IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 6773/2010

In the matter between:

JAN ANTONIE LOMBAARD **Plaintiff**

and

DROPROP CC **Defendant**

Order:

1. The defendant is ordered to do all things necessary and sign all the necessary documents to effect transfer to the plaintiff, against payment of the purchase price of R3 360 000, of the immovable property described as Portion 5[…] (of 4[…]) of the farm M[…] H[…] K[…] no 7[…], Registration Division FT in the Durban entity, Province of KwaZulu-Natal, in extent 2,0797 hectares, as more fully appearing on FT diagram no 782/1998.

2. In the event of the defendant failing to do so within seven days of being called upon by a conveyancer appointed by the plaintiff, the Sheriff of this court is authorised and directed to do all such things and sign all such documents in the place and stead of the defendant.
3. The defendant's counterclaim is dismissed.
4. The defendant is ordered to pay the costs of the action, in convention and reconvention, including those consequent on the employment of two counsel.

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JUDGMENT

Delivered on: 29 April 2014

PLOOS VAN AMSTEL J

[1] The plaintiff in this matter seeks an order directing the defendant to transfer an immovable property to him. The property is the subject of a written lease agreement which contains an option for the purchase of the property. The defendant disputes that it is liable to transfer the property to the plaintiff and contends that the agreement incorrectly refers to the whole of the property instead of a portion thereof. The defendant seeks rectification of the agreement and in the alternative an order declaring the agreement void on the basis of unilateral error.

[2] The plaintiff previously launched an application for an order compelling the defendant to transfer the property to him. The defendant opposed that application and contended that the agreement was void as it did not describe the property with sufficient certainty. The defendant was successful in the local division but on appeal it was held that the description of the property was unambigious and sufficiently certain. The Supreme Court of Appeal nevertheless dismissed the appeal in the light of the defence of rectification in respect of which there was a dispute of fact on the papers. It added that the plaintiff was free to proceed by way of a trial so that the defence of rectification could be dealt with. This is the trial which proceeded before me.

[3] The parties were agreed that the defendant bore the onus of proof with regard to both defences and that it had the duty to begin.

[4] The lease agreement was concluded in Durban on 26 January 2005. It was signed by the plaintiff personally and by Mr Dhraundaw Preethepaul on behalf of the defendant. The leased property is described in the agreement as 'Certain Portion 5[…] of Lot 4[…] of the F[…] M[…] H[…] K[…] no 7[…]'. The lease was for a period of five years, commencing on 1 February 2005, with an option to renew for a further period of five years. It provided for an option in favour of the plaintiff to purchase the property for a sum of R3m, with a yearly escalation of 12 per cent. The option could only be exercised after the expiry of the first year of the lease and would be valid for five years only.

[5] It was not in dispute before me that the plaintiff purported to exercise the option in writing on 12 November 2007 and that if the defences to which I have referred fail a valid agreement of sale would have come into existence.

[6] The property described in the lease agreement is the subject of Deed of Transfer T […], according to which it is 2, 0797 hectares in extent. It lies between the M25 Highway and the Old Kwa Mashu Highway and roughly between a river on the south-east and a bridge on the north-west. There is a building on the property, near the south - eastern boundary. It was common cause before me that the description of the leased property in the lease agreement is that of the entire property.

[7] The background is as follows. Mr Preethepaul, on behalf of the defendant, bought the property in August 1997 for a sum of R627 000. It was then zoned as farmland and there were no improvements on it. He and his wife each owned a forty per cent interest in the defendant and the remaining twenty per cent was owned by one of their sons. It was common cause before me that at all material times Mr Preethepaul was a successful an experienced businessman who was involved in property development and the sale of petroleum products. His offices were in a building across the road from the property, at 6[…] H[…] Road, which he owned, either personally or in a corporate entity. It was his intention to move his wholesale

petroleum products business to the new property because he was not allowed to operate wholesale and retail businesses on the same premises. The property was rezoned industrial and in 2000 the defendant commenced the construction of a building on the property. The building was not completed as the defendant ran out of funds. It stood empty and was vandalised by people who removed windows and part of the roof.

[8] The plaintiff owned a business known as Goat World, which was operated from premises not far from the defendant's property. He lived in Namibia and the business was managed by his uncle, Christie Lombaard (Christie). The plaintiff bought goats in Namibia which were transported to Durban and sold from these premises. He started to look for alternative premises because of the regular increases in his rent, and asked Christie to make enquiries about the vacant and incomplete building up the road. Christie made contact with Mr Preethepaul, and this led to the conclusion of the lease agreement which is the subject of this dispute. The plaintiff spent a considerable sum of money on renovations to the building but, due to threats by his landlord where his business was operating from, he never moved his business there. He sublet the property to Nyathi Textiles, and on 12 November 2007 he notified the defendant that he was exercising the option to purchase the property.

[9] The defendant's case is that the description of the property in the lease agreement was a mistake. It contends that neither of the parties intended the lease to relate to the whole of the property. It sought an order that the agreement be rectified so as to describe the property as 'A certain part of Portion 5[…] of lot 4[…] of the F[…] M[…] K[…] No. 7[…], which is fenced and demarcated, in extent approximately 6500 square meters'.

[10] A party who seeks the rectification of an agreement must prove that due to a mistake common to the parties it does not correctly reflect their common intention. He must prove what the common intention was, otherwise it is not possible to rectify the agreement. In *Levin v Zoutendijk* 1979 (3) SA 1145 (W) Coetzee J said at 1148 A that the very cause of action for rectification postulates that the parties' agreement or common intention was clear and unmistakeable on those aspects in respect whereof the writing is to be reformed.

[11] Mr Preethepaul testified that he erected a concrete block wall on the southern and eastern boundaries of the property, adjacent to the building, and on the western side of the building he erected a wire fence. The fence separated the portion on which the building stood, and an area surrounding it, from the rest of the property on the western side. This is the fence to which reference was made in the defendant's pleadings.

[12] In his evidence Mr Preethepaul had considerable difficulty in specifying what part of the property should have been described in the lease agreement. In response to a question what area of the property he understood was going to be leased he said the building would have been leased and a common driveway leading to the building and to the other tenants. When the defendant's counsel drew his attention to clause 6 (d) of the lease agreement, which provided that the premises would be used as a livestock depot and business premises, he said that this was what he expected when the lease agreement was concluded. It seems plain that if the premises were to be used as a livestock depot it could not have been restricted to the building itself. It is significant that there is no reference to the building in the description of the leased property. If it had been the intention of the parties that the plaintiff would rent the building as opposed to the entire property one would have expected to find a reference to the building in the description of the leased property. Mr Preethepaul later said that what he intended to lease to the plaintiff was the building and 'the property around the building'. He also said the lease included a strip of land surrounding the building and approximately 10 meters wide. He said he never discussed the terms of the lease with the plaintiff and maintained that he never even met him. He also said that he did not mention the 10 meter area surrounding the building to anybody. He expressly denied that the leased area which he intended went as far as the wire fence, which is in direct conflict with his case on the pleadings. To this I should add that the plaintiff said there was no mistake - they had expressly agreed that the lease would cover the whole of the property. I do not consider that the defendant has made a case for the rectification of the agreement. On Mr Preethepaul's evidence it is not possible to determine what the common intention of the parties was with regard to the description of the leased property. It seems to me that the defendant's real defence is unilateral error, in the sense that it contends that it did not intend to lease the

whole of the property and that the plaintiff knew or should have known that this was the case. I proceed to consider whether this defence was proved.

[13] The defendant had to prove, first of all, that the description of the property in the lease agreement was a mistake. It did not have to prove that the mistake was a reasonable one because it was its case that the plaintiff knew of the mistake or that he, as a reasonable person, ought to have known of it. See in this regard *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239I-240B and Christie's *The Law of Contract in South Africa*, 6ed, at 329 and 332.

[14] There was a sharp conflict on the evidence as to how the lease agreement was produced and signed. Mr Preethepaul testified that Christie Lombaard came to see him in his office and they discussed the letting of the building to him. On another occasion a number of men arrived at his office and introduced themselves as Lombaards. They said they were related to Christie. He discussed the incomplete building with them. He told them that he had a standard lease agreement and he asked Pranisha, one of his assistants, to print the agreement and let them go through it. They said they would like to take it away with them and would bring it or send it with Christie. They asked to see the building plan and he showed it to them. Christie later came to the office and left the lease agreement with an employee. He was not there at the time. The gaps in the document had been filled in. Pranisha brought him the document together with a stack of other documents which he had to sign. He said he did not know who had typed in the details, which were usually filled in in manuscript.

[15] The plaintiff's version was entirely different. He said he personally discussed the proposed lease with Mr Preethepaul and it was perfectly clear to both of them that they were talking about the entire property. He said Mr Preethepaul told him that the property extended more or less from the river to the bridge. They discussed an option to purchase the property, which he said he would not want to exercise in the first year as he needed to spend a considerable amount of money on renovating the building. They also discussed a limitation on a claim for improvements in the event of him not exercising the option to purchase. He confirmed that he was given the defendant's standard lease agreement, which he took away with him. He added the relevant details and provisions relating to, inter alia, the option and a claim for

improvements, and returned to Mr Preethepaul's office the following day. He said they went through the draft agreement and changed the option to five years as Mr Preethepaul felt ten years was too long. An assistant then took the document away and produced a typed version, with all the amendments and additions. He and Mr Preethepaul then signed the agreement. It is plain that on the plaintiff's version there had been no mistake.

[16] There are several reasons why I consider that the defendant has not discharged the onus on it. Mr Preethepaul was not a good witness. He is 66 years old and had suffered a stroke some years ago. He was said to be not a shadow of his former self. He was nevertheless able to testify and I would not have guessed that he had had a stroke if he had not said so. He accepted that the description of the property in the lease agreement referred to the whole of it but maintained that he had intended to lease only part of it. He offered no explanation as to why the agreement did not make this clear. I have referred to the difficulty which he had in specifying what part of the property he had intended to lease. It would have been a simple matter to refer to the leased property as the building on the property, if that had been the intention. A lease agreement which describes the leased property as, eg, the garden cottage at a specific address, is perfectly valid.

[17] There were material differences between Mr Preethepaul's evidence before me and his affidavit in the previous proceedings. There he said:

'The section subject to the lease with the applicant is the section left white at the broad bottom end of the property as one looks at the diagram. There is a fence made of blocks around the perimeter. A wire mesh fence borders the applicant's leased space'.

He specifically disavowed this in his evidence before me. He did not say in the affidavit, as he did in his evidence at the trial, that what the defendant let to the plaintiff was the building and a 10 meter strip of land around it. He was asked in cross-examination about a notice which the defendant's attorney delivered in terms of rule 36 (9) and according to which an engineering surveyor would testify that Mr Preethepaul had pointed out to him the area which he had intended to lease to the plaintiff, as depicted on a drawing annexed to the notice. According to the drawing the intended leased area included the building, a strip of land immediately to the

west of the building one meter wide, and the rest of the property between the building and the eastern boundary, comprising 4093 square meters. Mr Preethepaul's reaction was that he had not pointed this out to the surveyor and that he had never met with him in relation to this matter.

[18] He was also inconsistent with regard to the option to purchase. In his evidence he said there had been no discussion about an option and he suggested that the agreement had been 'doctored'. He confirmed however that there had been a discussion about possibly purchasing the property in about a year's time. The defendant's counsel made it clear that he was not contending that the option clause had been inserted fraudulently. Indeed, in Mr Preethepaul's affidavit in the previous proceedings he accepted that the option formed part of the agreement, but contended that it applied only to a portion of the property. It cannot be mere co-incidence that the purchase price of R3m referred to in the option clause is the figure which Mr Preethepaul said had been suggested to him by an estate agent. It was also the defendant's case on the pleadings and in the further particulars that there was an option, but that it did not relate to the whole of the property. It is significant that there was no discussion at all about subdividing the property, which would have been required if the option was not intended to apply to the whole of the property.

[19] The form of the agreement itself is more consistent with the plaintiff's version than with Mr Preethepaul's. A comparison of the standard agreement, which was referred to in the evidence as a template, with the lease agreement shows that, but for the amendments and additions to which I have referred, the forms are identical in appearance. The font is the same, the same words are in bold print, the same gaps are left open for details to be filled in, and at the top of the first page, under the words 'Head Lease' appears a provision for an identity or company reference number in the form 'ID/CO.REF.No', followed by 24 dots. It seems highly unlikely that someone had taken the trouble of re-typing the template and in the process made the additions to which I have referred. It is far more likely that the additions and alterations were effected to the template by computer and that the amended form was printed out in the defendant's office. I do not accept Ms Mehilal's say-so that the template was a so - called PDF document which was not capable of being amended. She did not elaborate on this or explain why the format of the document

could not be changed or the contents copied and pasted in a programme which allowed amendments. There are other similarities which appear to me to confirm this. The word ‘Certain’ precedes the space left for a description of the leased property in clause 1 of the template. The omission of the word ‘out’ after the words ‘as set’ in the second last line of clause 1 of the template is repeated in the same place in the lease agreement. The incorrect use of the apostrophe in clause 2 of the template also occurs in clause 2 of the lease agreement.

[20] The amendments seem to me to be in accordance with the plaintiff’s evidence. Clause 5(f) of the template, which obliges the tenant to keep the premises in clean and tidy condition, does not appear in the lease. Mr Lombaard testified that this provision was removed because it would not have been practical to accept such an obligation if he would be keeping goats on the property. Clause 7(e) of the template, which was inconsistent with the option to purchase, was omitted from the lease. Clause 18 of the template provides that the leased premises are not to be sublet whereas clause 19 of the lease allows the tenant to do so. Clause 19 of the template provides that the tenant shall not be entitled to any compensation for any improvement made by the tenant to the property, whereas clause 20 of the lease provides that the tenant shall be entitled to compensation for any improvement made to it by the property ‘for an amount exceeding R 300 000 that which (sic) can be proven or such improvement can be removed by the tenant’. Clause 21 of the template provides that the tenant is prohibited from altering or adding to the building, while clause 22 of the lease provided that it is not prohibited from doing so. Then there is the option clause itself, which stipulates a price of R3m and provides that it could only be exercised after the first year of occupation, as the plaintiff explained.

[21] On 4 February 2008 the plaintiff’s attorney wrote to the defendant, with a copy to its attorney, and requested an undertaking that the defendant would not deal with the property or attempt to alienate it or in any way affect the plaintiff’s rights in terms of the lease and the option. Included in the letter was the following paragraph:

> ‘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 5[…] (of 4[…]) of the F[…] M[…] H[…] K[…] No. 7[…] 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 clients consent'.

The defendant's attorney responded to this letter on 5 February 2008 and provided an undertaking not to alienate the property for a period of 7 days, obviously in order to give the plaintiff's attorney an opportunity to launch the application to which reference was made in the letter of 4 February. Of significance is the fact that neither the defendant nor its attorney dealt with the accusation that the defendant had concluded a conflicting lease agreement in respect of a portion of the property with another tenant. One would have expected, in the light of the defendant's case, a response to the effect that the lease agreement with the other tenant was not a conflicting one and that the plaintiff's lease agreement pertained only to the building.

[22] It was contended on behalf of the defendant that the presence of other tenants on the property must have alerted the plaintiff to the fact that the defendant had not intended to lease the whole of the property to him. This contention overlooks the plaintiff's evidence that it had been expressly agreed that the lease would apply to the whole of the property. I nevertheless deal with this contention briefly as this aspect may be said to reflect on the plaintiff's credibility. The evidence in this regard was less than satisfactory.

[23] The defendant contends that when the lease was concluded Gralio Construction was in occupation of a substantial part of the western portion of the property and operated a stone crushing plant there, which was visible for all to see. The plaintiff denied this. The evidence as to when Gralio moved onto the property and when they left was vague and conflicting. Mr Preethepaul testified that when he returned from overseas in January 2005 he noticed Gralio's operations on the property. His passport however revealed that he had not been overseas at that time and that he did not return from abroad in January 2005. When confronted with this he became confused and said he may have had the dates wrong. Kistensamy Naidoo, who was Gralio's plant manager, said they moved their plant onto the site in October and November 2004 and started crushing stones in January 2005. He

said he recalled this as it was the first December that he had to work. He said Gralio left the site during October and November 2005 after they had won a tender at a quarry in Marianhill. The building on the property was then still unoccupied although renovations on it started when Gralio was in the process of moving out. He said he did not meet anyone from Nyati Textiles as the building was not yet occupied. Kumaran Pillay, a warehousing manager employed by Nyathi Textiles, said they started to move into the building in July 2005 and was in occupation by August. By then there was no sign of Gralio and no activity on the western part of the property. Mrs Robynne Bishop, a financial manager employed by Nyathi Textiles, said they started to move their machines into the building in April 2005 and its factory was fully operational by the end of September. She was never aware of the presence of Gralio on the property. None of these dates was confirmed by documentary evidence. The only date about which there was no dispute was 19 April 2005, which was the date on which the photograph exhibit C3 was taken, and which depicts the presence of Gralio's operations on the property. The photograph shows that by then the roof of the building had been completed. An odd feature of the case, which was not really explored in the evidence, was the fact that Gralio never paid any rental to the defendant. There is also no mention of Gralio in Mr Preethepaul's affidavit in the previous proceedings.

[24] The plaintiff was adamant that Gralio was not on the property when he signed the lease agreement. He said they must have arrived there after he had returned to Namibia. He arrived in South Africa on 24 January 2005, met with Mr Preethepaul on the 25th, signed the lease agreement on the 26th and returned to Namibia on the 28th. He then did not return to Durban until 29 August 2005. By then he had decided not to move his business onto the property and had concluded a sublease with Nyathi Textiles. He said he had really lost interest in the property and was unconcerned about the lease as the rental which he received from his subtenant was substantially more than the rental which he had to pay to the defendant. It was never reported to him that there were other occupiers on the property and it only became an issue when he decided to exercise the option to purchase.

[25] The defendant also concluded other lease agreements in respect of portions of the property. Mr Preethepaul's evidence in this regard was vague and he said

several times that he did not deal with these matters personally. Some of these agreements were concluded, apparently by Mr Preethepaul's son, in breach of an undertaking which had been given on behalf of the defendant that no further lease agreements would be concluded. Be this as it may, none of these agreements lead me to conclude that Mr Preethepaul believed that the lease agreement with the plaintiff did not apply to the whole of the property.

[26] The plaintiff was a much better witness than Mr Preethepaul. He appeared to me to be an honest witness and when he was confronted with discrepancies he explained them satisfactorily. It must of course be remembered that the trial took place some ten years after the events in question. The probabilities also seem to me to favour the plaintiff's case. The defendant's case suffered from the contradictions and inconsistencies to which I have referred and the improbabilities in Mr Preethepaul's evidence regarding the preparation of the lease agreement and the inclusion therein of the option to purchase.

[27] It was contended by counsel for the defendant that I should draw an adverse inference from the failure by the plaintiff to call his brother Kobus and his uncle Christie to testify. The plaintiff explained that Kobus was in Namibia as they could not both be away from the business which they own jointly, and that Christie found it difficult to come to court as his wife was very ill. Christie did however make himself available and consulted with the defendant's legal representatives.

[28] In those circumstances I find that the defendant failed to discharge the onus of proof. The lease agreement in terms refers to the whole of the property and it has not been shown on a balance of probability that this was a mistake. There is therefore no room for either rectification or unilateral error.

[29] I make the following order:

1. The defendant is ordered to do all things necessary and sign all the necessary documents to effect transfer to the plaintiff, against payment of the purchase price of R3 360 000, of the immovable property described as Portion 5[…] (of 4[…]) of the farm M[…] H[…] K[…] no 7[…], Registration

Division FT in the Durban entity, Province of KwaZulu-Natal, in extent 2,0797 hectares, as more fully appearing on FT diagram no 782/1998.

2. In the event of the defendant failing to do so within seven days of being called upon by a conveyancer appointed by the plaintiff, the Sheriff of this court is authorised and directed to do all such things and sign all such documents in the place and stead of the defendant.
3. The defendant's counterclaim is dismissed.
4. The defendant is ordered to pay the costs of the action, in convention and reconvention, including those consequent on the employment of two counsel.

[30] I wish to express my appreciation to counsel on both sides for their thorough and helpful arguments.

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Ploos van Amstel J

Appearances:

For the Plaintiff	**:** Adv. J A Julyan S.C/Adv. M A Koningkramer
Instructed by	**:** Susan Abro Attorney Durban
For the Defendant	**:** Adv. R J Salmon S.C
Instructed by	**:** Naidoo & Company INC Durban
Date of Hearing	**:** 30, 31, 01 October 2013 26, 27, 28 March 2014
Date of Judgment	**:** 29 April 2014