* 2005 (3) SA 141 (C) 151F ff). The appellant chose not to respond to the factual allegations concerning rectification. He did so at his peril: he put forward no answer to allegations which, on their face, substantiated the defence of rectification and laid no basis for an application for a referral of the matter to evidence. In these circumstances the application to refer the matter to evidence should be refused. It remains open to the appellant to proceed by trial should he so wish.

[27] The following order is made:
The appeal is dismissed with costs.

M S NAVSA
JUDGE OF APPEAL

F R MALAN
JUDGE OF APPEAL

HEHER and SHONGWE JJA:

[28] We have had the opportunity of reading the judgment prepared by Navsa and Malan JJA. We respectfully do not agree with the dismissal of the appeal, although we agree however, with the conclusion and reasoning reached in concluding that the lease agreement is valid and unambiguous, and identifies a specific property, namely, Portion 526 (of 432) the property in the title deed.

[29] It has long been recognised that a discretion resides in a high court, derived from the rules of court, to refer a disputed issue of fact which cannot be decided on affidavit

for the hearing of oral evidence regardless of whether the parties request it.[6] The present uniform rule is 6(5)(g).[7] The overriding consideration in the exercise of the discretion is ensuring a just and expeditious decision. In short, in the case of a dispute of fact, the court must be persuaded that the hearing of evidence will be fair to the parties and will conduce to an effective and speedy resolution of the dispute and the overall application.

[30] The courts have developed rules of practice to guide (but not hamper) the exercise of the discretion. In the context of the present appeal it is necessary only to refer to the principles set out in para 4 to 6 below which are trite.

[31] Motion proceedings are not designed or intended to resolve disputes of fact. Therefore, if a party has knowledge of a material and bona fide dispute or should reasonably foresee its occurrence and nevertheless proceeds on motion that party will usually find the application dismissed.

[32] Although the court has the power to act *mero motu* it may properly regard the failure of a party who cannot succeed in an application without resort to evidence to seek a reference as an indication that that party does not have evidence to support his case or does not have confidence in such evidence as he may have.

[33] If the probabilities, on the affidavits, lie clearly against a party who requires evidence in order to succeed on motion, the court is unlikely to regard evidence as profitable or necessary to determine the issue. However if the balance of the probabilities is even, or, at least, the court considers that the issue can fairly be said to remain open, then a just outcome may well require the hearing of evidence. With regard

[6] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168.

[7] 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise'.

to the last-mentioned aspect, it is obvious that the court must take into account all factors relevant to the manner in which the parties presented their versions in the affidavits. (The relevance of this approach will become clear in due course.)

[34] As to the consideration in paragraph 4 above, not only was the appellant not apprised of a threatening dispute of fact, but the attitude of the respondents disclosed in the correspondence prior to the launching of the application was such as positively to mislead the applicant and his legal advisers. In the preceding correspondence the following allegations were made by the appellant's attorney.

(i) the property in relation to which the lease and the option related were referred to substantially as described in the lease agreement (ie the deeds office description of the whole property);

(ii) the option had been exercised in terms of clause 5 of the lease with effect from 12 November 2007;

(iii) he had been appointed to handle the transfer of that property and sought certain information to enable him to pursue his mandate.

[35] For more than a month there was no response from the respondents. At last, on 18 December 2007 their attorney sent a terse reply:

'Kindly be advised that our client had previously indicated to your client that he would not be selling. You are invited to proceed as you deem fit.'

[36] On 4 February 2008 the appellant's attorney wrote to seek an undertaking that the respondents would not deal with or alienate the property. They added:

'Furthermore, we are instructed that in breach of the Lease Agreement, you have entered into a conflicting Lease on the same property. We remind you that the aforementioned Lease Agreement is for the entire Portion 526 (of 432) of the Farm Melk Houte Kraal No. 789 and that you accordingly do not have Title to enter into a conflicting Lease Agreement for a portion of that property with another tenant, without consulting our client and/or obtaining our client's consent.'

[37] The respondents' attorney replied as follows the following day:

'OPTION: JA LOMBAARD – Agreement of Lease (dated 26 January 2005): PORTION 526 (OF 432) OF THE FARM MELK HOUTE KRAAL No. 789

Your telefax dated 04th February 2008 refers.

Client believes that your clients threat of legal action to be some kind of fabrication, as it has been anticipating just that since November 2007.

Be that as it may, and bearing in mind that client has no intention to alienate the property we hereby undertake not to alienate same for a period of only 7 (seven) days from date hereof.

We write to advise further that client are duly represented and you are advised to refer all correspondences to our offices and not to our client.

You are invited to proceed as you deem fit.'

[38] It can thus be seen that not only did the respondents' attorney not mention the misdescription of the leased property when a proper answer to the letter demanded an appropriate response, but he adopted the same description at the head of his letter. Moreover the defence which he put forward was patently no defence at all. There was therefore no reason to incur the delay and expenses involved in a trial action.

[39] The conduct of their attorney and their subsequent failure, in the application, to offer any explanation for it, justified a strong inference that the respondents had failed to instruct their attorney that they had only leased a portion of the property to the applicant and that the property described in the lease had been misdescribed.

[40] As to the second consideration (paragraph 5, above), the defence of rectification was not pleaded in terms. It had to be inferred. The defences readily apparent from the answering affidavit were those related to non-compliance with the formalities legislation. The appellant, in his replying affidavit, deposed, with reference to the factual averments which were afterwards relied on to make out the defence of rectification:

'(a) It is denied that I am tenant to only a portion of the property. In this regard I have been advised, which advice I verily believe, that the wording of the written agreement is binding upon the parties and that this Honourable Court is not permitted to consider, in the instant circumstances, extrinsic evidence of the alleged intentions of the parties.

(b) I am advised, which advice I believe, that the people negotiating the lease have no input in this

dispute in view of the clear and unequivocal wording of the lease. In this regard I therefore submit that these aspects have been raised by the Respondents in order to create confusion in this Court and as a red herring.

(c) The whole portion of the land forms part of the lease and the option. In view of the irrelevance of the negotiations in light of the relevant legal principles set out above, I do not attach affidavits of the relevant witnesses.'

and

'(e) Should the version of the Respondents be believed, this Court would be required to in fact rectify the express terms of the agreement by inclusion of additional words therein which never formed part of the agreement.

(f) No rectification by the Respondents has been sought in these proceedings. I therefore submit that the Respondents are bound by the terms of the written agreement. I have been advised that in terms of the contractual principal of *caveat subscriptor*, the parties are bound by the written terms. I have also been advised that there are only certain limited exclusions to this legal contractual principle. I submit, and the necessary legal argument in this regard will be presented at the hearing of the matter, that none of those exclusions are applicable in the instant matter.

(g) With regard to the First Respondent leasing a portion of the property to Execucrete I respectfully submit that I never deemed it necessary to protest to such action as I, at that relevant time, was not in a position to purchase the property and exercise the option. The presence of the other party on the premises only becomes an issue once I exercise the option. This duly occurred and the letter was written, and therefore, with respect, I submit that the contents of paragraphs (h), (i), (j) and (k) of this paragraph should be dismissed with the contempt it deserves.'

The appellant also pointed out that the first respondent had been responsible for the drafting of the lease agreement in the form in which he signed it. From all this it is apparent that the appellant did not seek to present evidence relating to the rectification of the agreement because he was advised that it was not relevant to the defences raised by the respondents. Wrong he may have been. But to hold, as our colleagues, do that he so acted at his own risk, seems to leave little room for the exercise of an equitable discretion.

[41] Ndlovu J, in giving judgment in the application, addressed only the technical defences despite referring in detail to counsel's submissions. He said:

'Neither party applied for rectification of the head lease nor referral of the matter for the hearing of evidence.'

The inference is overwhelming (and indeed counsel for the respondents in the appeal, who did not appear in the application, conceded as much): the respondents' counsel at the hearing did not rely on rectification as a defence and did not raise it in argument. Just as important, Ndlovu J did not himself either understand that the defence had been raised in the answering affidavit or realise that he was vested with a discretion *mero motu* to direct that evidence be heard.

[42] Before us, it was with difficulty that counsel for the appellant accepted that the answering affidavit set out the basis for a defence of rectification. Only at the last gasp of the appeal did he clutch at the possibility of asking us to make such a direction.

[43] Having regard to all the factors we have mentioned the injustice to the appellant inherent in a dismissal of his application is, in our view, manifest. He is possessed of a written agreement which unequivocally bears out his reliance on the exercise of the option. He had been misled by a perception induced by the respondents' attorney and his own legal advisers into not fully confronting the defence. Both counsel and the judge a quo did not appreciate the legal force of the respondents' factual averments in the answering affidavit. There are telling inferences against a bona fide belief in the existence of a misdescription in the attitude adopted by the respondents before the proceedings were initiated. Even with the failure fully to confront the consequences of the rectification defence, the balance of probabilities is open to the influence of evidence. One can say no more with any certainty than that one of the parties has been deliberately misleading the court. That in itself is a culpability worth determining by evidence. For all these reasons the *Wightman's* case is, we think, a far cry from the situation in the case relied on by our colleagues. There the deponent, Mr Head, provided no acceptable excuse for his failure to address certain circumstances which were perculiarly within his knowledge. Here, by contrast, not only the appellant but everybody else involved in the application understood the issues in the same way.

[44] There cannot be the slightest prejudice to the respondents in referring what is

now seen to be the true issue between them (a relatively narrow one) to the test of oral evidence. We can see no point in putting the parties to the unnecessary delay and costs of an action commenced afresh, especially as the delay is already substantial.

[45] The learned judge misdirected himself both in what he decided and in what he should have considered but did not. We are at large to make the order he should have made as all the information required to exercise the discretion is available to us.

[46] We propose the following order:

1 The appeal is upheld.

2 The order of the court a quo is set aside and the following order is substituted therefor:

('1) The issue of whether or not the lease agreement between the parties should be rectified in regard to the description of the leased property and, if so, the terms of the rectification, is referred for the hearing of oral evidence.

(2) The parties are to furnish each other with a list of witnesses which each proposes to call at the hearing together with a summary of the evidence of each witness (to the extent that such evidence does not appear from the affidavits) not less than thirty days before the date for commencement of the hearing.

(3) The rules of court relating to discovery and production of documents, expert evidence (if required) etc are to apply.'

3 The costs of all proceedings to this stage are to be costs in the cause.

J A HEHER

JUDGE OF APPEAL

J B Z SHONGWE
JUDGE OF APPEAL

MHLANTLA JA: (Concurring in the judgment of Navsa and Malan JJA):

[47] I have read the judgments of my colleagues Navsa and Malan JJA on the one hand and of Heher and Shongwe JJA on the other. I respectfully concur in the former judgment.

[48] I find it necessary to add some comments of my own. First, there can be no doubt that on the application of the *Plascon-Evans* rule, the application in the court below ought to have been dismissed. Faced with the detailed factual allegations concerning the true contract between the parties, the appellant deliberately and consciously did not engage on those issues.

[49] The appellant, despite facing the mass of allegations concerning the true contract, did not seek a referral to oral evidence. In my view, it was that attitude that led to the appellant's downfall. A referral to oral evidence was sought by the appellant's counsel before us at a very late stage during the appeal hearing and was prompted by a question from the court.

[50] There is no rule of law requiring a person threatened with litigation to reveal beforehand such defences as may be available to him or her. In the present case had the respondents chosen to remain absolutely silent and not respond to the correspondence referred to by Heher and Shongwe JJA the appellant would still have been faced with the application of the *Plascon-Evans* rule and would, absent a justifiable request for a referral to oral evidence, have failed at the first hurdle.

[51] I agree that uniform rule 6(5)(g) should be employed to ensure a just and expeditious decision . Equally, we should be consistent in our application of the principle set out in *Plascon-Evans* as described in the judgment of my brothers Navsa and Malan.

[52] In the court below the appellant, against whom the probabilities were in relation to the question of the true contract between the parties, at that stage stood before an election to request a referral to oral evidence. He elected not to do so. In my view, it is turning equity on its head to suggest in those circumstances that the respondents should be penalised by being compelled to face further proceedings after having incurred the inconvenience and costs of the present appeal.

[53] It has repeatedly been held that an application to refer a matter to evidence should be made at the outset and not after argument on the merits. See in this regard *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 981D-F. In *Kalil* Corbett CJ stated that this is a salutary rule. Recently, Streicher JA, in *Pahad Shipping CC v The Commissioner for the South African Revenue Service* [2009] ZASCA 172 (2 December 2009) stated that unnecessary costs and delay can be avoided by following the general rule.[8] In *Kalil* Corbett CJ accepted that the rule was not inflexible. However, it is only in exceptional cases that the court will depart from the general rule. See in this regard *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587C-D and *Pahad* at para 20. The present case is not exceptional.

[54] The appellant chose not to engage on the question of the true contract between the parties and restricted its defence to resisting any attempt to adduce evidence in that regard on the basis that it would be inadmissible. The referral to oral evidence now sought is a desperate attempt to salvage the situation. One is left to ponder what precisely it is that the appellant seeks to have referred for oral evidence.

[55] For these reasons, I concur in the judgment of my brothers Navsa and Malan.

---

[8] See para 20.

____

N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: M Pillemer SC
R G Mossop

Instructed by
Susan Abro Attorney Durban
Webbers Bloemfontein

For Respondent: A M Stewart SC

Instructed by
Henwood Britter & Caney Durban
Claude Reid Incorporated Bloemfontein