THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 149/2023

In the matter between:

SHAAN NORDIEN	**FIRST APPELLANT**
TAVIA NORDIEN	**SECOND APPELLANT**
and	
KIDROGEN RF (PTY) LTD	**FIRST RESPONDENT**
CITY OF CAPE TOWN	**SECOND RESPONDENT**

Neutral citation: *Nordien and Another v Kidrogen RF (Pty) Ltd and Another* (149/2023) [2025] ZASCA 159 (23 October 2025)

Coram: MAKGOKA, WEINER and KGOELE JJA and HENDRICKS and NAIDOO AJJA

Heard: 6 September 2024

Delivered: : This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 23 October 2025.

Summary: Property law – eviction – lease agreement signed by directors of the company which owned the property without indicating that they acted on behalf of company – lessee challenging owner's standing in eviction application – *rei vindicatio* – rectification – general principles restated.

ORDER

On appeal from: Western Cape Division of the High Court (Goliath AJP and Cloete and Thulare JJ concurring, sitting as court of appeal):

The application for special leave to appeal is dismissed with costs to be paid by the first and second applicants jointly and severally, the one paying the other to be absolved.

JUDGMENT

Hendricks AJA:

[1] This is an application for special leave to appeal and, if granted, the determination of the appeal itself. The matter was, on special application for leave to appeal to this Court, referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 (the Act).[1] It is therefore a two-pronged approach in that at first, it is the determination of whether special leave to appeal should be granted, and if so, the determination of the merits of the appeal itself. The test for the determination of special leave to appeal is different from the test to be applied on the merits of the appeal.[2] The parties were directed to be prepared to argue the merits of the application if called upon to do so.

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[1] Section 17(2)*(d)* provides:
'The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

[2] In *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A), this Court stated that 'an applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal' These would include ': (a) the appeal raises a substantial point of law; (b) the matter is of very great importance to the parties or of great public importance; and (c) where the refusal of leave to appeal would probably result in a manifest denial of justice. . .'; *Beadica 231 CC v Sale's Hire CC* (1191/2018) [2020] ZASCA 76 (30 June 2020) para 29

[2] The litigation history of this matter has its genesis in the order granted in the Western Cape Division of the High Court (the high court), where Fortuin J granted an order dismissing an application for eviction with costs. The application was launched by Kidrogen RF (Pty) Ltd (Kidrogen) against Mr Shaan Nordien (Mr Nordien) and Mrs Tavia Nordien and their son (the Nordien family). Kidrogen applied for leave to appeal which was also dismissed with costs by the high court. It then petitioned this Court for leave to appeal, either to the Western Cape Division of the High Court (the Full Court) or to this Court.

[3] Leave to appeal was granted by this Court to the Full Court. The Full Court upheld the appeal against the order and judgment of Fortuin J, which was set aside and substituted with an order: granting the application for rectification of the written lease agreement; evicting the Nordien family; ordering Mr Nordien to pay an amount of R250 800 as arrear rental; as well as the costs of the application. Dissatisfied with the order and judgment of the Full Court, Mr Nordien successfully petitioned this Court, and an order was granted in terms of the provisions of s 17(2)*(d)* of the Act, as alluded to earlier.

[4] The background facts to this application are largely common cause. Kidrogen is the registered owner of a residential immovable property, situated at 62 Trinity Street, Parklands, Western Cape (the property). On 30 October 2019, a written lease agreement was entered into between Mr Nordien as lessee, and Mr Davids and Mr Peter as lessors. Mr Davids and Mr Peter are directors of Kidrogen. An addendum was also concluded between Mr Nordien and Mr Peter on behalf of Kidrogen, decreasing the annual rental increase from 15 per cent to 10 per cent. There was also a three-month rental relief from March 2020 to May 2020, as a result of the Covid-19 pandemic. The Nordien family took occupation of the property. On 5 February 2020, Kidrogen and Mr Nordien entered into an agreement of sale of the property. This agreement of sale was subsequently cancelled. It was alleged by Mr Nordien that another sale agreement of the

property was entered into on 8 March 2020. This was disputed by Kidrogen. The sale of the property did not come to fruition.

[5] On 7 October 2020, Kidrogen requested payment of the arrear rental that was due. Mr Nordien indicated that he was awaiting funds from his offshore account and would make payment of the arrear rental before the end of October 2020. This did not happen and no further rental payments were made. The lease agreement was cancelled by Kidrogen, which then launched an application for eviction and payment of the arrear rental in the amount of R250 800 plus costs.

[6] Mr Nordien opposed this application on the basis that Kidrogen relies on implied rectification of the written lease agreement without having pleaded rectification. It is common cause that Mr Davids and Mr Peter entered into the written lease agreement with Mr Nordien. He raised as a defence in his answering affidavit, that he did not contract with Kidrogen, but with Mr Davids and Mr Peter in their personal capacities. This led to an application for rectification to allege that the written lease agreement was entered into between Mr Nordien and Kidrogen, duly represented by Mr Davids and Mr Peter.

[7] As rectification was not pleaded, the contention was that the application was fatally defective. Furthermore, Mr Nordien contended that the lease agreement was not validly cancelled, and he is not in unlawful occupation of the property. In addition, he is not in unlawful occupation of the property in terms of the agreement of sale entered into. The sale agreement contains a clause that stipulates that he will not be liable for occupational rental pending the finalization of the sale agreement. Lastly, no case was made out for the amount claimed as arrear rental. The Full Court granted the order set out in paragraph 2, supra. It is against this order of the Full Court that special leave to appeal is requested.

[8] Central to this appeal is the issue whether the Full Court was correct in ordering rectification of the written lease agreement. It is trite that a written contract can be rectified if it does not accurately reflect the common intention of the parties. Contract rectification is a legal procedure used to amend the written documents of a contract when it fails to mirror the intention of the parties due to mutual errors or omissions. Rectification has no effect on the rights and obligations of the parties. It does not create a new contract but merely serves to correct the written memorial of the contract.

[9] Rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. Didcott J in *Spiller and Others v Lawrence*[3] emphasized that:

'(i)t is not the agreement between the parties which, on the other hand, is rectified. The Court has no power to alter it. To do so would be to amend their exclusive prerogative. All that the Court ever touches is the document.'

The onus is on a party seeking rectification to show on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out in the agreement.

[10] It was submitted on behalf of Mr Nordien that rectification should not be applied for in motion proceedings, but in an action. The general rule is that rectification should be sought by way of action, however, this rule is not immutable.[4] In *Gralio v DE Claassen*[5] the following is stated:

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

[3] *Spiller and Others v Lawrence* 1976 (1) SA 307 (N).
[4] Amlers' Precedents of Pleading – LT Harms at 298.
[5] *Gralio (Pty) Ltd v DE Claassen (Pty) Ltd* 1980 (1) SA 816 (A).

adjudicate upon the basis of the written contract relied upon by the plaintiff as it stands to be corrected.'[6]

[11] In the judgment of the Full Court, it was stated that regard must be had to all the evidential material holistically. There is a plethora of correspondence between Mr Nordien and Kidrogen. Amongst it is an addendum to the lease agreement. Although it was only signed by Mr Peter, it is nevertheless common cause that the addendum was agreed to. So too, there is correspondence from Mr Nordien to the effect that he was awaiting funds from his offshore account which he will use to settle the arrear rental. A letter of demand was sent from Kidrogen to Mr Nordien to which the latter did not reply. Mr Nordien failed to raise in such correspondence the issue of who the parties to the lease agreement were. It was always accepted in the correspondence and further agreements that Kidrogen, and not Mr Peter and Mr Davids, was the landlord and owner of the property.

[12] Mr Nordien submitted that the Full Court misdirected itself in granting rectification. An application for rectification of the lease agreement was made a day before the hearing of the application by Fortuin J, which was dismissed on the basis that the granting of rectification would be prejudicial to Mr Nordien as it amounts to short notice. Furthermore, that no case for rectification was made out in the founding affidavit. It is indeed true that no case was made out in the founding affidavit. But this is because the defence was only raised by Mr Nordien in the answering affidavit that he entered into a written lease agreement with Mr Davids and Mr Peter in their personal capacities and not in their representative capacities on behalf of Kidrogen. He also denied that he entered into the written lease agreement with Kidrogen.

[13] As alluded to, there was an addendum entered into between Mr Nordien and Kidrogen duly represented by Mr Peter. This is common cause. This being

[6] Ibid at 824B-C.

the case, it means that Mr Nordien admits that he contracted with Kidrogen, quite contrary to the argument that the lease agreement was entered into with Mr Davids and Mr Peter in their personal capacities. To add to this, there were demands made for payment of the arrear rental amount by Kidrogen. The demands were not disputed by Mr Nordien. On the contrary, Mr Nordien stated that he will pay the arrear rental amount when he receives money from his offshore investment. This too, is an admission by Mr Nordien that he contracted with Kidrogen.

[14] Mr Nordien also contended that he was not in unlawful occupation of the property. This, he based on the fact that he and Kidrogen entered into a sale of the property. In terms of the sale agreement concluded on 5 February 2020, he would not be liable for payment of any occupational rental until the property was transferred into his name. He does, however, not make an argument that he performed in terms of the sale agreement.

[15] It is common cause that the sale agreement concluded on 5 February 2020 was duly cancelled by Kidrogen. Mr Nordien contended that another sale agreement was entered into during March. This is disputed by Kidrogen. Even if it were to be accepted that the sale agreement was not cancelled, the question that begs an answer is how can Mr Nordien be in lawful occupation of the property in terms of a sale agreement concluded with Kidrogen, which makes reference to a written lease agreement which, on his version, was not concluded with Kidrogen, but with Mr Davids and Mr Peter in their personal capacities?

[16] I am of the view that Mr Nordien did not make out a case for special leave to appeal to be granted to this Court. The Full Court was correct in granting the requisite rectification of the written lease agreement. There is no merit in this

application for special leave to appeal. Special leave to appeal should consequently be refused.

[17] In the result, the following order is made:

The application for special leave to appeal is dismissed with costs to be paid by the first and second applicants jointly and severally, the one paying the other to be absolved.

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RD HENDRICKS

ACTING JUDGE OF APPEAL

Makgoka JA (Weiner and Kgoele JJA and Naidoo AJA concurring):

[18] I have read the judgment prepared by my Colleague, Hendricks AJA (the first judgment). I agree with its order. I write separately because in my view, Kidrogen comes home on the *rei vindicatio* principle as the owner of the property. I also consider that the rectification issue, to the extent it needs to be considered, needs fuller treatment.

[19] The issue in the application is whether Kidrogen had the locus standi to apply for the eviction of Mr Nordien. That question arose because the lease agreement upon which Mr Nordien occupied the property, was signed by two of Kidrogen's directors, Mr Andile Peter (Mr Peter) and Mr Essa Davids (Mr Davids). They are referred to in the lease agreement as the Lessor, and there is no indication that they signed it on behalf of Kidrogen. This fact is the sole basis on which Mr Nordien resisted Kidrogen's application for his eviction. The high court considered it meritorious. It dismissed Kidgrogen's application for rectification to reflect it as the true lessor. It subsequently dismissed Kidrogen's eviction application on the basis that it lacked locus standi.

[20] Mr Nordien's assertion that Kidrogen is a 'stranger' to the lease agreement, and therefore, not the lessor, must be viewed against this factual background. It is common ground that Kidrogen is the owner of the property. Mr Peter and Mr Davids are two of its directors. In addition, Mr Peter is also the Chief Executive Officer (CEO) of Kidrogen. The first applicant, Mr Nordien, was the Managing Director of Eyethu Masiti Construction, a subsidiary of Kidrogen.

[21] On 30 October 2019, a written lease agreement in respect of the property was concluded between Mr Nordien as lessee, and Mr Peter and Mr Davids, the latter reflected as 'the lessor'. As mentioned, Mr Peter and Mr Davids are directors of Kidrogen. Clause 4 of the written lease agreement made the commencement date of the lease retrospective to 1 November 2017.

[22] On the same date, ie 30 October 2019, an addendum was concluded, which reduced the annual percentage rental escalation from 15 per cent to 10 per cent per annum effective from an earlier date, being 31 July 2019. Although this addendum was only signed by Mr Nordien, it is common ground that it was, in fact, concluded between Kidrogen and Mr Nordien, as the latter admitted Kidrogen's allegations to that effect.[7] Notably, the addendum is on Kidrogen's letterhead, which reflects Mr Peter as Kidrogen's CEO. It is recorded that the addendum 'is hereby a part for all purposes of the Lease Agreement between . . . [Mr] Andile Peter *on behalf of Kidrogen (Pty) Ltd as Landlord and Shaan Nordien as tenant'.* (Emphasis added.)

[23] On 5 February 2020, the parties entered into an Agreement of Sale in terms of which Mr Nordien would purchase the property from Kidrogen for R2,995,000, payable upon registration of transfer. It was recorded in clause 2.1

[7] For an unexplained reason, the addendum reflects its date as 13 July 2019.

of the sale agreement that Mr Nordien was in occupation of the property 'in terms of an existing lease agreement.' (Emphasis added.) Clause 4.2 of the Sale Agreement reads:

'The lease agreement contemplated under paragraph 2.1 above shall endure until the date of registration of transfer. Should the sale be cancelled for any reason whatsoever, the lease agreement shall remain in full force and effect.'

Kidrogen subsequently cancelled this sale agreement.

[24] As a result of the COVID-19 lockdown, Mr Nordien experienced financial difficulties. In consideration thereof, Kidrogen provided Mr Nordien with a three-month rental suspension. As record thereof, Kidrogen required Mr Nordien to sign an acknowledgement of debt in favour of Kidrogen relating to arrear rental. The acknowledgement of debt form, dated 6 September 2020, is under Kidrogen's letterhead. It authorises Kidrogen to deduct from Mr Nordien's service fee 'the relief on rental' in favour of '*Kidrogen (Pty) Ltd'*. In the relevant part, the document states that:

'I, the above mentioned [Shaan Nordien] *hereby authorize Kidrogen* (Pty) Ltd to deduct from my service fee as specified below.' (Emphasis added.)

[25] On 25 August 2020, Mr Nordien sent an email to Mr Peter in which he informed him, among other things, that due to the COVID-19 lockdown, he was experiencing cashflow problems. However, he agreed that the full amounts he owed to Kidrogen should be deducted from his 5 per cent profit share from the Sitari Project once the houses were sold.[8] This is what he said:

'The unforeseen COVID-19 lockdown has caused me tremendous cash flow issues, but the full amounts *due to Kidrogen* may be deducted from 5% Sitari Project profit sharing once the houses are sold.' (Emphasis added.)

[8] Sitari here refers to a building project Mr Nordien was developing for the Kidrogen at Sitari Country Estate in Somerset West.

[26] As of October 2020, Mr Nordien was still in arrears with rental. On 7 October 2020, Ms Lusanda Nyamela sent an email from a Kidrogen email address to Mr Nordien, enquiring when he intended to make payments towards the arrear rental. Ms Nyamela pointed out that Mr Nordien was at that stage 'in breach of the [Acknowledgement of Debt] agreement signed in respect of the COVID-19 relief granted to you as there [were] no further amendments made to the agreement. Please urgently advise when we can expect payment.'

[27] In response to the above email, Mr Nordien, on 8 October 2020, undertook to settle the arrears by the end of October 2020. That did not happen. On 6 November 2020, Ms Nyamela followed up with Mr Nordien regarding the payment he had previously committed to in his correspondence. On 8 November 2020, Mr Nordien stated that he was awaiting funds from his offshore account and would settle the arrears owed to Kidrogen as soon as he received the funds.

[28] On 24 November 2020, Kidrogen's attorneys served a letter on Mr Nordien by sheriff, cancelling the lease agreement. The letter clearly stated that it was written on Kidrogen's instructions regarding the lease of the property. The lease agreement was attached to the letter, which also referenced the addendum, the acknowledgement of debt, the arrears, the demand for payment, and the failure to settle the arrears. Mr Nordien was given until 31 December 2020 to vacate the property. There was no response to this letter.

In the high court

[29] Kidrogen subsequently launched an application for the eviction of Mr Nordien and for payment of the arrear rental of R250 800. The second applicant, cited as the second respondent in the eviction application, is Mr Nordien's former wife. Mr Nordien opposed the application. In his answering

affidavit, he set out in detail his business association and dealings with Kidgrogen, none of which is relevant for present purposes.

[30] Regarding the specific allegations in Kidrogen's founding affidavit, Mr Nordien admitted that Kidrogen owns the property. Having made this admission, the only defence he raised was that Kidrogen was not a party to the lease agreement, as it was between him, on the one hand, and Mr Peter and Mr Davids, on the other. Therefore, he contended that Kidrogen's cancellation of the lease was ineffective, and he was not unlawfully occupying the property.

[31] Mr Nordien did not provide any meaningful response to Kidrogen's detailed engagement with him regarding the addendum, the demand for him to pay the arrear rental, or his undertakings to pay Kidrogen once he received his offshore funds. However, he did comment on the acknowledgement of debt he signed in favour of Kidrogen as follows:

'I further point out that the Acknowledgment of Debt. . . in relation to the rental relief for the months of March, April and May 2020, authorises [Kidrogen] to deduct three amounts of R20,900.00, over a period of three months, from my service fee'. In other words, in terms of the acknowledgement it was within [Kidrogen's] powers to deduct the said amounts from my monthly remuneration, which it has failed to do.'

[32] In its replying affidavit, deposed to by Mr Peter, Kidrogen reiterated that it is the registered owner of the property, and that Mr Peter and Mr Davids, as its directors, were mandated to enter into all agreements on its behalf, including the impugned lease agreement. Mr Peter emphasised that 'the lease agreement was signed by Mr Davids and I in our capacities as directors of [Kidrogen].'

[33] On 30 August 2021, Kidrogen issued its notice of intention to amend its notice of motion by adding a new prayer 9, in terms of which the lease agreement would be rectified by: (a) inserting after the words 'made and entered into by and

between' the words 'Kidrogen RF (Pty) Ltd (Lessor) herein represented by'; (b) removing the identity numbers of Mr Peter and Mr David, and deleting them as 'lessor'; and (c) substituting these with the words 'both persons duly authorised for and on behalf of the Lessor'.

[34] On 9 September 2021, Mr Nordien delivered his notice of objection to the notice of intention to amend. The grounds of objection were that: (a) Kidrogen had no locus standi to seek rectification of an agreement to which it is not a party; (b) there was a misjoinder to the extent that the signatories to the lease agreement, Mr Peter and Mr Davids, were not joined as parties to the proceedings; (c) No grounds for rectification were made out in the founding papers; (d) the grounds for rectification had not been established.

[35] It was specifically stated that 'the founding papers did not allege that a mistake was made in the drafting of [the lease agreement] nor do the founding papers contain any'. Furthermore, it was stated that there were no allegations that the lease agreement did not accurately reflect the parties' common intention, nor what the true intention of the parties was. It was emphasised that Kidrogen should be non-suited since it had not made out its case for rectification in the founding affidavit.

[36] On 14 September 2021, the day before the hearing of the eviction application, Kidrogen submitted its 'Notice of Motion (as amended)', which included the new prayer 9, as referenced earlier. It also served notice of motion informing Mr Nordien that it would seek rectification of the lease agreement based on the terms previously stated. That application was to be heard concurrently with the main eviction application on 15 September 2021.

[37] The high court first considered Kidrogen's opposed application for amendment to its notice of motion. It agreed with Mr Nordien's arguments and held that Kidrogen had not established a proper case for rectification in its application. On the face of the lease agreement, the court held, Kidrogen was not a party to the lease. Furthermore, the application for rectification was filed late, and Mr Nordien did not have sufficient opportunity to respond. The court held that Kidrogen was attempting to substitute itself for Mr Peter and Mr Davids, without joining the latter. The high court reasoned that this would prejudice Mr Nordien.

[38] Consequently, the high court dismissed Kidrogen's application to amend its notice of motion. Concomitantly, its eviction application was dismissed because, without rectification of the lease agreement, the cancellation is not valid as 'it was not given by a party to the agreement.' As a result, the high court found that Kidrogen lacked the standing to cancel the lease, since it was not a party to it. Additionally, the court reasoned that Kidrogen had not established a prima facie case for the relief sought.

In the Full Court

[39] The Full Court identified three grounds on which Mr Nordien's defence rested, namely: (a) whether Kidrogen had locus standi to seek rectification of an agreement to which it is allegedly not a party (the locus standi issue); (b) whether rectification was competent when Mr Davids and Mr Peter had not been joined (misjoinder issue); (c) whether rectification was competent when no grounds for it had been advanced in the founding papers.

[40] As to the first ground, the Full Court held that the written lease agreement did not faithfully record the agreement between the parties, but mistakenly reflected something else that was not meant, ie that Mr Peter and Mr Davids

signed the lease in their personal capacities. The court held that this was misleading and unreliable evidence, which ordinarily, would be rejected. However, instead of rejecting it, the court held that it must be corrected so that it matches the facts and thus becomes reliable. That, the court held, would give effect to the true intention of the parties.

[41] Regarding non-joinder, the Full Court dismissed the point on the basis that given that Mr Peter and Mr Davids were the directors of Kidrogen, they would not be prejudiced by the non-joinder. As to the third ground, the Full Court acknowledged that no grounds for rectification were made out in Kidrogen's founding papers. However, the court did not consider this to be an insurmountable obstacle in Kidrogen's path. It reasoned that prior to the launching of the eviction application, Mr Nordien had never contended that the lease was not one between him and Kidrogen. The facts, it held, demonstrated that at all material times up to the delivery of his answering affidavit, Mr Nordien had considered Kidrogen to be the lessor, despite the reference in the written version of the lease to Mr Davids and Mr Peter as the lessor.

[42] The Full Court noted an additional ground raised by Mr Nordien, apparently during argument in the high court, namely that rectification is generally not permitted in application proceedings. The Full Court dismissed this argument summarily. However, its reasoning for that conclusion is not clear from its judgment. The Full Court referenced Rule 28(3) of the Uniform Rules of Court, which states that a party objecting to an amendment must specify the grounds for such an objection.[9] But, as demonstrated earlier, Mr Nordien had fully set out his grounds of objection to Kidrogen's proposed amendment.

[9] Rule 28(3) of the Uniform Rules of Court provides an objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

Viewed in this light, the Full Court's reasoning for summarily dismissing this point is difficult to follow.

[43] Be that as it may, the Full Court found no merit in any of Mr Nordien's defences. It accordingly upheld Kidrogen's appeal with costs. It set aside the high court's order and replaced it with an order: (a) granting the application for rectification of the written lease agreement; (b) evicting Mr Nordien and his family from the property; (c) for payment by Mr Nordien of R250 800 as arrear rental; (d) granting costs to Kidrogen.

In this Court

[44] Mr Nordien persisted with his assertion that Kidrogen did not have locus standi to cancel the lease agreement and to bring the eviction application, as it was not a party to the lease agreement. It seems to me that this point is dispositive of the appeal. For its part, Kidrogen contended that as the owner of the property, it had the necessary standing to bring the eviction application.

Analysis

Rei vindicatio

[45] It is common ground that Kidrogen is the owner of the property. Based on the principle of *rei vindicatio*, it was required to do no more than allege and prove that: (a) it is the owner of the property; (b) the property is in the possession of the respondents; and, (c) the property is still in existence.[10] As this Court explained in *Chetty v Naidoo (Chetty)*:[11]

'It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove

[10] G Muller *et al*. *Silberberg and Schoeman's The Law of Property* 6 ed (2019) LexisNexis at 270.
[11] *Chetty v Naidoo* 1974 (3) SA 13 (A) (*Chetty*).

that he is the owner and that the defendant is holding the *res* - the *onus* being on the defendant to allege and establish any right to continue to hold against the owner.'[12]

[46] Thus, by denying the lease agreement between himself and Kidrogen as alleged by the latter, Mr Nordien bore the burden of proving some other lawful right to occupy the property. He could not merely assert that Mr Peter and Mr Davids were the lessors in their personal capacities regarding a property they did not own. He was required to demonstrate that the two gentlemen, despite not being the owners, granted him a lawful right to occupy the property. Mr Nordien failed to do so. This is unsurprising because Mr Peter and Mr Davids could not transfer greater rights than they had to Mr Nordien.[13] Thus, in the absence of an allegation that he was conferred a right in law by Mr Peter and Mr Davids to occupy the property, nothing stands in the way of Kidrogen, as the owner of the property, from vindicating it from him by way of an eviction application.

[47] As an owner asserting *rei vindicatio*, once Mr Nordien denied the existence of a lease agreement between him and it, Kidrogen was relieved of the duty to prove termination of the lease. As explained in *Chetty*:

'[A]lthough a plaintiff who claims possession by virtue of his ownership, must *ex facie* his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity for this proof falls away if the defendant does not invoke the right conceded by the plaintiff, but denies that it existed. Then the concession becomes mere surplusage as it no longer bears upon the real issues then revealed.'[14]

[48] Recently, in *Robert Paul Serne NO v Mzamomhle Educare and Others*,[15] this Court had occasion to consider a similar situation. There, the respondents sought to resist an owner's eviction application by alleging that: (a) the owner

[12] Ibid at page 20B-D.
[13] *Smit v Creeser* 1948 (1) SA 501 (W) at 507H.
[14] *Chetty* fn 12 above at 21G-H.
[15] *Robert Paul Serne NO and Others v Mzamomhle Educare and Others* [2024] ZASCA 152.

had obtained ownership by dishonest means; and (b) there was no valid lease agreement. This Court rejected the defences and stated that neither of them establishes a right in law for the respondents to continue occupying the property. It held that 'the respondents cannot content themselves with a denial of the existence of the lease agreement, yet simply remain in occupation of the property in perpetuity without any lawful basis.'[16]

[49] In all circumstances, Mr Nordien had failed to establish a lawful basis to continue occupying Kidrogen's property in the absence of either a valid lease agreement between him and Kidrogen or a right in law conferred by Mr Peter and Mr Davids. Mr Nordien continues to occupy the property of Kidrogen without paying any rental, neither to Kidrogen nor to Mr Peter and Mr Davids, his supposed lessor. On this basis alone, his application falters.

Rectification

[50] To my mind, this issue was a red herring by Mr Nordien. Kidrogen did not need the rectification to vindicate its right, as mentioned earlier. That should have been the end of the matter. But, as pointed out by the Constitutional Court in *Spilhaus v MTN*,[17] '[l]itigants are entitled to a decision on all issues raised, especially where they have an option of appealing further. The court to which an appeal lies also benefits from the reasoning on all issues.'[18] Because we are no longer the apex court, I will consider the issue.

[51] In *Propfokus v Wenhandel*[19] this Court affirmed that a party claiming rectification of a written agreement has to allege and prove: (a) that an agreement had been concluded between the parties and reduced to writing; (b) that the

[16] Ibid para 31.
[17] *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16; 2019 (4) SA 406 (CC); 2019 (6) BCLR 772 (CC).
[18] Ibid para 44.
[19] *Propfokus 49 (Pty) Ltd and Others v Wenhandel 4 (Pty) Ltd* [2007] ZASCA 15; 2007] 3 All SA 18 (SCA).

written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established; (c) an intention by both parties to reduce the agreement to writing; and (d) that there was a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a *bona fide* common error; and (e) the actual wording of the true agreement.[20]

[52] Mr Nordien's main complaint was that no case had been made out for rectification in the founding papers. This is disingenuous given that up to the point when Mr Nordien delivered his answering affidavit, he had never suggested that Kidrogen was not the lessor, and that Mr Peter and Mr Davids, in their personal capacities, were. On the contrary, Mr Nordien had given every indication that he regarded Kidrogen as the lessor.

[53] Thus, Kidrogen could not have known when it launched the eviction application that Mr Nordien would adopt the stance that it was not the lessor. It was only after the answering affidavit was delivered that Kidrogen could apply for rectification. Given this, it does not lie in the mouth of Mr Nordien that Kidrogen did not make out a case in its founding papers. In this regard, the high court held that there was no reason to raise the identity of the lessor in the absence of any litigation. That may be so. But the failure to rebut Kidrogen's assertion of itself as the lessor is not without consequence. As this Court held in *McWilliams v First Consolidated Holdings*:[21]

'... [B]ut in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an

[20] Ibid para 13.
[21] *McWilliams v First Consolidated Holdings (Pty) Ltd* [1982] 1 All SA 245 (A).

important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion . . .'[22]

[54] In this present case, except for the names and identity numbers of Mr Peter and Mr Davids in the lease agreement, every reference in the papers points to Kidrogen as the true lessor. Throughout the exchange of correspondence with Mr Nordien, Kidrogen asserted itself as the lessor. Mr Nordien was not only silent about this. He also signed documents confirming it. First, an addendum to the lease agreement in which Kidrogen was identified as the lessor, represented by Mr Peter. Second, an acknowledgement of debt in favour of Kidrogen for arrear rental in respect of the property.

[55] In response to Kidrogen's demand to pay rental arrears, he undertook to pay Kidrogen as soon as his offshore funds became available. What is more, in Kidrogen's replying affidavit, Mr Peter and Mr Davids, denied Mr Nordien's averment that they were the lessor. They did this by confirming that they signed the lease agreement on behalf of Kidrogen.

[56] It is significant that Mr Nordien neither objected to Kidrogen's averment as constituting an impermissible new issue in reply nor sought to file a supplementary affidavit to deal with it. In *Pretoria Portland Cement Company Ltd v Competition Commission*[23] this Court held that a party under similar circumstances was entitled to do so. This was affirmed by the Constitutional Court in *Botha v Smuts*.[24]

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[22] Ibid at 250.
[23] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* [2002] ZASCA 63; 2003 (2) SA 385 (SCA) para 63. See also *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkS) at 550F; *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) paras 51 and 71.
[24] *Botha v Smuts and Another* [2024] ZACC 22; 2025 (1) SA 581 (CC); 2024 (12) BCLR 1477 (CC) para 56.

[57] It is trite that in motion proceedings, the affidavits constitute not only the pleadings but also the evidence.[25] In the present case, Kidrogen tendered evidence in the replying affidavit that Mr Peter and Mr Davids signed the lease agreement on its behalf. In the absence of an objection or a rebuttal thereto by Mr Nordien, such evidence stood uncontradicted. It thus should have been accepted. The high court erred in ignoring this evidence.

[58] In seeking to avoid the inevitable conclusion from the undisputed factual matrix, Mr Nordien called in aid the parol evidence rule to resist rectification. The parol evidence rule is to the effect that '[i]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning'.[26] Kidrogen did not seek to do any of the above. It sought to rectify a glaring mistake in the lease agreement. In *Venter v Liebenberg*[27] it was held that when rectification is claimed, the parol evidence rule yields to it. The court explained:

'[W]hen rectification is claimed the claimant is entitled to lead evidence of the term, agreed upon by the parties, which he alleges to have been omitted from the written document, and the parol evidence rule gives way to the more potent requirements of the equitable principle of rectification. The result is that the principle of rectification has substantially reduced the scope of the parol evidence rule . . .'[28]

[59] This Court in *Tesven v South African Bank of Athens*,[29] with reference to *Rand Rietfontein Estates Ltd v Cohn*,[30] affirmed that principle and held that the parol evidence rule does not exclude evidence of a common continuing intention

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[25] *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk* 1984 (2) SA 261 (W) at 269G-H and *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985 (1) SA 146 (T) at 149C.
[26] *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 18.
[27] *Venter v Liebenberg* 1954 (3) SA 333 (T).
[28] Ibid at 338B-C.
[29] *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA); [1999] 4 All SA 396 (A) para 16.
[30] *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 327.

which a party seeks to lead in support of a claim for rectification. It follows that Mr Nordien's reliance on the parol evidence rule is unavailing.

[60] The evidence which Kidrogen placed before the high court for rectification comprised of the following: (a) Mr Nordien signed the addendum, which clearly identified Kidrogen as the lessor in the main lease agreement; (b) he signed an acknowledgment of debt in favour of Kidrogen in respect of arrear rental; (c) he responded positively to Kidrogen's emails demanding payment; (d) he had never paid rental to either Mr Peter or Mr Davids, but to Kidrogen's appointed account; (e) Mr Peter and Mr Davids had denied in the replying affidavit that they were the lessor, and instead, confirmed Kidrogen as the lessor. The high court ignored the cumulative effect of this overwhelming body of evidence in dismissing Kidrogen's application.

[61] Mr Nordien also contended that because Mr Peter and Mr Davids were not joined, rectification was not competent. There is no merit in this contention. As correctly held in *Movie Camera v Van Wyk*,[31] a joinder in such an instance would only be necessary in the case of a party who is wholly unaware of the matter or removed from it. In the present case, Mr Peter was the deponent to the founding and replying affidavits. In the latter affidavit, he stated that he and Mr Davids signed the lease agreement on behalf of Kidrogen. Mr Davids confirmed this in a confirmatory affidavit to the replying affidavit. What is more, both were part of the directors of Kidrogen who adopted the resolution to institute the eviction application by Kidrogen against Mr Nordien. Thus, both were clearly aware of the proceedings.

Special leave

[31] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291 (C) para 25.

[62] In the circumstances, the Full Court was undoubtedly correct to uphold the appeal and dismiss Mr Nordien's rather fanciful defence. This has a direct bearing as to whether special leave to appeal should be granted. To obtain special leave from this Court, the presence of reasonable prospects of success is not enough. An applicant must, in addition to showing reasonable prospects of success on appeal, demonstrate special circumstances justifying such leave.

[63] In *Cook v Morrison*[32] this Court provided guidelines as to what constitutes special circumstances. Although not an exhaustive list, those circumstances may include that the appeal raises a specific point of law, or that the prospects of success are so strong that refusing leave could result in denial of justice, or that the matter is significant to the public or the parties.[33] As I see it, Mr Nordien has failed to establish any special circumstances why special leave should be granted.

[64] In the circumstances, the application for special leave to appeal must fail. For these reasons, I concur in the order of the first judgment.

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JUDGE OF APPEAL

[32] *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA); [2019] 3 All SA 673 (SCA) para 8.
[33] Ibid para 8.

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