IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 6247/07

In the matter between

E & D MOTORS (PTY) LTD Plaintiff

and

SPEARHEAD PROP HOLDINGS LIMITED Defendant

JUDGMENT DELIVERED ON 20 FEBRUARY 2008

ZONDI, J

Introduction

[1] The plaintiff seeks to enforce against the defendant an option to purchase immovable property known as Garage No.1, Ottery Hypermarket Shopping Centre, Ottery Cape as referred to in a written lease agreement concluded on 19 February 2003 between Quantum Leap Investments 230 (Pty) Ltd (Quantum Leap) as the lessor and the plaintiff as lessee.

[2] In its particulars of claim the plaintiff seeks an order requiring the defendant to:

(a) "forthwith take all steps necessary in order to procure the approval from the Cape Town City Council for the sub-division of the property demarcated in red on Annexure "B" to Plaintiff's Particulars of claim;

(b) should such sub-division be granted, defendant forthwith take all steps necessary in order to pass transfer to plaintiff of the said property".

Factual Background

[3] During early 2002, Quantum Leap acquired the shopping centre property known as the Ottery Hypermarket Shopping Centre.

[4] Mr M.S. Adams and Mrs. N. Adams, negotiated a lease of certain premises forming part of the Ottery Hypermarket Shopping Centre described as "garage No 1, Ottery Hypermarket Shopping Centre, Ottery", from Quantum Leap.

[5] Mr. and Mrs Adams initially represented the plaintiff as the intended lessee, but subsequently advised that the tenant would be Expectra 534 (Pty) Ltd.

[6] During or about October 2002, Expectra 534 (Pty) Ltd. and Quantum concluded a written lease agreement (the "Offer to Lease") in respect of certain premises known as garage No 1, Ottery Hypermarket Shopping Centre, Ottery (hereinafter referred to as "the leased premises"). In particular clause 10(b) of the offer to lease provides:

"on acceptance of this Offer the Lessor's standard Agreement of Lease will be prepared and signed by both parties in substitution of this Agreement within thirty (30) days of date hereof. In the event that both or either of the parties refuse or fail to sign such standard Lease Agreement, then this Agreement shall continue to bind both parties".

[7] Following the conclusion of the Offer to Lease, Quantum Leap acceded to the request of Mrs Adams that the plaintiff be substituted as lessee and reflected as such in the final lease agreement. On 19 February 2003, the plaintiff and Quantum Leap concluded a written lease agreement in respect of the leased premises.

[8] Each of the two agreements included a provision in terms of which Quantum Leap extended to the plaintiff an option to purchase the leased property.

Clause 16.1 of the Offer to Lease had the following special conditions:

"The landlord will provide the tenant with an option to purchase the property for R2, 000,000.00 excluding Vat for a 24 – month period from date of occupation, subject to approval from Pick 'n Pay, approval from the City Council for subdivision and approval from Quantum Leap Investments 230(Pty) Ltd. reciprocal access and parking agreement."

Clause 7 of Schedule "A" to the lease agreement dated 19 February 2003 provided:

"7.1 This lease automatically entitles the tenant with the first option to purchase the said property as per annexure "E", for the purchase price of R2 000 000.00 (Two Million Rand) within 2 (Two) years of date of signature hereof, the property totalling 3445sqm i.e. 1779sqm in addition to the leased premises.

7.2 the said property referred to in 7.1 above, shall constitute the entire area leased in terms hereof i.e. 847sqm plus an additional 529sqm for the extension and 290sqm for the undercover vehicle display, totalling 1666sqm.

7.3 it is further hereby expressly agreed that the tenant will be entitled to upon signature hereof also utilise the additional space referred to above (819sqm) which is situated at the front of the leased premises

[9] The plaintiff commenced building alterations and additions to the existing structures during November 2002 and took occupation during or about February 2003.

[10] By written deed of sale executed on 25 February 2003 Quantum Leap sold the leased premises to the defendant, who received transfer pursuant to this purchase, on 15 June 2003. Clause 6.4 of the said deed of sale provided:

"6.4 The Seller warrants and undertakes to the Purchaser –

6.4.1 *the seller is the owner of and has the absolute right to dispose of the property to the purchaser in accordance with the provisions of the agreement;*

6.4.2 *no agreements have been entered into by the Seller whereby any restrictive conditions or servitudes or other real rights attach to the property or in terms of which any person, natural or corporate, is entitled to obtain any real rights to the property, save for existing tenant, Ottery Toyota, who have limited rights to purchase their section subject to a subdivision of the land;"*

[11] Shortly before 14 July 2004, the plaintiff by letter addressed to the defendant exercised the option conferred by clause 7.1 of the final lease agreement. The relevant portions of the said letter state:

"2. *In terms of clause 7.1 of the aforesaid lease, we were granted a first option to purchase the property as demarcated on annexure "E" to the lease for the purchase price of R2 000 000.00, which option we are entitled to exercise in a period of two years after signature of the lease.*

3. *This letter serves as notification that we herewith exercise our option to purchase the said property and accordingly herewith tender*

payment of the said sum of R2 000 000.00 against transfer of the property.

4. *We understand that the area which we are herewith purchasing may have to be sub-divided from the remainder of the property and to the extent that you require any assistance from us in that regard, we herewith also tender our assistance.*

5. *Kindly inform us who would be the attorneys attending to the transfer and how long you envisage it will take before the transfer is registered. To the extent further that we may be able to negotiate a reduced transfer fee with our own attorneys, we shall also be pleased to hear whether you would have any objection to the appoint (sic) attorneys of our choice to register the transfer"..*

[12] In reply to the plaintiff's letter, the defendant in a letter dated 14 July 2004 informed the plaintiff as follows:

*"**RE: OTTERY TOYOTA***

Thank you for your undated letter noting your exercise of the option.

As was agreed with Quantum Leap and as is expressly provided for in the offer to lease, your exercise of the option is subject to:

1. *approval from Pick 'n Pay;*

2. *approval from the City Council for sub-division; and*

3. *approval from Quantum Leap Investments 230 (Pty) Ltd (now ourselves given the purchase of the Ottery Hypermarket) reciprocal access and parking agreement.*

We confirm that we will be approaching Pick 'n Pay in order to establish whether or not they are prepared to grant their consent, whereafter, we will revert to you".

[13] The plaintiff in an undated letter responded to the defendant's letter as follows:

"*Thank you for your letter dated 14 July 2004.*

We have considered the lease and option agreement incorporated therein and record that, in our reading of the agreement, the option is not subject to any of the conditions referred to in your letter dated 14 July. Consequently, Pick 'n Pay's approval is not a requirement for validity of the agreement, neither any agreement regarding access and parking. On this point we have no problem in negotiating a sensible and mutually acceptable arrangement regarding access and parking, but our point is that the conclusion of such and arrangement is not a prerequisite for the validity of the exercise for the option.

With regards to City Council's approval for sub-division, we herewith request that you immediately take the necessary steps to obtain the approval and also tender any assistance you may require from our side to obtain the said approval.

We look forward to hearing from you".

It is against this background that the issues between will have to be resolved.

The issues between the parties

[14] The plaintiff alleges that the defendant is bound, in substitution for Quantum Leap, by the terms of the option in clause 7.1 of the final lease agreement on the three bases. Firstly, it is suggested by the plaintiff that after the purchase of the property by the defendant "an assignment of all Quantum's rights and obligations in respect of the final lease agreement" was made to and accepted by the defendant. In its further particulars the plaintiff suggests that such assignment is provided for in the provisions of clauses 5.2.2 and 6.4.2 of the sale agreement, flows from the principle of "huur gaat voor koop" and was tacitly agreed. Secondly, the plaintiff contends that the defendant is substituted for Quantum Leap simply on the basis that it purchased and took transfer of the property with "full knowledge of the said option". Thirdly, it is suggested by the plaintiff that the defendant acknowledged the existence of a valid option and the exercise thereof, albeit alleging that it was in different terms and, in particular, subject to conditions.

In further particulars, the plaintiff relies upon correspondence between it and the defendant.

[15] On the other hand the defendant denies firstly, that it has become party to the "first option" on any of the bases relied upon by the plaintiff and accordingly denies that the option was capable of being exercised against the defendant (as opposed to Quantum); and that the purported exercise thereof by the plaintiff in relation to the defendant gave rise to any obligations enforceable against the defendant. Secondly, the defendant denies that the "first option", even as between Quantum and the plaintiff, contained a sufficiently clear description of the property as to meet the requirements for validity in terms of section 2(1) of the Alienation of Land Act (No 68 of 1981). Thirdly, it denies that the alleged agreement (resulting from the purported exercise of the "first option") is contained in a "deed of alienation signed by the plaintiff and the defendant or by the agents acting on their written authority" as required for the existence of a valid contract of sale of the property in terms of section 2(1) of the Alienation of Land Act (no 68 of 1981). Fourthly, the defendant avers that the "first option" as contained in the final lease agreement between Quantum Leap and the plaintiff falls to be rectified in a number of respects, so as to reflect that it was subject to the three conditions (as framed in the agreement concluded by the acceptance of the 'Offer to Lease'); and the option price as "R2 000 000.00 excluding Value Added Tax" (as set out in the original agreement concluded by the acceptance of the 'Offer to Lease'). Finally the defendant pleads that, to the extent that the defendant might be held to have become party to a valid and enforceable sale agreement, the plaintiff's rejection of the claim for rectification constitutes a repudiation of the (rectified)

agreement and that the defendant has accepted such repudiation and cancelled the agreement.

[16] The parties have agreed that all issues relating to the plaintiff's alleged claims for damages , including the defendant's pending exception, are to be held over for later determination (if necessary).

Whether clause 7 of the lease agreement constituted an option to purchase the leased property.

The plaintiff relies upon the option in clause 7.1 of the lease agreement for the relief it seeks. The question is whether clause 7.1 of the lease agreement constituted an option to purchase the leased property. The answer to this question depends upon the true construction of clause 7.1 of the lease agreement, which reads as follows:

> *"7.1 This lease automatically entitles the tenant with the first option to purchase the said property as per annexure "E", of the purchase price of R2 000 000.00 (Two Million Rand) within 2 (Two) years of date of signature hereof, the property totalling 3445sqm i.e. 1779sqm in addition to the leased premises".*

The approach to be followed in construing the provisions of the written contracts is of course to be found in **Scottish Union & National Insurance CO. Ltd v Native Recruiting Corporation Ltd** 1934 AD at 465 – 6:

"We must gather the intention of the parties from the language of the contract itself, and if that language is clear, we must give effect to what the parties themselves have said; and we must presume that they knew the meaning of the words they used. It has been repeatedly decided in our Courts that in construing every kind of written contract the Court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the Court may modify the words just so much as to avoid that absurdity or inconsistency but no more."

[17] It is clear that the right granted to the plaintiff by Quantum Leap by clause 7.1 of the lease agreement is a right of option. Option is a unilateral contract binding the grantor and the person to whom it is given acquires a right, which he can exercise until the right expires. (**Fram v Rimer** 1935 WLD 10). For an option to be valid it is essential that the price be fixed or determinable (**Hattingh v Van Rensburg** 1964 (1) SA 578 (T)).

[18] The defendant does not dispute the existence of the option as appears in the letter addressed by it to the plaintiff on 14 July 2004:

"As was agreed with Quantum Leap and as is expressly provided for in the offer to lease, your exercise of the option is subject to:..."

It is the exercise of the option that the defendant disputes.

[19] In my view the clearly stated intention of the plaintiff and Quantum Leap in the relevant provisions was to confer within the period of two years of date of signature of the lease agreement on the plaintiff a right to purchase the leased property for the sum of R2m subject to certain conditions.

[20] The next question is whether the option may be exercised against the defendant (a successor in title) or whether it must still be exercised as against the grantor of the right (Quantum Leap) and whether section 2(1) of the Alienation of Land Act 68 of 1981 should be complied with in exercising the option.

It is to these questions that I now turn.

Exercise of Option Against Successor

[21] *Mr Smit* who together with *Mr Masuku* appeared for the plaintiff, submitted that the plaintiff correctly exercised the option against the defendant as Quantum Leap's rights and obligations were assigned to the defendant when the defendant purchased the property and took transfer of the property with full knowledge of the option.

[22] On the other hand *Mr Mullins*, who together with *Mr Brown* appeared for the defendant, submitted that when exercising an option, the option holder is required to exercise that option against the grantor of option as the option holder's contractual rights remain in relationship to the grantor and are not transferred or assigned to the successor in title under the ambit of the maxim *huur gaat voor koop*. He argued that it is only incidents of the lessor – lessee relationship (ie those which arise in relation to occupation or "gebruiksreg") which are transferred in terms of the principle – and not those that fall outside of that direct relationship (such as those that may relate to *dominium* of the property).

[23] It is common cause that the lease agreement which contains a first option was between the plaintiff and Quantum Leap. Quantum Leap subsequently sold the leased property to the defendant while the plaintiff was in occupation of the leased property and it is not suggested by the defendant that the defendant was unaware of the existence of the option when it acquired the leased property from Quantum Leap.

[24] The question is whether the option may be exercised against the defendant being a successor in title.

[25] *Mr Smit* sought to found the defendant's liability on the basis of the *huur gaat voor koop* principle. He argued that the defendant had knowledge of the option when it bought the property from Quantum Leap. He accordingly submitted that the defendant became bound by the option agreement. In support of his submission he referred to the decision of **Genna-Wae Properties (Pty) Ltd v**

Medio-Tronics (Natal) (Pty) Ltd 1995 (2) SA 626 (AD) in which Corbett CJ stated at 939A-C:

> *"Accordingly, I hold that in terms of our law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted ex lege for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise to observe his obligations under the lease. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract. This is the impact of huur gaat voor koop in our modern law".*

[26] *Mr Mullins* submitted that the *huur gaat voor koop* principle does not transfer all rights under the lease and he argued that an option was one of such rights. He submitted that this Court ought to follow the approach of the Full Bench of this Division in **Shalala and Another v Gelb** 1950(1) SA 851 (C). In **Shalala** case the plaintiffs had on 11 July 1947 entered into a written lease agreement with one Fabian. The lease was for the period of two years and the lessee had the right to renew it for an additional period of 5 years "subject to the same terms and

conditions as are contained herein". By written deed of sale executed on 14 April 1948, Fabian sold the leased premises to the defendant who took transfer of the property on 19 May 1948. A special condition in the deed of sale between Fabian and defendant reads:

> **"The Purchaser to take over the existing tenants, according to present law"**

[27] On 15 July 1948 the plaintiffs addressed a letter to the defendant notifying it that they had exercised the option conferred in the lease and renewed the lease for an additional period of five years reckoned from 1 July 1949. The plaintiffs brought an action against the defendant for a declaratory order that the defendant was bound by the right of renewal, that such renewal had been validly exercised by the plaintiffs and that, consequently, they were entitled to remain in occupation of the premises, as lessees for an additional period of 5 years from 1 July 1949. In its plea the defendant admitted that he was bound to allow plaintiffs to remain in occupation of the premises until 1 July 1949 on the terms and conditions set out in the original lease, but denied that it was bound by the right of renewal contained in the lease.

[28] The question before the court was whether the right of renewal fell within the ambit of the maxim *"huur gaat voor koop"*. To answer this question the court had this to say at 864 – 5:

"The tenant's right to renew his lease forms a very material part of his 'interest in the land', and the above stated principle of Barnhart v Greenshields can, subject to the qualification about to be stated, I think, reasonably be applied to the present enquiry which - I must emphasise - relates solely to the question of whether the purchaser is bound by a right of renewal. There may be cases where a collateral agreement, though appearing in a document of lease, is clearly severable from the conditions on which the land is let and, as such, does not fall within the maxim huur gaat voor koop (cf. In re Umkomaas Central Sugar Mill Ltd. in Liquidation (1916 NPD 178)). I am not now directly concerned with such collateral agreements and I wish to reserve my opinion thereon, save to say that, so far as concerns the present enquiry, an option to purchase - with which we were, not unnaturally, much pressed by Mr. Schock - is in my judgment readily distinguishable from an option to renew. An option to purchase contained in his lease confers upon the tenant the right to acquire dominium of the property: the option to renew relates to an extension of the tenant's right of occupation of the property - to the continuation of the relationship of landlord and tenant. The maxim huur gaat voor koop has no application as between competitors for dominium. When the innocent purchaser has acquired transfer, his right to the dominium of the property is clearly preferential to the personal right of the tenant (as against the vendor landlord) to obtain dominium by exercising his option to buy. On the other hand, the whole purpose of the maxim huur gaat voor koop is to protect the tenant's continued occupation of the leased premises in competition with the claim for occupation based upon the purchaser's subsequently

acquired ownership of the property: and, for the reasons I have given above, I am of opinion that the right of renewal should, for the purposes of the maxim huur gaat voor koop, be regarded as part of the tenant's right of occupation. I accordingly am, with respect, unable to agree with Mackeurtan Sale of Goods (4th ed., p. 85) that, so far as concerns a right of renewal in relation to the maxim huur gaat voor koop, all the tenant has is 'the right to become a lessee, and not the rights of a lessee'. I do not think that, for the purposes of the present enquiry, the right of renewal should be regarded as thus severable from the lease itself".

[29] In my view **Shalala** case does not provide an answer to the defendant's submission as the Court there specifically had to consider the tenant's right to renew the lease and the reference to an option to purchase was *obiter.*

[30] *Mr Mullins* argued that both options and rights of pre-emption fall outside of the ambit of the "*huur gaat voor koop*" principle. In support of his contention he referred to a passage in the Full Bench of the Transvaal Provincial Division in **Hirschowitz v Moolman and Others** 1983(4) SA 1 (T) at 11b-c:

"I agree therefore with the contention advanced by the respondents' counsel that the doctrine of huur gaat voor koop applies not only to purchasers of leased property but also to gratuitous successors in title of the original lessor, such as donees and legatees and that that doctrine obliges particular successors in title (whether onerous or gratuitous) of the original lessor to respect the continued right of occupation of the lessee,

but does not impose any obligations upon such successors to abide by other personal or collateral obligations undertaken by the original lessor, such as options or rights of pre-emption".

[31] In **Hirschowitz** case the applicant had sought to enforce a pre-emptive right contained in a lease of a farm against the pre-emption grantor who had subsequently offered an option to purchase the leased premises to a third party. The persons against whom the applicant sought to enforce the right of pre-emption had not signed the contract. The Court was thus correct to classify the pre-emption right as personal or collateral obligations.

[32] In my view the effect of the *huur gaat voor koop* principle is that a lessee acquires a real right in respect of the leased property. The basis of the real right enjoyed by the tenant in occupation under a lease is the constructive notice which derives from circumstances of his occupation of the premises. When the leased property is sold the lessor/seller divests itself of its obligations under the lease and upon transfer of the property the obligations are transferred to the purchaser/lessor. In other words the right and corresponding obligation is transferred with the rights and obligations of the lease to the new owner.

[33] The question is whether when Quantum Leap sold the leased premises to the defendant and when the latter subsequently took transfer of the property they had intended their transaction to be subject to the lease and option. The common intention of the parties must be ascertained from the language used in the instrument and read in its contextual setting and in the light of any admissible

evidence. See **Sun Packing (Pty) Ltd v Vreulink** 1996(4) SA 176 (A) at 184 A-D (per Nestadt JA)

[34] In the offer to purchase concluded between Quantum Leap and the defendant the former had warranted and undertaken to the defendant that "no agreements have been entered into by the seller whereby any restrictive conditions or servitudes or other real rights attach to the property ..., save for existing tenant, Ottery Toyota, who have limited rights to purchase their section subject to a subdivision of the land"

[35] By letter dated 14 July 2004 the defendant informed the plaintiff:

> *"As was agreed with Quantum Leap and as is expressly provided for in the offer to lease, your exercise of the option is subject :-*
>
> 1. ....
> 2. ....
> 3. ....
>
> *We confirm that we will be approaching Pick 'n Pay in order to establish whether or not they are prepared to grant their consent, whereafter, we will revert to you".*

[36] A proper construction of all the relevant documents in the light of the surrounding circumstances satisfies me that Quantum Leap had intended the

lease and option to bind its successor in title. The defendant therefore purchased the leased property subject to the lease and subject to the option. It is clear from the sale agreement (clause 6.4.2) that the nature and extent of the plaintiff's interest in the leased property was disclosed to the defendant. It then acquired the property subject to the interest which the plaintiff had in the property. Not only was the defendant aware of the plaintiff's right to purchase the leased property but also acknowledged and recognised it. This fact is demonstrated in the letter the defendant wrote to the plaintiff on 14 July 2004 in which it confirmed that it was aware of the plaintiff's right and that it would approach Pick 'n Pay to ascertain if it was prepared to grant its consent. In the result the defendant's contention, that it is not bound by the option agreement, is dismissed.

Alienation of Land Act

[37] The other argument advanced by the defendant concerned the non-compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981, the relevant terms whereof read as follows:

> " *No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in the deed of alienation signed by the parties thereof or by their agents acting on their written authority*"

[38] *Mr Mullins* submitted that both the option and any agreement of sale resulting from the valid exercise thereof, would constitute agreements for the

"alienation of land" and therefore they had to comply with the provisions of section 2(1) of Alienation of Land Act. He argued that in *casu*, the parties to the agreement are Quantum Leap and the plaintiff and there is no deed of alienation to which both the plaintiff and the defendant are parties and the purported exercise of the option cannot result in a concluded agreement complying with the formalities prescribed by the Act. *Mr Mullins* accordingly submitted that the mere purported exercise of the option by the plaintiff as against the defendant cannot meet the requirements of the provisions of the Alienation of Land Act.

[39] It is correct that an option to buy land must be embodied in a written document signed by the grantor (**Venter v Birchholtz** 1972 (1) SA 276 (A) at 284 c-d). The provisions of section 2(1) do not stand in the way of the plaintiff. The option agreement in the present matter was transferred by virtue of the principle *huur gaat voor koop* from Quantum Leap to the defendant which entitled the plaintiff to exercise its rights as against the defendant directly. The option which the plaintiff seeks to exercise is contained in the lease agreement which it concluded with Quantum Leap. In other words the defendant was substituted ex lege for Quantum Leap (the original lessor) and the latter fell out of the picture. On being substituted the defendant acquired by operation of law all the rights and obligations of Quantum Leap under the lease. It is not suggested by the defendant that the plaintiff failed to observe the lease agreement incorporating the option which it now seeks to exercise.

[40] It was also argued by the defendant that the purported exercise of the option by the plaintiff as against the defendant failed to satisfy the requirements of

the Alienation of Land Act in that the subject matter of the sale is not clearly identifiable from the agreement itself.

[41] The property to be subdivided and transferred in terms of the option is identified as being that on annexure "E". In **Van Wyk v Rottchers Saw Mills (Pty) Ltd** 1948 (1) SA 983 (A) the Court in dealing with the question of adequacy of the description of the *res vendita* had this to say at 989:

> *"Clearly, if sec. 30 be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to a dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was really no dispute at all between the parties. Such construction would be an encouragement to dishonesty and cause loss of revenue to the State and it should be avoided if possible.*
>
> *In truth there is no necessity so to construe sec. 30 because even if, as has been suggested, the purpose of sec. 30 was to decrease the number of disputes, it is doubtful whether a strict construction will have any greater effect in that direction than a construction in accordance with the ordinary rule that the Court seeks in a written contract to ascertain and carry into effect the intention of the parties.*
>
> *There must, of course, be set out in the written contract the essential elements of the contract. One of such essential elements is a description of the property sold and, provided it is described in such a way that it can be*

identified by applying the ordinary rules for the construction of contracts and admitting such evidence to interpret the contract as is admissible under the parol evidence rule (see Rand Rietfontein Estates Ltd v Cohn (1937 AD 317)) the provisions of the law are satisfied. This statement must be taken subject to one caution or qualification which I wish to emphasise. In a simple written contract which need not by law be in writing it is possible to describe a piece of land by reference, e.g. the land agreed upon between the parties, and in that case testimony as to the making of the oral agreement may be admissible to identify the land, but when a contract of sale of land is by law invalid unless it is in writing, then it is not permissible to describe the land sold as the land agreed upon between the parties. Consequently testimony to prove an oral consensus between the parties which is not embodied in the writing is not admissible for any purpose, not even to identify the land sold. It follows that a written contract for the sale of land which contains a provision that the boundaries of the land sold shall be those agreed upon between the parties is invalid by reason of the provisions of sec. 30 of the Proclamation."

[42] The test for compliance with section 2(1) of the Alienation of Land Act, in so far as it concerns the adequacy of the description of the *res vendita*, is whether the land sold could be identified on the ground by reference to the provisions of contract and without recourse to evidence from the parties as to their negotiations and consensus (**Headermans (Vryburg) (Pty) Ltd v Ping Bai** 1997 (3) SA 1004 (SCA) at 1008 I-J – 1009A).

[43] Similarly the parties may agree upon the purchase and sale of immovable property which has not yet been completely surveyed off, leaving, it to a surveyor to determine a boundary so as to carry out the agreement of the parties provided that the terms of the agreement are such that the surveyor can act without further reference to the parties as to what is sold (**Kruger v McCallum** 1947 TPD 22 at 25). In this matter Mr Bhawan, the expert witness called by the plaintiff, testified that in drawing the topographic survey of the leased property he referred to the lease agreement and the plans ("A77" and "A78") annexed to it. The area covered by the option agreement is identified in the lease agreement by reference to the plan (Annexure"E") and by size, namely 3445m². In other words the area to be subdivided is 3445m² in the plan (Annexure"E"). In my view the area covered by the option agreement is adequately described on the ground by reference to the plans annexed to the lease agreement without recourse to evidence from the parties. Mr Bhawan was able to plot the area by using its description as set out in the lease agreement and as depicted on the plans annexed to it. In the circumstances the defendant's contention is rejected.

Rectification

[44] The defendant, in its amended counterclaim, seeks to have the lease agreement rectified should I find that a valid option agreement, which was capable of being exercised, existed and that the option was validly exercised by the plaintiff.

[45] The defendant seeks to have the lease agreement rectified by insertion of the words "excluding VAT" after the option price, and by the insertion of the following phrase at the end of clause 7.1:

> *"subject to approval from Pick 'n Pay, approval from the City of Council for subdivision of property and approval from Quantum to reciprocal access and parking agreement"*

[46] In support of its claim for rectification the defendant relies upon the evidence of one Salvatore Codron ("Mr Codron") who was the director of Quantum Leap when the lease agreement was concluded.

[47] Mr Codron testified that during or about November 2002, he concluded an offer to lease with Expectra 534 (Pty) Ltd. The latter was represented by Mr M.S. Adams and Mrs Adams and he (Codron) represented Quantum Leap. At the request of Mr Adams the plaintiff was substituted as a lessee in the final lease agreement. Referring to Exhibit "A 34", Mr Codron confirmed that in terms of the offer to lease the plaintiff had an option to purchase the leased property for R2m. exluding VAT within two years of taking occupation. The option was subject to three conditions. The sale had to be approved by Pick 'n Pay, the City Council had to give approval for sub-division and approval from Quantum Leap to a reciprocal access and parking agreement.

[48] Mr Codron testified thereafter the final lease agreement was concluded between the parties. He stated that the final lease agreement must have been

drafted for Quantum Leap by its agent namely Diamond Property Management who had been with the parties during all the negotiations.

[49] When he signed the final lease agreement he noticed that the special conditions contained in the offer to lease had been excluded. Mr Codron testified that he brought the absence of the special conditions to Mrs Adams' attention who confirmed that the special conditions were missing. Mr Codron informed her that he would have necessary amendments made to the lease agreement and have it sent to her for signature. When he subsequently presented the amendments to Mrs Adams for signature she informed him that she did not have authority to sign as she was no longer with the plaintiff.

[50] Mr Moegamat Carriem denied that the option was subject "to the suspensive conditions as testified to by Mr Codron. He stated that the offer to lease was not a binding contract. He testified that the provision for payment of the VAT by the option holder had been excluded by agreement and that the omission of the conditions in the final lease agreement was similarly agreed upon. As far as he was concerned, the final lease agreement correctly reflected the intention of the parties. The suggestion by Mr Codron that the offer to lease was not a contract is without basis. The offer to lease was accepted by the parties on both sides and in terms of clause 10(b) it was to continue to bind the parties should both or any of the parties refuse or fail to sign the final lease agreement.

[51] The question is whether the defendant has established the requisites for rectification. The onus is on a party who pleads rectification. (**Lazarus v Gorfinkel**

1988 (4) SA 123(C) at 131 D). To succeed the defendant must show that the lease agreement, because of a *bona fide* mutual mistake, did not reflect the common intention of the parties.

[52] The only direct evidence before the Court regarding why special conditions were excluded in the final lease agreement was that of Mr Codron. It is clear to me that Mr Carriem was not present when the parties negotiated terms of the lease agreement. The plaintiff was represented by Mr and/or Mrs Adams. Neither the plaintiff nor the defendant called either Mr or Mrs Adams to testify. Mr Carriem explained his failure to call the Adams on the basis that the plaintiff is currently involved in the contractual dispute with the Adams and their relationship has turned sour. In the circumstances one cannot rely upon Mr Carriem's evidence regarding the negotiations that occurred between the parties as he was not present at those negotiations.

[53] However, on the rectification issue the onus is on the defendant to show that the final lease agreement because of a bona fide mutual mistake did not reflect the common intention of the parties. I have to decide this issue on the basis of the evidence presented.

[54] In explaining how the omission of the conditions in the option agreement had come about, Mr Codron testified that when the lease agreement was presented to him for signature he noticed that the conditions were missing. He contacted Mrs Adams who confirmed that the relevant conditions should have been included in the final lease agreement. Mr Codron thereupon instructed the

defendant's management agent to prepare an addendum, setting out the correct position. According to Mr Codron when the addendum was presented to Ms Adams for signature, she informed him that she was no longer in charge of the plaintiff. Mr Codron was unable to testify as to what had happened to the addendum thereafter as the defendant sold the leased premises about five days after the conclusion of the lease agreement. At one stage it was suggested by Mr Codron that the final lease agreement might have been changed by the plaintiff's attorneys. That suggestion cannot, however, be true as Mr Codron had not seen the draft agreement which the defendant's management agent had prepared for signature. All what he saw was the final lease agreement which he signed.

[55] There are inherent improbabilities in Mr Codron's evidence. I find it difficult to accept his explanation that he signed the final lease agreement even though he had noticed that it did not convey the true common intention of the parties. He is an experienced businessman. One would have expected him to have declined to sign the lease agreement until he was satisfied with its contents. I am in the dark regarding the exact nature and extent of the content of the addendum which purported to rectify the mistake. Its whereabouts are not known.

[56] In my view the defendant has failed to establish on a preponderance of probability the requisites for rectification. In the circumstances the defendant's counterclaim is dismissed with costs.

[57] In the light of the conclusion I have reached it is not necessary to deal the rest of the contentions raised by the defendant.

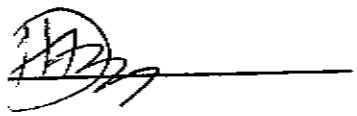
The Order

[58] In the result I make the following order:

(a) The defendant is directed to take all steps necessary in order to procure the approval from the Cape Town City Council for the subdivision of the property demarcated in red on annexure "B" to the plaintiff's particulars of claim;

(b) Should the sub-division be granted, the defendant should take necessary steps in order to pass transfer to the plaintiff of the said property; and

(c) The defendant is ordered to pay the costs of the plaintiff, including the costs of two counsel.



ZONDI, J