REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

In the matter between: **Case No: EL 1133/2020**

NYERERE TRADING ENTERPRISE CC **Applicant**
REGISTRATION NUMBER: 2006/194746/23

And

ELIZABETH ELASLY **First Respondent**

PETER VERDOUKAS TRUST and

MARIA VERDOUKAS N.O **Second Respondent**

JUDGMENT

Govindjee AJ:

Background

[1] The applicant approached this Court for the following relief, together with costs:

'1.1 The Addendum to the lease agreement dated 14 October 2020 entered into between the first and second respondents in respect of the premises at 268 Oxford Street, East London is declared void;

1.2 a) The lease agreement dated 16 April 2019 entered into between the first and second respondents in respect of the premises at 268 Oxford Street, East London is cancelled;

b) There is no existing lease agreement between the applicant and first respondent;

c) That the applicant is entitled to evict the first respondent and / or any other person occupying the premises, known as the Oxford Bottle Store, situate at No. 268 Oxford Street, East London;

1.3 The first respondent and / or any other person found in the premises described at paragraph 1.2(c) above is hereby directed to vacate the aforesaid premises within a period of 10 (ten) days from the date of receipt of order issued by the above Honourable Court; and

1.4 The Sheriff of this Honourable Court, duly assisted by the members of the South African Police Services, if needs be, are authorized and permitted to evict the first respondent and / or any other person(s) found at the premises described at paragraph 1.2(c) above, should they fail to vacate within 10 (ten) days of service of the order.

1. That the applicant is hereby granted leave to evict the respondent and / or any other person found in the premises described at paragraph 1.2(c) and in carrying out such eviction, the applicant allows the respondent 10 (ten) days period for voluntary vacating and / or leaving the premises.
2. That only in the event of the respondent and / or persons occupying the premises refusing to vacate the premises, the applicant is permitted to instruct the Sheriff to evict the first respondent to ensure that the first

respondent vacates the premises and to ensure that the applicant is restored with vacant possession of the said premises.'

[2] Instead of opposing the application, the first respondent brought an urgent application for a temporary stay ('the stay') of the main application ('the application'), pending the finalisation of an action issued under case number EL203/2021 ('the action') for a rectification of the Agreement of Lease concluded on 16 April 2019. The applicant opposed the stay and the matter was argued before me.

[3] Much of the background is common cause. The applicant purchased the leased premises from the second respondent after the conclusion of the lease, and became the current landlord of the first respondent by operation of law. The first respondent seeks to rectify the lease so that the use of the premises described in clause 8.1 provides for both a 'tavern and bottle store', claiming that the omission of the word 'tavern' was a mistake common to the first and second respondents and that a rectification would accord with their true and common intention at the time that the lease was concluded in 2019. The first respondent avers that a rectification is necessary in order for it to rely on its defence in the application that it is not in breach of the lease agreement.

[4] The issue to be decided is, accordingly, whether it is in the interests of justice to grant the first respondent the stay in order for her to attempt to rectify the lease by way of the action before the application is considered. The first respondent places reliance on the following correspondence from the second respondent on 2 October 2020 (after the property had been sold to the applicant) to advance the stay:

> 'This is to certify that Elizabeth Elasly trading as Oxford Bottle Store was granted verbal authority to use the premises leased from us at 268 Oxford St, East London as a tavern during the term of her first lease with us. Due to an error, this was not included in the lease when renewed but it was agreed by us that the use of the premises as a tavern could continue for the full term of the lease.'

[5] Subsequent to that correspondence, the first and second respondents purported to enter into an addendum to the lease on 13 and 14 October 2020 (in which the word 'tavern' is incorporated), which the applicant claims is void.

Legal principles

[6] A party cannot render any evidence in a dispute that is expressly at odds with a written agreement, in terms of the parole evidence rule. Nor can it tender any evidence to demonstrate the actual intention of the parties in doing so, unless the rectification of an agreement is pursued.[1] I have no difficulty in accepting that this is typically sought by way of action proceedings.[2]

[7] The first respondent relies heavily on *Mokone v Tassos Properties CC and Another*[3] to support its argument for a stay of the application pending the finalisation

[1] *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA).
[2] *Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) and Others* 1991 (4) SA 514 (N) at 527A-F.
[3] 2017 (5) SA 456 (CC).

of the action for rectification. In considering a stay in the context of a right of pre-emption, the Constitutional Court, per Madlanga J, held as follows:[4]

> 'Put simply, this (section 173 of the Constitution) says the mentioned courts may regulate their own process taking into account the interests of justice. I will say nothing about equity but, based on this, I do not see why proceedings may not be stayed on grounds dictated by the interests of justice. Whatever the import of what was said by courts previously may be, the Constitution lays down its own test; and it has everything to do with the interests of justice.'

[8] ***Mokone's*** case dealt, at least in part, with the validity and enforceability of a right of pre-emption as a basis for holding eviction proceedings in abeyance. In deciding to grant the stay of eviction pending the finalisation of the action for pre-emption, the majority of the Constitutional Court held as follows:[5]

> 'In the litigation pending before the High Court, Ms Mokone has pleaded that the purchaser, Blue Canyon, knew of the existence of the right of pre-emption before it took transfer of the leased premises. If that is indeed so, the purchaser's ownership obtained upon transfer to it may well be assailable. It seems unjust to require Ms Mokone to be uprooted and her business brought to a halt or destroyed in circumstances where the purchaser might not have been an innocent player when it purchased or took transfer of the leased premises. The interests of justice dictate that the

[4] At para 67. The decision on this aspect is effectively unanimous, with Froneman J dissenting only in respect of one aspect of the majority judgment relating to pre-emption.
[5] At para 70.

eviction proceedings be held in abeyance pending finalisation of the action in which Ms Mokone is seeking to enforce the right of pre-emption.'

[9] The key principles that emerge from this *dictum* are the following:

a) The High Court had concluded as a matter of law that there was no way that Mokone could assail the purchaser's title and had not exercised its discretion whether to stay the proceedings or not.
b) In fact, the purchaser's rights in respect of the property were in dispute.
c) It would be unjust to evict Mokone in circumstances where the purchaser might not have been completely innocent.
d) The eviction proceedings were held in abeyance (pending finalisation of the action to enforce the right of pre-emption) in the interests of justice.[6]

[10] The dissenting judgment of Froneman J in ***Mokone*** provides a useful note of clarification in respect of the dichotomy between law and equity:[7]

'The pre-constitutional case law in relation to whether courts have an equitable discretion to stay proceedings in one matter until determination of a material legal point in another was at pains to separate law from equity in denying this wide equitable competence to our courts. If there is a broad

[6] In *Pillay v Pillay* 2010 ZAKZDHC 81, decided before *Mokone*, the court placed emphasis on the 'balance of convenience' in favouring a stay. The balance was affected by a number of factual disputes and the likelihood that there would be a need for the main application to be referred to oral evidence. In *Industrial Development Corporation v Hsu-Nan Tsung* 2011 JDR 1469 (WCC) (case 5932/2006), the Court also considered the possible prejudice to the two parties and the plaintiff's entitlement to an expeditious hearing and not to be subjected to delays which have little or no basis in law.
[7] At para 79.

> theme of the Constitution, it is to unshackle our law from this painful historical dichotomy and tension between law and fairness. The Constitution demands that they run together, hand in hand. Ordinary folk assume that is the purpose of law – that it should be infused with fairness and justice. Lawyers should no longer be embarrassed to admit that there is nothing wrong with that view.' (Footnotes omitted).'

[11] The key question is whether this Court should exercise its equitable discretion to stay the application[8] or, put differently, whether the interests of justice necessitate this.

[12] In this regard, the first respondent relies on the 'common cause attempt made and intent shown by the first and second respondent to rectify the lease, it is submitted that the first respondent's prospects of success in the action are high and worthy of consideration.'[9]

[13] In the circumstances, it is undoubtedly the case that the application of a stay is inextricably linked to the rectification of the lease agreement entered into between the first and second respondents. The prospects of rectification must, therefore, affect the exercise of the judicial, equitable discretion and the proper consideration of the interests of justice.

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[8] *Clipsal Australia v GAP Distributors* 2010 (2) SA 289 (SCA).
[9] First Respondent's Heads of Arguments, para 33.

The prospects of rectification

[14] A party to a contract who claims rectification of that contract must allege the following (the three requirements):[10]

a) That a contract was entered into by the parties;

b) That the written record does not reflect the true intention of the parties and

c) What the true intention was.

[15] It is established that rectification is not granted if the effect would be to prejudice third persons.[11] As Christie puts it, "Rectification will not be granted if it will adversely affect the rights of innocent third parties, 'innocent' in this context meaning innocent of knowledge…"[12] In *Industrial Finance and Trust Co (Pty) Ltd v Heitner*,[13] the plaintiff was a third-party innocent of knowledge of the agreement. The Court held:[14]

> 'A negotiable instrument is a written contract, with some special features. No logical or practical reason suggests itself why it should not be as capable of reformation as any other written contract...To fulfil this condition the rectification would have to be *strictly limited, in its effect, to the parties concerned in the error sought to be rectified*. That is, in fact, a requirement of the rules as to rectification of contracts other than negotiable instruments. In this respect there is no difference between rectification and the admission

[10] AJ Kerr *The Principles of the Law of Contract* (6th ed) (2002) (Butterworths) 152.
[11] Kerr 154. See *Meyer v Merchants Trust Ltd* 1942 AD 244 at 254. Also see *Durmalingam v Bruce* [1964] (1) SA 807 (D) at 811H.
[12] RH Christie *The Law of Contract in South Africa* (5th Ed) (LexisNexis Butterworths) (2006) 332.
[13] [1961] (1) SA 516 (W). In the context of negotiable instruments, this case is authority for the following: a) parties to a bill may in actions between themselves prove, in defiance of the parol evidence rule, contemporaneous agreements between themselves which tend to vary the unambiguous term of the document; b) such agreements relate to the nature of their relationship *inter se*; c) by implication, the agreements must not relate to various terms of the contract, and d) such agreements may not be proved to the prejudice of third parties to the bills or note.
[14] At 522D. Also see *Durmalingam supra* at 812A.

> of extrinsic evidence under Lord Watson's rule: innocent third parties may not be allowed to suffer prejudice in consequence of the application of a rule which is essentially founded on equitable considerations.' (Own emphasis).

[16] In *Movie Camera Company (Pty) Ltd v Van Wyk*,[15] the Court held as follows: 'For a party to succeed with a claim for rectification of a written agreement, he / she must prove a common intention which the parties intended to express but by mistake failed to express.' In that case, the plaintiff sought to avoid the conclusion that rectification ought to be ordered by submitting that since the plaintiff was not a party to the conclusion of the contract rectification should not be granted as it would adversely affect the rights of an innocent party (the plaintiff). The Court concluded that "…in the reference to innocent third parties the word 'innocent' means 'innocent of knowledge'. Were this not so, a party having knowledge of a particular state of affairs would be able to snatch at a bargain by ignoring such knowledge."[16]

Analysis

[17] It is self-evident that the contract that the first respondent seeks to rectify was not entered into with the applicant, even though the applicant subsequently stepped into the shoes of the landlord subsequent to the purchase of the property in terms of the *huur gaat voor koop* maxim. The 'common mistake' that the first respondent relies on is an alleged mistake common to the first and second respondents, and rectification is sought so that the lease accords with their claimed intention at the time of the conclusion of the lease agreement in 2019.

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[15] [2003] 2 All SA 291 (C) at para 21.
[16] At para 25.

[18] A stay pending the conclusion of the action for rectification should be granted if this is in the interests of justice, to be determined in the discretion of this Court. The prospects of rectification and the 'innocence' of the applicant are important considerations in this regard, and the law must ultimately be infused with fairness and justice.[17]

[19] In my view, the prospects of rectification are extremely poor. The contract that is the subject matter of the rectification action was not entered into by the first respondent and the applicant, but was a contract between the first and second respondents. This is problematic considering the authorities suggesting that rectification ought to be strictly limited, in its effect, to the *parties concerned in the error sought to be rectified*. This must relate to the first and second respondents, whereas a future judgment granting rectification would impact on the applicant. As the Court held in ***Trust Bank of Africa Ltd v Frysch***:[18]

> 'A contract can only be rectified if it does not recite accurately the contract which the parties had in fact entered into. The wrong recording may be rectified to make the contract recite what the parties had in fact agreed upon. This being so the first requisite for rectification is that the error must be a mutual one. If the Court were to order a contract to be rectified to include a term or to cover circumstances that had not been mutually agreed upon, the Court would not be ordering the rectification of the agreement but would be imposing upon the parties a contract which had not been arrived at by their

[17] *Mokone* at paras 70, 79.
[18] 1976 (2) SA 337 (C) at 338F-H.

agreement – *consensus*, the foundation upon which all contracts, i.e. agreements, rest.'

[20] The first respondent's argument in this respect seems to be that the applicant, as purchaser, stepped into the shoes of the seller for purposes of the lease agreement and in effect became a party to that contract by operation of law, seemingly opening the door for possible rectification. In fact, the established requirements for rectification make little sense when an attempt is made to read 'the parties' (the first requirement) to refer to the purchaser (the applicant) and the tenant (the first respondent). Even if that were the case, it cannot possibly be contended that the written record does not reflect the true intention of the purchaser (the second requirement) or that there could have been a 'true intention' in respect of the tenant and purchaser, at the time the contract was entered into, that is different from what is recorded in writing (requirements two and three).

[21] The historical development of the *huur gaat voor koop* maxim has been described in a number of cases, including *Mignoel Properties (Pty) Ltd v Kneebone*.[19] It is unnecessary to repeat those developments. What is important for present purposes is that '…after a sale, the seller *ex lege* falls out of the picture and his place as lessor is taken by the purchaser. No new contract comes into existence; all that happens is that the purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations. On being so substituted for the seller, the purchaser acquires all the rights which the seller had in terms of the lease, except, of course, collateral rights unconnected with the lease.'[20]

[19] [1989] ZASCA 110 at para 9 *et seq*.
[20] At paras 24, 25.

[22] The fact that the purchaser is, as a matter of law, substituted as lessor in place of the seller and that, as a logical concomitant of that position, the purchaser acquires all the rights which the lessor enjoyed, *qua* lessor, in terms of the lease, does not make the purchaser a *party* to the contract at the time it was entered into for purposes of consideration of rectification. Further support for this approach is to be found in the authorities that liken the effect of the *huur gaat voor koop* maxim to a delegation by operation of law.[21] Delegation is a form of novation by which, by agreement between all concerned, a third party is introduced as debtor in substitution for the original debtor, who is discharged.[22]

[23] Significantly, an order granting rectification would then have the effect of prejudicing the applicant (as a third party in this context), provided that it may be said that the applicant was 'innocent' or had no knowledge of the state of affairs that form the basis of the action. If that is the case, the action holds no prospects of success and the interests of justice would favour the applicant when considering the stay.

[24] It is clear from the papers that the applicant had visited the premises prior to purchase and noted the use of the premises as a tavern:

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[21] See *Boshoff v Theron* 1940 TPD 299 at 303, relying on *Scrooby v Gordon & Co* (1904, T.S.): 'Now when the owner of land which has been leased sells it to someone else the purchaser takes the land subject to the lease, so that he is bound to the tenant and the tenant is bound to him in the relation of lessor and lessee (van Leeuwen, *Censura Forensis*, 1.4.22.15; *Voet*, 19.2.19; Groenewegen, *ad. Dig,* 19.3.32). It seems to me that it would be impossible to contend in respect of the ordinary obligations of a lessor arising in respect of the property during the continuance of a lease, that the tenant would have a right of action not against the landlord who had failed to fulfil these obligations…but against the person with whom he had originally contracted…'

[22] Christie 462, 463.

> 'When our entity purchased the property, on the lease agreement it is clearly stated that the premises are to be used as a bottle store and no other use unless there is written agreement (sic). When we visited the property we noticed that there were a number of breaches of leases in a number of commercial spaces in the building, but it was not for us to point out as the property was not transferred to our entity. We noticed that the place is being used as a tavern and not as per the lease and some tennants residing in cormercial spaces (sic). We enquired with the selling agents about any addendum to lease and we were notified there was no such (sic). As per the lease agreement, only a bottle store is permitted by the signed lease. A tavern is not permitted by Nyerere Trading Enterprise in the building.'

[25] Does this knowledge (that the premises was being used as a tavern), on its own, result in the applicant not qualifying as an 'innocent party'? I think not. As the correspondence quoted above suggests, the applicant remained completely 'innocent' of knowledge of the alleged true intention of the parties (the first and second respondents) at the time the contract was entered into, because this was not disclosed at the time of purchase. The selling agents were even asked about any addendums to the lease and relied on the wording of the lease agreement. As such, the applicant must qualify as 'innocent' and lacking knowledge of the alleged state of affairs that forms the basis of the action. Rectification would accordingly operate to the prejudice of the applicant and would not be permitted.

[26] In all the circumstances, it is not in the interests of justice to exercise the Court's discretion to grant the stay in this instance, and that application is dismissed. The issue of costs is considered, below.

Eviction

[27] The first respondent contends that it should be given the opportunity, to the extent possible, to file opposing papers to the application in the event that the stay is refused.

[28] The applicant applied for the eviction-related relief (quoted in para 1, above) during November 2020. The papers were served on the first respondent on 16 November 2020 and the first respondent served its notice to oppose on 23 November 2020. No opposing affidavit has been served or filed since that time.

[29] The facts relevant to the application are straightforward and largely common cause. The first and second respondents entered into a lease agreement on 16 April 2019, containing terms similar to those of an initial lease agreement entered into between those parties on 25 October 2010. In particular:

a. Clause 20 provides that 'This lease constitutes the whole agreement between the parties and no warranties or representations, whether express or implied, not stated herein shall be binding on the parties;

b. Clause 8 provides that the use of the leased premises shall be for a bottle store involving the sale of alcoholic drinks, and for no other purpose without the prior written consent of the Lessor.

[30] The property where the lease operated was sold to the applicant on 27 September 2019. The applicant stepped into the shoes of the second respondent on

transfer of the property to it on 26 March 2020, as explained above, and the purported lease agreement dated 14 October 2020 (between the first and second respondents) must be declared void.

[31] The first respondent presently operates a tavern on the premises contrary to the terms of the lease agreement. Despite being advised to desist, it continues to do so. The applicant relies on the *rei vindicatio* for the relief sought. The applicant merely has to allege and prove its ownership and the fact that the *res* is held by another, in order to succeed with an order for the return of the *res* or for eviction. The onus is then on the first respondent to allege and prove a right to stay in possession.[23] If the owner acknowledges that the occupier has or had a right of occupation, such as a lease, the onus is on the owner to prove that the right no longer exists or is not enforceable.[24]

[32] In this case, it is clear and undisputed that the applicant is the owner of the property in question, and that the first respondent remains in occupation. The lease agreement was breached, the lessee notified to remedy the breach[25] and failed to do so, entitling the applicant to cancel the agreement and regain possession of its property. The applicant cancelled the agreement formally on 23 October 2020.

[33] I have considered the *pacta sunt servanda* principle and whether its strict enforcement in this case would offend constitutional values in the context of a possible

[23] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A.
[24] *Ibid* at 21.
[25] Reference is made in Annexure G to the application to written notification to cease using the premises for a tavern and failure to remedy the breach for a period of seven days, in terms of the provisions of the lease agreement.

eviction of the first respondent from the commercial premises presently occupied. I am of the view that the applicant has made out a case for the relief sought.

[34] As to costs, the applicant prayed for attorney and client costs on the strength of a clause in the lease agreement, despite the notice of motion making no reference to this. Although an order for costs on the attorney and client scale will only be made where there is a special prayer to that effect, such an order may be made even in the absence of this.[26] In *Intercontinental Exports (Pty) Ltd v Fowles,*[27] the Supreme Court of Appeal noted as follows:

> 'The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant considerations. These would include the nature of the litigation being conducted before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation. …as a matter of policy and principle, a court should not, and must not, permit the ouster of its discretion because of agreement between the parties with regard to costs.'

[35] In *Geldenhuys v East and West Investments (Pty) Ltd*,[28] the Supreme Court of Appeal dismissed an appeal with costs on the attorney and client scale. In this case, a contract of lease obliged the appellant to pay attorney and client costs, and the court

[26] *Fein v Rabinowitz* 1933 (CPD 289 292.
[27] 1999 (2) SA 1045 (SCA) 1055F-I.
[28] 2005 (2) SA 74 (SCA) 77C-E.

noted that there existed a contractual stipulation which the respondent was entitled to enforce. It held that no grounds had been advanced on appeal for the court to exercise its residual judicial discretion against granting the costs of appeal on such scale.[29]

[36] In this instance, the applicable clause in the lease provides as follows:

> 'In the event of the Lessor instructing its attorneys to take measures for the enforcement of any of the Lessor's rights under this lease, the Lessee shall pay to the Lessor such collection charges and other legal costs on an attorney/client basis as shall be lawfully charged by such attorney, to the Lessor on demand made thereof by the Lessor'.

[37] I am satisfied that costs on the attorney and client are warranted in the circumstances, both in respect of the applicant's costs occasioned by the application and the unsuccessful stay.

Order

The following order will issue:

a. The first respondent's application (the stay) is dismissed with costs, to be paid on the attorney and client scale, the costs to include the costs occasioned by the postponement on 9 March 2021.

b. The Addendum to the lease agreement dated 14 October 2020 is declared void.

[29] AC Cilliers *The Law of Costs* (3rd Ed) (LexisNexis) (Durban) (1997) 4-23.

c. The lease agreement entered into between the first and second respondents on 16 April 2019 is cancelled and there is no lease agreement between the applicant and first respondent.

d. The applicant is entitled to evict the first respondent and / or any other person occupying the premises, known as the Oxford Bottle Store, situated at No. 268 Oxford Street, East London.

e. The first respondent and / or any other person found at the premises is hereby directed to vacate the premises within a period of 10 (ten) days from the date of receipt of this order;

f. The Sheriff of this Honourable Court, duly assisted by the members of the South African Police Services, if needs be, are authorised and permitted to evict the first respondent and/or any other person(s) found at the premises should they fail to vacate within 10 (ten) days of service of this order.

g. The first respondent is to pay the costs of the application on the attorney and client scale.

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A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant	:	*Adv S. X. Mapoma*
Instructed by	:	*S.N. Jiba Attorneys, Office 1, Central Square, East London Tel: (043) 722 4003*
Obo the Respondent	:	*Adv C.D. Kotze*
Instructed by	:	*Allams Attorneys, 6 Sansom Road, Vincent, East London*
Heard:	:	*25 March 2021*
Delivered:	:	*20 April 2021*