Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: **2021/10258**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

....
DATE SIGNATURE

In the matter between:

ENSEMBLE HOTEL HOLDINGS PROPRIETARY LIMITED

(Registration Number 1999/018439/07) **Applicant**

And

GUNZENHAUSER, MAXINE

(Identity Number […]) **First Respondent**

NAVISURE PROPRIETARY LIMITED t/a NAVIBON

(Registration Number 2019/084594/07) **Second Respondent**

J U D G M E N T

KAIRINOS AJ:

"Error is ever the sequence of haste" said the Duke of Wellington. The French playwright Moliere stated "Unreasonable haste is the direct road to error". Never has this been more apt than to the facts of this matter.

The Applicant launched an application against the First and Second Respondents as co-lessees for payment of arrear rentals in terms of a written lease agreement in respect of a residential property which it is common cause the Applicant leased to the Second Respondent. The burning question is whether the parties intended that the Applicant also leased the property to the First Respondent as co-lessee. This is because the First Respondent completed her details in the place reserved for lessees. She contends she did so in error and intended to sign only as representative of the Second Respondent. Her main defence to the application to hold her liable as co-lessee

was therefore to seek rectification of the lease agreement to reflect only the Second Respondent as lessee. This is the main issue in the matter.

Initially the Second Respondent opposed the relief sought against it on the basis of various spurious defences. Wisely, on the first day of the hearing, the Second Respondent indicated that it no longer relied on such defences and withdrew its opposition to the application. In the circumstances, judgment was granted against the Second Respondent.

That left the issue of the First Respondent's liability to the Applicant in terms of the lease agreement. The First Respondent indicated in her answering affidavit that the lease had been completed and signed in rushed circumstances when she met the Applicant's leasing agent, Mr Chaim Bronstein ("Bronstein"), at his doctor's offices where he had an appointment. They met in the waiting room of the doctor's offices where the First Respondent filled in the details of Second Respondent. However, she stated that instead of filling in her details in the appropriate place reserved in the lease for a representative of a company, she erroneously filled in her details on the place above the company's details, which is a place reserved for lessees to insert their details. She stated that she immediately indicated to Bronstein that she had made an error and he told her it was fine and she should complete the company's (i.e. the Second Respondent's) details under her name. Importantly, in Bronstein's affidavit attached to the Applicant's replying affidavit, he did not refute this allegation. Indeed, nowhere did he state on oath that his understanding was that both the First and Second Respondents were intended to be co-lessees and he remained silent in this regard in his affidavit. In fact there was a glaring paucity of evidence on oath as to what precisely

the negotiations had led him to believe in relation to which party/s would be the lessee/s in the lease agreement. It was clear it was agreed that the Second Respondent would be a lessee but nothing was mentioned by Bronstein of the First Respondent.

The Applicant relied heavily on the fact that in a prior and pending action in the Magistrates' Court for the eviction of the Respondents from the residential home, the Respondents had in their plea admitted the allegation that they were both co-lessees. Various defences were raised in their plea in the Magistrates' Court[1], yet rectification of the lease to reflect that only the Second Respondent was a lessee was not raised by the First Respondent. The Applicant correctly contended that this was a factor which weighed against acceptance of the First Respondent's version in the application. The First Respondent in turn in her answering affidavit stated that the admission in the Magistrates' Court plea was made in error and that an application for withdrawal of the admission and amendment of the plea, would be launched in due course. To date this had not been done.

The application for a lease, attached to the founding affidavit, also seemed to tell a story. The first page of the application form – which it is common cause was completed by the First Respondent – refers to a Dr Taitz as being the Applicant for the lease. However, the form then asks the question "*is lease to be concluded in your name?*" with a "Yes" and "No" as possible answers and one line down states "*If not, state name*". The First Respondent circled the "No" thereby making it clear that the lease was not to be concluded in Dr Taitz's name and that he was not to be a lessee in his personal

[1] The Applicant attempted to make much of the fact that the defences raised in the plea in the Magistrates' Court action were allegedly spurious and that this somehow affected the credibility of the First Respondent. Since the matter in the Magistrates' Court is not completed and still pending, I do not comment on the veracity of these defences.

capacity. In the appropriate space to insert the details of corporate entity that was to be the lessee, if the applicant for a lease was not to be the lessee in their personal capacity, the registration number of the Second Respondent was completed and filled in, even though its name was omitted. That section of the form, once completed, looked as follows:

> *"Is lease to be concluded in your name? Yes / (No)***.**
>
> *If not, state name:*
>
> *Company/CC/Trust name*
>
> *Company/CC registration number:*
> *2019/084594/01"*

However, the remainder of the form referred in various places to the Second Respondent and it is common cause that it was the Second Respondent's banking details that were filled in the form. It is clear therefore that the Second Respondent was intended to be an applicant for the lease and not Dr Taitz.

Then, on the second of the application forms, the First Respondent completed her details in the same space where she had filled in Dr Taitz's details on the first page. However, she did not circle the "Yes" or "No" in regard to whether she was to be a lessee in her personal capacity. But she did complete the details of the Second Respondent in the appropriate place where the question was asked "*If not, state name*". The fact that she completed the Second Respondent's name after the "*If not, state name*" seemed to reflect that she did not intend for the lease to be in her personal name either, but rather in the name of the Second Respondent. She did not complete the

remainder of the form, presumably because the Second Respondent's details and banking details were already completed on the first application form.

The two application forms seemed to show that the Respondents intended that only the Second Respondent was applying to be a lessee.

Furthermore, in an email dated 16 August 2019, sent by the First Respondent to Denny Goddard (a person in the employ of the Applicant's letting agent) and to Bronstein and Dr Taitz, in which the First Respondent replied to Denny Goddard, the First Respondent had stated:

"The lease will be in the company name. Is it still the same form?"

This email was sent to the aforesaid parties approximately one hour before the completion and signature of the lease agreement by the First Respondent. It therefore appeared that at the time when she sent the said email to Goddard, the First Respondent intended that the Second Respondent would be the lessee and was querying the application forms. There is no evidence that any response was sent by Goddard or Bronstein to this query.

The aforesaid was therefore the only evidence in the affidavits of the negotiations preceding the conclusion of the lease agreement. Faced with the fact that the documents preceding the lease agreement seemed to indicate that only the Second Respondent was intended to be the lessee whereas the Respondents had in the Magistrates' Court admitted that the First Respondent was a co-lessee with the Second Respondent, I decided to refer the issue of the rectification of the lease to oral evidence.

I accordingly made the following order, which referred to the matter to oral evidence in relation to the issue of rectification of the lease agreement and also granted judgment against the Second Respondent:

"1 The second respondent is to make payment to the applicant of: -

1.1 R 282 454.31;

1.2 R 138 333.75; and

1.3 interest upon the sums in [1.1] and [1.2] supra, a temporae morae to date of payment at the rate prescribed from time to time in accordance with the provisions of the Prescribed Rate of Interest Act 55 of 1975;

2 The second respondent is to make payment of the costs of the application on a scale as between attorney and own client.

3 As regards the first respondent's liability (if any) to the applicant: -

3.1 the issue of whether the lease agreement falls to be rectified as claimed by the first respondent in her answering affidavit and whether she is therefore jointly and severally liable with the second respondent, is referred to the hearing of oral evidence.

3.2 the evidence shall, unless the Court directs otherwise, be that of the deponents to the various affidavits in the application, subject thereto that

the first respondent's evidence shall be led first and she shall be subject to cross examination;

3.3 No party may call any other witnesses save with the leave of the court;

3.4 the parties shall, within fifteen court days of this order, discover, on oath, any further documents they wish to rely upon;

3.5 either of the parties may approach the Deputy Judge President of this Division for preferential and/or expedited allocation of the hearing of the oral evidence referred to in paragraphs [3.1] and [3.2] supra on a date as assigned by the Deputy Judge President.

4 The costs against the first respondent are reserved for determination at the hearing of oral evidence."

It had been agreed at a pre-trial hearing before the hearing of the oral evidence, that since the First Respondent bore the onus to prove rectification, she would have the duty to begin. However, on the first day of the hearing, the Applicant, now represented by Mr De Bruyn, applied for an amendment of the order which had referred the matter to oral evidence to introduce a further issue for determination and that was the following:

"Whether, as a matter of law, a valid and lawful contract was concluded between the applicant and the first respondent."

This arose because the First Respondent contended that even if she did not prove rectification of the lease agreement, she nevertheless disputed and put the Applicant to the proof of whether there had been a meeting of the minds in relation to whether the First Respondent was intended to be a co-lessee and therefore whether there was consensus in regard to this issue. The First Respondent therefore raised the issue of whether there was a valid and enforceable agreement between the First Respondent and the Applicant. The First Respondent contended that the Applicant bore the onus in this regard.

At the hearing of the oral evidence before me, the First Respondent testified and the Applicant called Bronstein.

The First Respondent testified that she was legally qualified and had completed one year of articles at Webber Wentzel Attorneys. The First Respondent was relatively new to running the business of the Second Respondent – which was a travel agency - or indeed, the running of a firm at all. The First Respondent testified that she is the "adoptive" daughter of Dr Mark Taitz, which adoption was done pursuant to an oath before a Rabbi in accordance with Halakha of the Jewish law. She subsequently married Mr Dustin Ebben. She testified that she never lived at the house in Edward Rubenstein Drive (being the leased property), save for a two or three-week period after her marriage when she and her husband stayed there while they were waiting for their new residential home to become available.

The Second Respondent was an online travel company. The company was funded by five shareholders through issued share capital of some R2 million. The company was

established in 2019, but from March 2020, when the COVID-19 pandemic was in full force and the travel business in general shut down, it led to the demise of the Second Respondent. The First Respondent was a small (less than 4%) shareholder of the Second Respondent, although she was its sole director. Dr Taitz was the CEO and in fact the controlling mind of the Second Respondent and he ran its business operations. It was not explained in evidence why Dr Taitz was not a director of the Second Respondent.

The First Respondent explained that they had approached Bronstein to source a residential home for Dr Taitz since he had to urgently leave his current residential home. Apparently, he had to vacate his previous home by 20 August 2019 and therefore had to find a new home as a matter of urgency. This also explained the rush to sign the lease agreement on 16 August 2019. She testified that most of the discussions surrounding the finding a new home were conducted between Dr Taitz and Bronstein.

The First Respondent testified how she completed the application forms and that as far as she was concerned, the Second Respondent was intended to be the lessee and not herself in her personal capacity. She also testified about the exchange of emails and Whatsapp messages between herself, Bronstein and Goddard.

The First Respondent did initially testify that she has never authorized a credit check on herself and that despite the fact that she had not consented to a credit check on herself, one was indeed conducted on her. However, when confronted with an email - which neither party had initially discovered and which I gave leave to be used and discovered during the oral evidence - she recanted her evidence and testified that she had written

and sent the email granting the authorization for a credit check on herself, from her cellular phone whilst stopped at an intersection on her way to meet Bronstein to sign the lease agreement and she had forgotten about it. She explained that her denial that she had authorized the credit check was in the context of the Whatsapp messages. The relevance of this evidence is of course the fact that on the probabilities, she would not have needed to authorize a credit check on herself if she was not intended to be a co-lessee and the Applicant understandably spent much of its cross-examination exploring this issue. However, Bronstein in his evidence provided the answer as to why it was necessary for the First Respondent to have a credit check done on her. He testified that when dealing with a small and unknown company, it was the practice of his letting agency to require a credit check on the directors of the company. This evidence refuted the contention that the only reason that a credit check was done on the First Respondent was because she was intended to be a co-lessee. It therefore appeared from Bronstein's evidence a credit check was undertaken on the First Respondent simply because she was the sole director of the First Respondent.

Tellingly, it was common cause that no affordability check was done on the First Respondent and she never provided her banking details or bank statements to the Applicant or Bronstein for the purposes of an affordability check. Only the banking details and bank statements of the Second Respondent were ever provided to Bronstein and the Applicant.

The First Respondent then explained what occurred on 16 August 2019 when she completed the lease agreement and signed it. She testified that she met Bronstein at his doctor's office at the Bluebird centre at approximately 15:00pm on the afternoon of

Friday 16 August 2019. The importance of the fact that it was a Friday was that both she and Bronstein were Orthodox Jews who were required to be home by sundown and they could not drive after sundown because the Sabbath had begun. The meeting was therefore rushed because she had to leave in order to be home to begin the preparations for the Sabbath.

She met Bronstein in the doctor's waiting rooms. She began completing the lease agreement document.

Her actual evidence was as follows:

> "*I met [Bronstein] .. I started filling this in and then obviously it says full names. I write my full name and then below that I saw it said registration number or ID number. So when I realised that could have been the company name written there, I just assumed full name mean my name. So I asked [Bronstein] if that line where I had just written my name was meant to be the company name because I see registration number just below it and then he told me it is not a problem. I can just write the company name just below where I filled in my details and then I proceeded to do that and then he took me through where I needed to sign."*

Bronstein in turn testified that when he met Dr Taitz and the First Respondent, he was not aware of their exact relationship and he viewed them as a "single unit". But whilst that may be so, the real question is whether that single unit contracted through the Second Respondent. In this regard, Bronstein's evidence was extremely vague. He could not conclusively state that his understanding was that the parties intended that both the Second Respondent and the First Respondent were intended to be co-lessees or whether it was merely the Second Respondent that was intended to be a lessee.

When confronted with the fact that all the documentation and emails preceding the signature of the lease seemed to point to only the Second Respondent being a lessee, he could not refute this. When he was asked why he believed that the First Respondent had intended to bind herself as co-lessee if all the preceding documentation seemed to indicate that only the Second Respondent was intended to be a lessee, he could only point to the fact that the First Respondent had filled in her name on the line for lessee in the lease agreement and it was not for him to question whether a person intended to bind themselves to the lease.

But of course, this evidence begs the question whether the First Respondent made an error in doing so. It also begs the question what precisely the parties common continuing intention was.

Tellingly, when the First Respondent's evidence that she had stated there and then in the doctor's office to Bronstein that she had filled in her details in the place for lessee instead of the place for representative and he had told it was fine and that she must merely also write in the company's details in the place for a lessee, he could not recall that she had said this and that he had so responded. However, he could not deny it. He simply and honestly stated that he could not recall but could not deny that it had in fact occurred. He did testify that in retrospect he would probably have rather stated that she delete her name and merely fill it in again under the company's name in the appropriate space reserved for the company representative – but conceded that this was merely with the benefit of hindsight.

To my mind, it is plausible that Bronstein – if he knew that the Second Respondent was intended to be the lessee (which he must have at that stage bearing in mind the lead up to the signature and the documentation and emails preceding the signature) – would have said that it was fine that she signed in the wrong place because he was aware that it was merely an error and he was aware that it was not the intention of the parties that the First Respondent be a co-lessee in her personal capacity. Had Bronstein intended (on behalf of the Applicant) that the First Respondent be a co-lessee, he no doubt would have ensured that he obtained copies of her personal bank statements and conducted an affordability check on her in addition to the Second Respondent. It is common cause that neither he, Goddard nor the Applicant did so.

In relation to the Applicant, it is appropriate at this juncture to state that the Applicant was represented by Bronstein, even though the lease was signed by a representative of the Applicant. Bronstein undertook all the negotiations on behalf of the Applicant and whatever common continuing intention was formed between the parties was formed by Bronstein on behalf of the Applicant and whatever knowledge he had obtained was constructive knowledge of his principal, the Applicant. The importance of this was because the Applicant contended that by filling in her details in the incorrect place, the First Respondent had created the impression with the Applicant that she intended to sign as co-lessee, irrespective of the prior intention expressed in the preceding documents and correspondence and that therefore she was bound in terms of the principle of quasi-mutual assent[2]. However, this submission fails since if Bronstein was aware that she had filled in her details in the wrong place, then by constructive

[2] See *Pieters & Co v Salomon 1911 AD 121*

knowledge, the Applicant was also aware and there is no quasi-mutual assent established in such circumstances. Bronstein did not and could not refute the First Respondent's evidence that she had immediately told him that she had filled in her details in the wrong place and he had told her it was fine and she merely had to fill in the company's details below her name. This too should have been conveyed by Bronstein to his principal, the Applicant and even if it was not, the Applicant is deemed to have had constructive knowledge thereof.

Rather curiously, the representative of the Applicant who signed the lease agreement, made the exact same error as made by the First Respondent. Mr Adel Abdulhamid Almahdi Emadani, also filled in his details in the place for a co-lessor in addition to filling in the details of the Applicant. The only difference is that he then again and correctly filled in his own details in the space for the representative of the Applicant. The question must be asked if he could make this mistake as representative of the lessor, why could the First Respondent not make the same mistake as representative of the Second Respondent.

The First Respondent attempted to suggest that there may therefore be an issue of material misjoinder since the case law makes it clear that if there are two or more creditors (such as co-landlords) in an agreement, they must both claim the debt jointly and cannot claim singularly or severally[3]. However, this matter was conducted on the undisputed basis that the Applicant and the Applicant alone was the lessor and this much was admitted not only in the Magistrates' Court pleadings, but again under oath in the First and Second Respondents' answering affidavit. It was not an issue in this

[3] I was referred to *Prinsloo v Roets en Andere 1962 (3) SA 91 (O)* and *Grasslands Agriculture (Pty) Ltd v Parmalat SA (Pty) Ltd 2011 JDR 0694 (ECG)*

matter and clearly the insertion of Mr Adel Abdulhamid Almahdi Emadani's details in the place for a lessor, was merely an error.

The test, after having heard oral evidence from the witnesses is set out in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell Et Cie & Others 2003 (1) SA 11 (SCA)* as follows at paragraph [5] thereof:

"*[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of A subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of B his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.*"

It is therefore clear that when all the factors are equipoised, the probabilities prevail since, after all, a court is called upon to determine where the truth probably lies. In this

regard it was held as follows in *Haunt v Paramount Property 2020 JDR 1372 (GJ)* at para [49]:

> *"[49] … In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favour the plaintiff, then the Court will accept this version as being probably true."*

This is followed by the following *dicta* as to the order in which the credibility and the probabilities are to be decided:

> *"[49] …*
>
> This view seems to me to be in general accordance with the views expressed by Coetzee J in Koster Kööperatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens and African Eagle Assurance Co Ltd v Cainer. I would merely stress, however, that when in such circumstances one talks about a plaintiff having discharged the onus which rested upon him on a balance of probabilities, one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

The Applicant argued vigorously that I should reject the First Respondent's version of rectification on the basis that her credibility should be rejected due to the fact that she was not to be believed having given incorrect evidence on the issue of whether she had

granted consent to a credit check on herself and thereafter recanting such version when confronted by her email in which she did indeed give such evidence. However, as set out above, she gave the reasonable explanation that she had forgotten about that email until it was produced by the Applicant and it had been sent in haste from her cellular phone whilst she was waiting at an intersection on her way to the meeting with Bronstein. Her version of why she had forgotten about it is plausible and I have no reason to reject it.

The Applicant also contended that I should reject the First Respondent's credibility because it is improbable that an admitted attorney would make the errors in the lease agreement which she had made and that an admitted attorney would immediately have advised her legal team in the Magistrates' Court matter to plead rectification. However, this ignores the fact that she was a relatively inexperienced attorney and had not been long in practice. Whilst it is so that she was the managing director of her law firm, it appeared from the undisputed evidence that she was no more than a glorified office manager and did not actually practice law other than running the administration of her law office. She employed various attorneys to deal with the various departments in her law firm. She testified that when she received the Magistrates' Court summons and since it related largely to eviction and did not pay sufficient attention to it and she left it in the hands of her litigation team. In this regard, she was extremely careless and negligent and she admitted as much. However, that does not mean that I should reject her credibility or her version in this regard.

The First Respondent contended that it was more probable that she signed the lease as co-lessee in error and that the lease agreement did not correctly reflect the parties'

common continuing intention and should therefore be rectified. It is to these probabilities that I now turn.

The First Respondent's answering affidavit spelt out precisely what happened at the meeting at the doctor's rooms. On three occasions, the First Respondent identified that her name was inserted at the incorrect place and that she had told Bronstein of this immediately. In his affidavit, Bronstein never seriously disputed any one of these statements.

The two lease application forms completed by the First Respondent both clearly reflect the lessee as the Second Respondent.

It is also improbable that the First Respondent would incur a liability in excess of R500 000 per annum as a co-lessee for a company of which she is less than a 4% shareholder and in respect of a residential property which she did not intend to reside in. This is particularly so when there was no evidence that the Applicant required her to sign as co-lessee.

The evidence is unequivocal that the First Respondent had in an email informed Bronstein that "the company" would be the lessee. Bronstein testified that he had received the forms and he never denied receiving the said e-mail.

The Applicant never made any enquiries regarding the First Respondent's ability to afford the rental. An affordability test was only done on the Second Respondent. This is a further indication that Bronstein and his administration staff were well aware that the lessee was intended to be the Second Respondent.

That the First Respondent probably erroneously completed her details in the place reserved for lessees is the fact that the Applicant's representative made the same error.

Lastly, it is common cause that the lease document was completed in extreme haste and under severe time pressures. This is what probably led to the error in its completion in regard to the First Respondent putting her details on the line reserved for a lessee instead of the line reserved for a representative of the company. I need not refer again to the statements with which I began this judgment. Legally binding documents should never be completed in haste for they then often lead to much unnecessary heart-ache and of course, costly litigation.

The requirements for rectification have recently been summarised as follows in *Voltex (Pty) Ltd v First Strut (RF) Ltd (In Liquidation) and Others 2022 (3) SA 550 (GP)* at paragraph [49]:

> "*[49] A party seeking the rectification of an agreement needs to allege and prove –*
>
> *(i) an agreement between the parties which was reduced to writing;*
> *(ii) that the written document does not reflect the common intention of the parties correctly;*
> *(iii) an intention by both parties to reduce the agreement to writing;*
> *(iv) a mistake in drafting the agreement;*
> *(v) the wording of the agreement as rectified."*

In 2020, the Gauteng Local Division in *Haunt v Paramount Property 2020 JDR 1372 (GJ)* elaborated upon the requirements for rectification as follows at paragraphs [41] – [45]:

"[41] The remedy of rectification, which some authorities regard as an exception to the parol evidence rule, allows for extrinsic evidence to be adduced in the determination of the intention of the parties in a written agreement. The principle allows the Court to infer into the agreement ***the intention of the parties from the evidence of the negotiations.*** *In other words, it allows for the supplement of an incomplete agreement with the relevant and material term or terms that might be missing.*

[42] It is through rectification that the Court presents to the parties a term or terms which they might have failed to include in recording their agreement. It addresses the essential term which the parties may, by mistake, have failed to include in the agreement.

[43] …

Thus a mistake is an essential element of rectification.

[44] The common intention which the parties failed to reduce to writing ***can be inferred from the surrounding circumstances****.* ***The unexpressed intention can thus amount to a tacit consensus****.*

[45] In ***Meyer v Merchants Trust Ltd****, it was held:*

'… '

… but there is no reason in principle why that common intention should not be proved in some other manner [other than an antecedent agreement] provided such proof is clear and convincing."

In *Brits v Van Heerden Haunt v Paramount Property 2020 JDR 1372 (GJ),* the Court elaborated upon the nature of the mistake:

"In order to obtain rectification of a written contract, it is necessary to prove that there was a mistake of some sort. The mistake not having to relate to the writing itself, but it can relate to the consequence thereof. The mistake can be one common to both parties, of one party; or induced by misrepresentation or fraud – the crux of the matter is that mistake, be it misunderstanding of fact or law or incorrect drafting of the document, it has to have the effect of a written memorial not correctly reflecting the parties' true agreement."

In my view and on a balance of probabilities, the First Respondent has discharged her onus of proving that it was the common continuing intention of the parties that the lease would be in the name only of the Second Respondent, that the lease agreement does not therefore accurately reflect the common continuing intention of the parties, that the First Respondent's details being included in the space reserved for a lessee was in error and that the error came about because of the haste with which the document was completed and signed.

Applying the aforesaid principles and the probabilities of the matter, I am satisfied that the First Respondent has discharged her onus of proving the requirements for the rectification of the lease agreement. That being so, I need not deal with the alternative issue which is that the Applicant allegedly did not prove consensus in regard to whether the First Respondent was to be a co-lessee or not.

That being said, had the First Respondent pleaded a reliance on rectification in the preceding Magistrates' Court action, the Applicant would no doubt not have proceeded by way of application at all. However, when the issue was raised the Applicant joined issue and did not concede the First Respondent's reliance on rectification of the lease agreement. When it comes to costs, I will therefore disallow the First Respondent the costs of drafting, preparation and service of the notice of motion and founding affidavit and annexures and award such costs to the Applicant as a sign of my displeasure at the First Respondent's failure to date to plead rectification in her plea in the Magistrates' Court.

In the circumstances, I make the following order:

1 The lease agreement, being annexure FA2 to the Applicant's founding affidavit, is rectified to remove any reference to the First Respondent as a co-lessee with the Second Respondent.

2 The application against the First Respondent is dismissed with costs on the party and party scale, save for the costs referred to in paragraph 3 below.

3 The First Respondent is to pay to the Applicant the party and party costs occasioned by the drafting, preparation and service of the notice of motion, the founding affidavit and annexures thereto, as taxed or agreed.

G KAIRINOS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION JOHANNESBURG

(**Digitally submitted by uploading on Caselines and emailing to the parties)**

Appearances:

Counsel for the Applicant: Adv DS Hodge

Counsel for the First Respondent: Adv W De Bruyn

Dates of hearing: 8 October 2021; 28, 29 and 30 March 2022; 20 and 21 June 2022; 23 September 2022

Date of judgment: 28 September 2022