THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 809/2011
Reportable

In the matter between:

NATIONAL SCRAP METAL (CAPE TOWN) (PTY) LTD	**First Appellant**
MUREC CRUSHING AND MILLING (PTY) LTD	**Second Appellant**
and	
MURRAY & ROBERTS LTD	**First Respondent**
MURRAY & ROBERTS STEEL (PTY) LTD	**Second Respondent**
CAPE TOWN IRON AND STEEL WORKS (PTY) LTD	**Third Respondent**

Neutral citation: *National Scrap Metal v Murray & Roberts* (809/2011) [2012] ZASCA 47 (29 March 2012)

Coram: Mthiyane DP, Cloete, Leach, Tshiqi and Wallis JJA

Heard: 7 March 2012

Delivered: 29 March 2012

Summary: Motion proceedings – whether disputed allegations of fact capable of being rejected on the papers – factors relevant thereto.

O R D E R

On appeal from: Western Cape High Court, Cape Town (Griesel J sitting as court of first instance):

1. The appeal succeeds, and the order of the high court is set aside and replaced with the following:

'(a) The application is dismissed.

(b) The applicants are to pay the respondents' costs, jointly and severally, the one paying the others to be absolved.

(c) The respondents are to pay the applicant's costs of the interlocutory proceedings on 31 August 2011 and 13 September 2011, jointly and severally, the one paying the other to be absolved.

(d) The above orders as to costs shall include the costs of two counsel where employed.'

2. The respondents are to pay the appellants' costs of the appeal, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

J U D G M E N T

LEACH JA (MTHIYANE DP, CLOETE, TSHIQI AND WALLIS JJA concurring)

[1] The appellants appeal against an order of the Western Cape High Court (Griesel J) granted on 9 November 2011 evicting them from certain immovable property in Kuilsrivier owned by the first respondent. It was common cause that the appellants had earlier leased portions of the property, the first appellant under a written agreement which had expired on 31 October 2010 and the second appellant under a lease which the respondents had purported to terminate in 2011. Both appellants relied upon an oral lease agreement allegedly concluded in 2008 which entitled them to remain in occupation for at least ten years after the expiry of the first

appellant's written lease. This agreement was, in turn, denied by the respondents. Without resorting to oral evidence, the high court concluded that the appellants' allegations in regard to the oral lease were not sustainable and granted the eviction order sought by the respondents. With leave of the high court, the appellants now appeal to this court, contending that in the light of the dispute of facts raised on the papers, the eviction application ought to have been dismissed.

[2] The respondents are all members of the Murray & Roberts group of companies. The first respondent, Murray & Roberts Ltd ('M&R Ltd'), is a subsidiary of Murray & Roberts Holdings Ltd, a public company listed on the Johannesburg Stock Exchange. M&R Ltd is, in turn, the holding company of the second respondent, Murray & Roberts Steel (Pty) Ltd ('MRS') of which the third respondent, Cape Town Iron & Steel Works (Pty) Ltd ('CISCO') is a wholly owned subsidiary. (For convenience I intend to adopt the nomenclature used by counsel by referring to the respondents collectively as 'M&R'.)

[3] Not only are the respondents related to each other in this way, but MRS holds 42.8 per cent of the ordinary issued share capital of the first respondent, National Scrap Metal (Cape) (Pty) Ltd ('NSM'). The second appellant, Murec Crushing & Milling (Pty) Ltd ('Murec') is a wholly owned subsidiary of NSM.

[4] At all material times each of the parties was, in some way or other, involved in the scrap metal industry. NSM was established by MRS, effectively as a joint venture with a company that for present purposes may simply be referred to as 'Reclam', which also holds 42.8 per cent of NSM's shares. The principal motivation behind the establishment of NSM was for it to provide CISCO with an adequate supply of the ferrous scrap it required for its manufacturing steel plant. Pursuant to this, in September 1999, CISCO and NSM concluded a supply agreement under which CISCO agreed to purchase its scrap metal requirements exclusively from NSM which agreed, in turn, to supply the scrap metal it collected exclusively to CISCO. CISCO retained the right to purchase scrap metal from other sources if NSM was unable to fulfil its requirements, while NSM had the right to supply other customers if it had scrap metal available surplus to CISCO's requirements. This initial supply agreement was later amended in May 2001. In terms of the agreement

as amended, it was to remain in force until 31 October 2010.

[5] M&R Ltd is the owner of a piece of immovable property in Kuilsrivier, approximately 20.25 hectares in extent. Of this CISCO was using a portion of some 15.5 hectares (referred to in the papers as 'the CISCO portion'). Shortly after it had been established, and in order to facilitate its supply of scrap to CISCO, NSM leased another portion of the property from CISCO ('the leased portion'). Situated immediately adjacent to the CISCO portion, it was let for a period of 12 months with effect from 1 July 1999, the stated intention in the lease being that NSM would use the premises for the 'procurement, processing, handling and distribution of scrap metals'.

[6] Although the lease contained an option to renew for an indefinite period, neither NSM nor CISCO actually exercised the option before the lease expired in mid-2000. Despite this, they thereafter conducted themselves as if the lease had in fact been renewed, with the rental escalating at eight per cent. Eventually, however, as NSM found it was spending a considerable amount of money on improvements to the property, it decided to formalise the agreement, and it is recorded in the minutes of an NSM board meeting held on 27 August 2003 that a director was tasked with finalising a rental agreement by 30 September 2003. But although the existence of a rental agreement between CISCO and NSM was confirmed in the minutes of the NSM board meeting of 27 November 2003, a written agreement was not finalised until 13 March 2007 to do so when a so-called 'amending agreement' was concluded which extended the terms of the lease until 31 October 2010.

[7] The initial lease included a gantry and existing cranes on the leased premises. NSM's operations duly flourished and by the time it came to amend the initial lease it had spent vast sums on various improvements, as I have mentioned. This gave rise to protracted problems which took years to resolve but which finally led to NSM's ownership of the gantry being recognised and adjustments to the rental being made. Ultimately this was reflected in the amending agreement.

[8] In October 2003, CISCO and NSM entered into a waste removal and disposal agreement with Murec to provide for the collection, removal and disposal of waste

products known as ‘slag’ produced by CISCO’s operations from an area of the CISCO property. This portion of the property, approximately 1.2 hectares in extent, has been referred to as ‘the services site’. Under this agreement, Murec operated and used the services site with effect from 20 January 2003. The initial agreement provided for the lease to be valid until 31 January 2008 but it was amended to continue indefinitely, subject to the right of either CISCO or Murec to terminate on not less than six months notice. The services site was the property from which Murec was evicted under the order of the court below.

[9] As appears more fully below, in 2009 NSM purchased a heavy duty shredder with integrated hydraulic and electrical control systems. It is an extremely large plant. Its feeding belt alone weighs 140 tons; the shredder weighs 80 tons; its router 25 tons; its motor 12 tons; and its feed rollers 20 tons. Due to its size and weight it is necessary for the shredder to be based on substantial concrete foundations which had to be erected when it was installed.

[10] In 2008, Murec and CISCO agreed to allow NSM to install the shredder on a portion of the services site. This portion is referred to in the papers as ‘the shredder site’. For illustrative purposes a diagram of the CISCO portion, the leased portion, the shredder portion and the slag handling area (being the remainder of the services side excluding the shredder portion) is attached to this judgment.

[11] During the course of 2010, due to a change in economic circumstances, MRS decided to dispose of CISCO and its business. Pursuant to this decision, the respondents’ attorneys wrote to NSM on 6 May 2011 and instructed it to vacate both the leased portion and the shredder portion by 8 August 2011. The same day, the attorneys sent a notice to Murec, terminating its lease of the services site and requiring it to vacate by 8 November 2011. This notice was later withdrawn and a second notice of termination was given to Murec on 3 June 2011 requiring it to vacate by 31 December that year. When both NSM and Murec indicated that they would not vacate their respective portions of the property, the respondents applied to court for their eviction.

[12] In seeking to avoid eviction, the appellants relied upon the oral agreement mentioned at the outset of this judgment. They drew attention to an NSM board meeting held on 19 June 2008 at which the board had agreed to purchase a heavy duty shredder at an anticipated cost of some R45 million on condition that a long-term lease be concluded with CISCO relating to the property on which the shredder would be erected. On behalf of the appellants, Mr Michael Movsas and Mr Dave Kassel, both members of the NSM board, alleged they had met with Mr Robert Noonan who was on the boards of both MRS and NSM, but who had not attended the meeting of 19 June 2008. They stated that to the best of their recollection, this meeting occurred at the Johannesburg airport. They alleged that Noonan was fairly assertive at the meeting and, after referring to a competitor known as 'SA Metal', which had ordered a steel rolling mill, had stated that M&R could not be in the hands of its opposition and would therefore purchase a shredder if NSM did not do so. Kassel and Movsas alleged that they then told Noonan that 'as he was aware the board of [NSM] had resolved to proceed with the purchase of a shredder on condition that a long-term lease agreement be entered into with [CISCO] in respect of the premises where the shredder was to be located'. They went on to say that they had stated that if Noonan agreed on behalf of M&R that such a lease would be entered into, they (on behalf of NSM) would confirm that NSM would acquire and install a shredder that would meet M&R's requirements. They further alleged that Noonan had immediately responded by saying that M&R would be prepared to let the premises to NSM for a further period of ten years following 31 October 2010 when the existing lease would lapse, and that:

'After a brief discussion, Noonan . . . Kassel and [Movsas] agreed that following the expiry of the existing lease on 31 October 2010, [NSM] would continue occupation of the premises (including the premises in which the shredder would be installed) on the same terms and conditions as those recorded in the existing lease and that such occupation would be for a period of at least ten years commencing 1 November 2010. The rental was to be on the basis of the built-in escalation in the existing lease over the ten year period.'

[13] Movsas alleged that after this he had advised NSM's remaining board members who were not M&R appointees that agreement had been reached with M&R as to the terms which would govern NSM's continued occupation of the leased premises, including the portion on which the shredder would be installed.

[14] The respondents denied that this meeting had ever taken place or that Noonan had ever purported to conclude an oral lease on such terms. According to them there had been two meetings at the airport attended by Noonan and Movsas. The first had been much earlier, on 17 March 2008, and had been attended by various other persons, including a representative of SA Metal; that the discussions had centred on whether the SA Metal's increase in its steel mill capacity would result in there being insufficient shred to satisfy both its and CISCO's requirements; and that there had been no discussion concerning a lease for NSM. The second, they alleged, had been on unspecified date at which Noonan had indeed said that unless NSM installed a shredder, M&R would purchase one itself. M&R averred this latter meeting had taken place well before the June 2008 board meeting.

[15] The respondents also alleged that Noonan had in any event not been authorised on behalf of any entity in the M&R group to conclude a ten-year lease which, they said, would have been highly unusual and would have required the approval of M&R's board of directors – which had neither been sought nor obtained. I intend to deal with this issue at the outset.

[16] Although the appellants denied that Noonan lacked the necessary authority to bind M&R, it was contended by the respondents that this amounted to no more than a bare denial which did not raise a genuine and bona fide dispute on the issue. They therefore contended that the matter had to be decided on what they had alleged the facts to have been viz that only a board decision, and not Noonan acting alone, was required to conclude a long lease.

[17] Of course NSM was not a party to whatever authorisation M&R may or may not have given to Noonan relevant to the conclusion of a lease, and the original denial in the appellants' answering papers did in fact consist of no more than the bold assertion that M&R's appointee to the NSM board (Noonan) 'was authorised to and agreed to a lease for a period of at least ten years'. However, as pointed out by this court in *Wightman*[1]:

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1 *Wightman t/a J W Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA); [2008] 2 ALL SA 512, 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 bare denial meets the requirement because there is no other way open to the disputing party and nothing more can 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' .

[18] Here, not only were the appellants probably not privy to the extent of the authority M&R had vested in Noonan, but in a further affidavit Movsas stressed that it had taken seven years for the amending agreement to be concluded after the original lease had lapsed; that during that period Noonan had been intimately involved in the interactions in regard to the conclusion of a fresh lease and that he had, effectively, been allowed to represent M&R in the negotiations which led to the amending agreement. Consequently there was no reason to suspect that he lacked authority to represent M&R in concluding another lease on its behalf.

[19] These are valid considerations. Accordingly, in the light of the respondents' failure to either attach any documentation or provide any other evidence to demonstrate Noonan's alleged limited authority or showing that the consent of M&R's boards was a prequisite for the conclusion of a ten year lease, in my view the appellants made sufficient allegations relevant to Noonan's actual authority for there to be a genuine and bona fide dispute between the parties on the issue. The matter must therefore be decided on the basis of the averments made by appellants in their affidavits ie that Noonan in fact had the necessary authority.

[20] Consequently, I turn to consider the respondent's contention that the appellants' allegation of the conclusion of an oral lease for a period of ten years can be rejected on the papers. In attacking what was referred to as the 'implausibility' of the appellants' allegations concerning an oral lease agreed at the Johannesburg airport, counsel for the appellant argued that there were eight main reasons why the appellants' version could not be seriously entertained, expressed by counsel as the following:

(a) First, the documentation shows that M&R's approach had consistently been

that any new lease agreement could only be concluded in tandem with a new supply agreement, the terms of which could only be agreed once there was certainty as to what supply arrangements would be permitted under competition law. This was crucial as the Competition Commission had already found that the original supply agreement between CISCO and NSM involved the commission of prohibited practices. As it had not been possible to conclude a new supply agreement before the alleged oral lease was concluded, and as indeed there still remained great uncertainty as to what supply arrangements would be permitted under competition law at that time, it was wholly improbable that M&R would have committed to a long-term lease in 2008.

(b) Second, there was no correspondence or any other document either confirming the terms of the alleged oral agreement or supporting the allegation that such an agreement had been reached. In particular, none of the NSM's board meeting minutes pertinently reflect that such an agreement had been reached.

(c) Third, as none of the other agreements between any of the interested parties relating to the premises, or indeed the supply agreements, were for a period of ten years, it was wholly improbable that Noonan, 'off the cuff' so to speak, would agree to a ten year lease.

(d) Fourth, in the light of the conclusion of written lease agreements relating to the premises in the past, it was extremely unlikely for M&R to have concluded an oral lease for a period of ten years.

(e) Fifth, that the rental allegedly agreed under the oral lease was unrealistic as the lease purportedly encompassed a bigger area than that leased under the amending agreement (it included not only the portion NSM had leased but also the shredder portion as well) but at the same rental charged for the leased portion alone, and at a rental which was well below the current market value. This was all the more unlikely as under the oral lease M&R would have been liable for all electricity consumed on both the leased portion and the shredder portion.

(f) Sixth, it was inherently improbable that discussions about a shedder to be installed on the shredder portion would have led to the conclusion of a lease relating to both the leased portion and the shredder portion on the same terms as the lease agreement, particularly as: the occupation and use of the shredder portion was governed by the Murec agreement which was to endure indefinitely subject to the right of either CISCO or Murec to terminate it on six months' written notice; any new

lease agreement would therefore have involved a variation of the parties' rights under the Murec agreement; given that the shredder portion was not the subject of the lease agreement, it made no sense for a purported long-term agreement in respect of the shredder portion to mirror the terms of the lease agreement.

(g) Seventh, it was unlikely for the meeting at which Noonan told NSM that if it did not acquire a shredder M&R would do so, to have taken place after the 19 June 2008 board meeting of NSM. It was far more likely that this ultimatum had been given before that date which would have precipitated NSM's decision to purchase and install the shredder.

(h) Eighth, and finally, that as M&R were intending to purchase a shredder if NSM did not do so, there was no reason for it to agree to a long-term lease even for the shredder portion, as NSM was given no choice and was in no position to bargain.

[21] These factors, particularly collectively, do cast a measure of doubt on the appellants' version, which is certainly improbable in a number of respects. However, as the high court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below) unless they are 'so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[2] An attempt to evaluate the competing versions of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.

[22] As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'.[3] In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross examination, things turn out differently from the way they might have appeared at first blush.[4] As Megarry J observed in a well-known dictum in *John v*

2 Per Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55 ─ referring to the phrase used by Corbett CJ in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd* 1984 (3) SA 623(A) at 635C.

3 *Mathewson and another v Van Niekerk and others* [2012] ZASCA 12 para 7.

4 Cf *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 390F-H and *Sewmungal & another NNO v Regent Cinema* 1977 (1) SA 814 (N) at 819A-D ─ also an ejectment case.

Rees [1970] Ch 345 at 402:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[23] Moreover, it is also necessary to guard against approaching a case such as the present on the assumption that businessmen will act in a businesslike manner or with meticulous concern for the keeping of accurate records. All too often they do not. As Harms JA has pointed out:

'Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work.'[5]

This is all the more so in this case where there was not only a close symbiotic relationship between NSM and M&R, but where M&R also had representation on NSM's board and was therefore a party to its business plans and strategies. The closeness of the relationship between M&R on the one hand and NSM and Murec on the other may readily explain why the respective parties did not conduct their business relationships with greater formality. In particular it may well explain why agreement on a ten-year oral lease did not result in it immediately being reduced to writing. And in regard to this latter issue, it is significant, as Movsas pointed out, that it had taken years for the amending agreement to be reduced to writing despite consensus on its terms having been reached. Consequently, so he alleged, NSM's board had become accustomed to the slow processes that took place within M&R's organisation and that he therefore never entertained any doubts that M&R would honour the oral agreement. This is a telling comment, and in the light of the relationship between M&R and NSM and the previous delay that Movsas mentioned, his explanation cannot be regarded as being one which is so far-fetched or untenable that a court is justified in rejecting it merely on the papers.

[24] In addition, as is clear from what I have already said, the respondents' argument is based in various respects upon what was or was not said at a number of NSM board meetings, relying on the minutes kept of those meetings for that

5 *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 561G.

purpose. It is necessary to remember that minutes of board meetings do not purport to be a verbatim record of what was said; rather they tend to be a fairly terse synopsis of what was discussed, highlighting what the compiler, usually the company secretary, considered to have been of importance. Merely because something is not specifically recorded in a minute does not necessarily mean that it was not mentioned, even in passing, and this should be borne in mind when considering what effect the minutes have upon the probabilities.

[25] In the light of these remarks, it is clear that undue weight should not be accorded to the fact that the oral agreement the respondents rely upon was not specifically recorded in the minutes of any NSM board meetings. As clearly mentioned, the minutes of 19 June 2008 record that after a presentation had been made in regard to the installation of a Newell 300 HP heavy duty shredder at an anticipated cost of approximately R45 million, the board 'agreed to go ahead with installation of this shredder on condition that a long term lease agreement be entered into with CISCO where the shredder is to be erected'. While it is so that Noonan, M&R's representative on NSM's board, did not attend that particular meeting, he must have received the minutes as he attended the following NSM board meeting on 5 August 2008 when the minutes of the meeting of 19 June 2008 were confirmed and the shredder issue was again discussed. By then, according to the appellants, the meeting at the airport at which they alleged Noonan had agreed to bind M&R to a lease for ten years, had already occurred. Such a lease would have fulfilled the condition stipulated at the 19 June 2008 meeting as being necessary for the board to persist with the purchase of a shredder. Significantly, it did so persist. The acquisition of a shredder was discussed again at the board meetings of 20 November 2008 and 5 March 2009, both of which Noonan attended. Neither the minutes of these nor any other board meeting mention a failure to obtain the required commitment to a long term lease as a potential stumbling block to NSM making the substantial capital investment required to purchase a shredder. It is hard to conceive that no-one on the board ever thought about the issue, Noonan included. Movsas, however, stressed that after the agreement on the oral lease was concluded, he informed the other non-M&R members of the board thereof and, if he did, this might well explain why the issue was never raised pertinently at subsequent board meetings. By the same token, Noonan's failure to raise the issue could also

be explained by his knowledge of the lease. In these circumstances there really is nothing overtly sinister in the failure of the minutes to specifically record that oral agreement had been reached in regard to a long term lease to accommodate the new shredder.

[26] What the minutes do reflect are discussions relating to a potential lease between NSM and CISCO in regard to the shredder portion. It was argued that on the appellants' version no separate agreement for the shredder portion would have been necessary as that portion was included in the premises leased under the oral agreement, and the fact that these discussions took place is therefore destructive of that version. But the appellants explained that a specific lease relating to the shredder portions was required in order to obviate similar difficulties to those that had arisen in regard to the improvements they had effected on the leased premises after the lapse of the 1999 lease which had led to a dispute as to ownership of the gantry that took several years to resolve. A similar dispute could once more be a potential problem, bearing in mind that a good deal of civil construction was required to install a shredder. Moreover, as Movsas explained, the local municipality was prohibited from supplying electricity to premises that were being supplied by Eskom. Eskom was already supplying electricity to CISCO's premises but was unable to supply sufficient power to satisfy the demand of the shredder. Accordingly, in order to enable the shredder to operate using power from the municipality, it was agreed with CISCO for the property to be sub-divided to enable the municipality to supply power to the portion housing the shredder. Indeed it is recorded in the minute of an NSM board meeting held on 12 May 2011 that the sub-division had been effected, that a municipal substation had been commissioned from which the shredder was being powered, and that NSM was being billed directly by the municipality.

[27] In the light of the proposed sub-division, Movsas explained that it was desirable for a separate lease relating to the shredder portion to be concluded, despite that portion having already been part of the premises leased under earlier oral agreement. A separate lease also had the advantage of recording that NSM was the owner of the shredder and that it was not a permanent fixture that acceded to the property. This is by no means an improbable explanation for the parties' discussions in regard to a separate lease for the shredder portion.

[28] In this regard, it is also significant that after the original lease agreement between CISCO and NSM had lapsed in June 2000, no formal lease relating to the lease premises was concluded until 13 March 2007 when agreement was reached on the 'amending agreement'. The fact that both sides conducted their affairs in such an informal manner is probably the product of the close relationship between them. This relationship appears also to have been the reason why, when NSM installed the shredder on the shredder portion (being part of the premises subject to the Murec lease), it did so without any formal agreement having been concluded and without thereafter paying any rental.

[29] In considering the inherent probabilities, it seems to me, as was strenuously argued by the appellants, that it is highly unlikely, particularly given the concern expressed at the board meeting of 19 June 2008 that the shredder should only be acquired if M&R would commit itself to a long-term lease, that NSM would then go ahead and incur the substantial capital expenditure required to acquire and install the shredder if it had not obtained such a commitment. This must also be considered in the light of the events which occurred at the board meeting on 2 December 2010 when M&R indicated it proposed to close down CISCO's operations. A discussion about the shredder followed immediately after this revelation. Movsas recorded that NSM board had approved and entered into the shredder project with the commitment from M&R to extend the necessary lease and that M&R would be going back on its previous assurance if it now refused to execute a written lease. Another director stated that he would be 'shocked' if M&R would not honour its commitment to execute a written lease. Faced with this indignation, Noonan appears not to have denied having committed M&R to a lease. Instead he stated that NSM needed to write to M&R in regard to the issue. If ever there was a time for Noonan to have alleged that he had not committed M&R to a lease, this was it. He did not do so and his failure in that regard can, at the very least, be interpreted as an implied admission of that with which he was being confronted, namely, that he had indeed committed M&R to a lease.

[30] I do not think that any useful purpose would be served by attempting to analyse the various allegations, minutes, correspondence and other documentary

evidence in any greater detail. Suffice it to say that there are probabilities and improbabilities in the versions of both sides. But, as I have already stressed, that is not the issue. In the light of the facts as I have already mentioned, it does not seem to me that, even though the appellants' version is improbable in certain respects, it can on the papers be rejected as palpably false in regard to the allegation that on oral long-term lease had been concluded, as both Movsas and Kassel alleged was the case. In my view, the high court erred in reaching the contrary conclusion.

[31] Both sides were agreed that if this court should find that the high court had reached the wrong conclusion, the matter should not be referred for the hearing of oral evidence and that the appropriate course would be to allow the appeal and dismiss the application.

[32] Finally, I must deal with the costs of two opposed interlocutory applications which had been awarded against the appellants: the first relating to a discovery of certain documents pursuant to a rule 35(12) notice; the second relating to the question of urgency. The costs of both these applications were reserved for decision in the main application. In dealing therewith, the high court observed that the present respondents had been substantially successful in both instances and should be awarded their costs. This conclusion was attacked on appeal, but with no real force. In my view, the respondents indeed achieved substantial success and, therefore, there seems to be no reason to interfere with the high court's decision in the exercise of its discretion to order the appellants to pay such costs, including the costs of two counsel where so employed.

[33] On the other hand, there is reason to interfere with the scale on which those costs were awarded. Persuaded that the appellants' allegations in their answering affidavits had been fabricated, the high court awarded costs on the scale as between attorney and own client. But as is apparent from what I have set out above, the high court erred in finding the appellants' case to be a fabrication and, in these circumstances, I see no reason for the appellants to pay costs on a punitive scale. The attorney and client award thus cannot be allowed to stand. This will be reflected in the order below.

[34] In the result the following order is made:

1. The appeal succeeds, and the order of the high court is set aside and replaced with the following:

‘(a) The application is dismissed.

(b) The applicants are to pay the respondents’ costs, jointly and severally, the one paying the others to be absolved.

(c) The respondents are to pay the applicant’s costs of the interlocutory proceedings on 31 August 2011 and 13 September 2011, jointly and severally, the one paying the other to be absolved.

(d) The above orders as to costs shall include the costs of two counsel where employed.’

2. The respondents are to pay the appellants’ costs of the appeal, including the costs of two counsel, jointly and severally, the one paying the others to be absolved.

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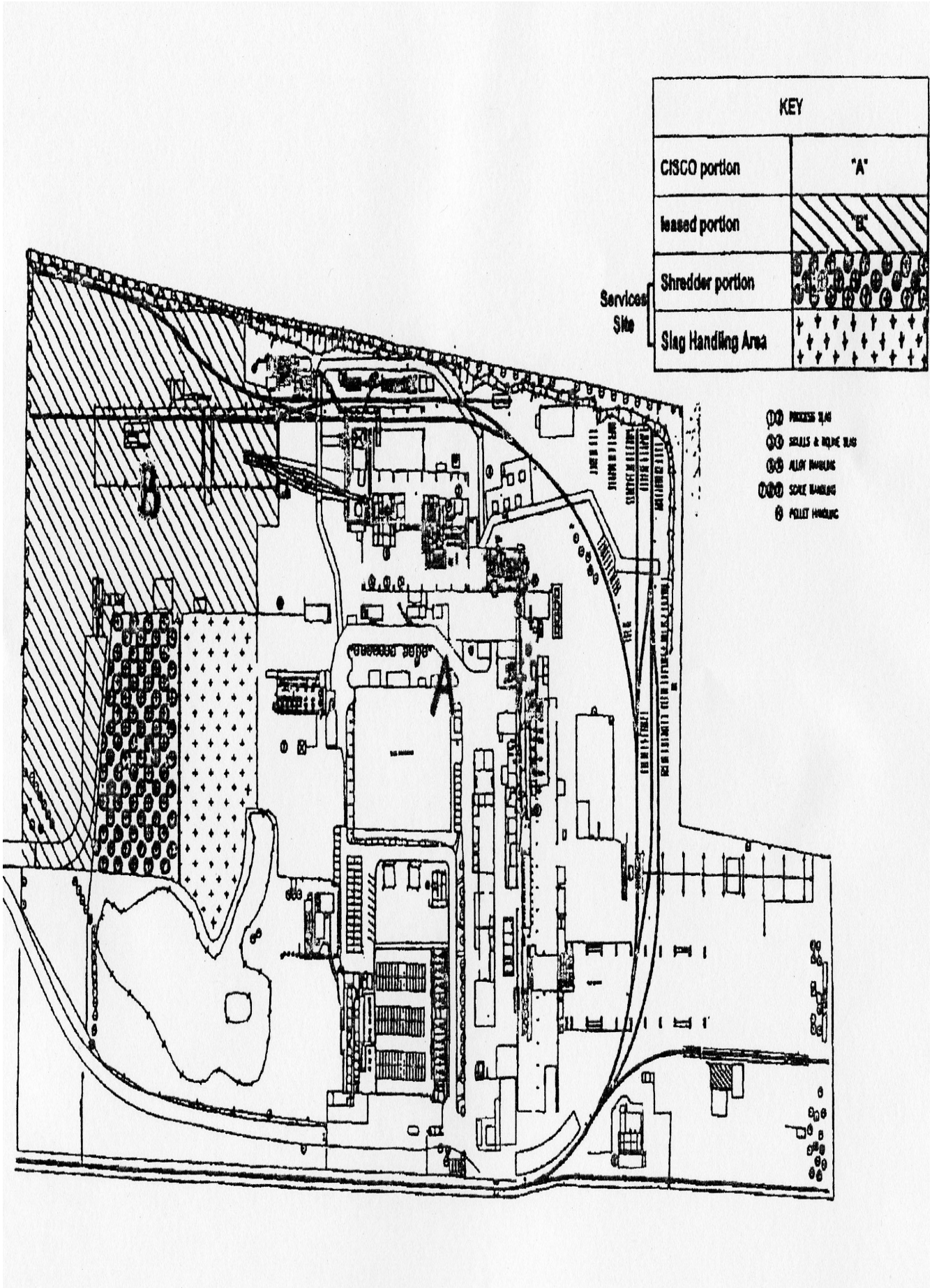
L E Leach

Judge of Appeal


KEY
CISCO portion
"A"
leased portion
"B"
Shredder portion
Services Site
Slag Handling Area
A
B

APPEARANCES:

For Appellant:	A Subel SC (with him R Howie) Instructed by: Werksmans Attorneys, Sandown, Sandton Naudes Inc, Bloemfontein
For Respondent:	W H G van der Linde SC (with him P B J Farlam) Instructed by: Webber Wentzel, Johannesburg Symington & De Kok, Bloemfontein