# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case number : 171/06
Reportable

In the matter between :

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| THE MINISTER OF LAND AFFAIRS AND AGRICULTURE | FIRST APPELLANT |
| THE DIRECTOR-GENERAL OF LAND AFFAIRS | SECOND APPELLANT |
| THE CHIEF LAND CLAIMS COMMISSIONER | THIRD APPELLANT |
| THE DEPARTMENT OF LAND AFFAIRS | FOURTH APPELLANT |

and

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| D & F WEVELL TRUST | FIRST RESPONDENT |
| JOHN FRANCIS CLARKE | SECOND RESPONDENT |
| ROSEMARY CLARKE | THIRD RESPONDENT |
| NTSINGANI FARMS CC | FOURTH RESPONDENT |

CORAM : SCOTT, BRAND, CLOETE, HEHER JJA *et* HURT AJA

HEARD : 1 NOVEMBER 2007

DELIVERED : 28 NOVEMBER 2007

**Summary: Motion proceedings: requirements that must be satisfied where a respondent, who is not able to deliver affidavits deposing to a defence, requests a referral to oral evidence or trial, set out.**

**Neutral citation: This judgment may be referred to as *Minister of Land Affairs and Agriculture v D & F Wevell Trust* [2007] SCA 153 (RSA).**

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# *JUDGMENT*

**CLOETE JA/**

CLOETE JA:

INTRODUCTION

[1] On 26 July 2005 Gildenhuys J presiding in the Land Claims Court granted an order in terms of the Restitution of Land Rights Act, 22 of 1994 ('the Act'). The order directed the Minister of Land Affairs and Agriculture (the first applicant before this court and the first respondent in the court *a quo*), the Director-General, Land Affairs (the second applicant before this court and the second respondent in the court *a quo*) and the Department of Land Affairs (the fourth applicant before this court and the fourth respondent in the court *a quo*) to pay, upon registration of transfer, the agreed purchase prices of properties. The properties had been purchased by the Department from the D & F Wevell Trust (the first respondent before this court and the first applicant in the court *a quo*) and from Mr J F Clarke, Mrs Rosemary Clarke and Ntsingani Farms CC (respectively the second to fourth respondents in this court and the applicants in the court *a quo*). No order was made against the Chief Land Claims Commissioner (the third applicant before this court and the third respondent in the court *a quo*). It would be convenient to refer to the parties as in the court below or by name.

[2] On 6 December 2005 the learned judge dismissed an application for condonation for the late delivery of the respondents' application for leave to appeal and on 3 March 2006 he dismissed the application for leave to appeal against that latter decision. The respondents applied for leave to appeal to this court. That application was also out of time. The respondents' application for condonation in this regard was ultimately not opposed. This court directed on 28 August 2006 that the application for leave to appeal the order of the Land Claims Court of 6 December 2005 (refusing condonation) be referred for oral argument;[1] and that should the application succeed, the parties should be ready to argue whether this court could deal with the appeal on the merits[2] and, if so, the merits of the appeal.

[3] The first question is therefore whether this court should grant the respondents

[1]The relevant section is s 37(7)(c)(ii) of the Restitution of Land Act, which corresponds to s 21(3)(c)(ii) of the Supreme Court Act, 59 of 1959.
[2]*NUMSA v Jumbo Products CC* 1996 (4) SA 735 (A).

leave to appeal against the order of the Land Claims Court given on 6 December 2005, in terms of which it dismissed the respondents' application for condonation for the late delivery of their application for leave to appeal against the order given on 26 July 2005. In order to consider this question, it is necessary to set out the relevant facts that led to the order of 26 July which the respondents wish to have set aside, and the reasons for the delay in the application for leave to appeal that resulted in a preliminary hurdle being placed in their path. It will also be necessary to consider the respondents' prospects of success in an appeal against the order of 26 July 2005, in the context of the application for condonation.

THE CONTRACTS

[4] On 14 October 2003 the Wevell Trust entered into a written agreement with the Department of Land Affairs. On 30 September 2003 the other applicants ─ Mr and Mrs Clarke, and their son who represented the close corporation in which he held a 100% interest, to all of whom it will be convenient to refer as 'the Clarkes' ─ also entered into an agreement containing identical provisions to the Wevell Trust agreement. In terms of the agreements the appellants sold certain farms situated in the Badplaas area to the Department for an agreed price which was payable on the date of registration of transfer of the properties into the name of the Department's nominee, the Ndwandwa Community Trust. Registration of transfer had to take place as soon as possible once the Department had undertaken to pay the full purchase price, a letter of intent to this effect had been issued and other defined amounts had been paid. The letter of intent had to be issued within thirty days of the approval of the agreement by the Minister of Agriculture and Land Affairs. Pending registration of transfer, the applicants were liable for payment of the following:

(a) all rates, taxes and levies (if any) in respect of the property;

(b) electricity and service rates, including levies to the town council, in respect of the property; and

(c) premiums for the insurance of the property.

DELAY IN PERFORMANCE OF THE CONTRACTS

[5] The Minister's approval was necessary in terms of s 42D of the Act, the relevant part of which provides:

'(1) If the Minister is satisfied that the claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following:

(a) The award to the claimant of land . . . .

. . .

(f) Such other terms and conditions as the Minister considers appropriate.'

Such approval was given, in the case of the Wevell Trust, in terms of a letter dated 21 April 2004 and the price fixed was R3 362 700; and in the case of the Clarkes, in terms of a letter dated 1 April 2004, and the purchase price (which was ultimately fixed after further negotiation) was R10 192 800.[3] Each letter of approval, signed by the Regional Land Claims Commissioner: Mpumalanga, contained the statement: 'Kindly advise your conveyancers to proceed with preparation of transfer documents'. The letters of intent were issued.

[6] The conveyancer in each case was the applicants' attorney, Ms Wellmanns. In the Wevell Trust matter, on 10 September 2004 ─ the day before registration was to have taken place ─ the attorney received a letter from the office of the Chief Land Claims Commissioner, stating:

'We hereby request your office to withdraw the transfer from the Deeds Office. An investigation is currently in process and the outcome will be within three weeks.'

The attorney received an identical letter on the same date in respect of the Clarke matter; there, documents had also been lodged in the Deeds Office and were 'on preparation', which means that registration was about to take place. These transfer documents were also withdrawn from the Deeds Office by the attorney. Correspondence followed.

[7] On 5 November 2004 the applicants' attorney pointed out in letters addressed to the Minister, the Director-General, Land Affairs and the Chief Land Claims

[3]There is a dispute between the parties in this regard. The figure I have given was that contained in the letter of intent and judgment was given for this amount. Details of the dispute are not relevant for the purposes of this appeal.

Commissioner that the three-week period had long since expired and that nothing had in the interim been communicated to her or her clients. She said:

'In the circumstances my client is left with no alternative but to advise that should you not give me written notification that I can arrange to re-lodge within 14 days of the receipt of this letter, my client will institute proceedings in the Land Claims Court . . . for an order compelling you to do so and thereafter to pay the purchase price together with costs & interest a tempore morae.

It is regretted by my client that this step has had to be taken, but the delay is prejudicing him severely, as well as causing considerable prejudice to the Community which has been allocated the farms.'

[8] The replies by the Chief Land Claims Commissioner dated 15 November 2004 said:

'We refer to your letters of 5th November 2004 and would like to advise as follows:

(1) We confirm that the Chief Land Claims Commissioner: Mr Tozi Gwanya has informed you that he would let you know within 3 weeks of the outcome of the investigation.

(2) Since the letter to yourselves by the Chief Land Claims Commissioner, it has transpired that the investigations will take longer than it was initially anticipated.

(3) Unfortunately we are unable to give definitive dates by which the investigations would be expected to be completed, suffice to say that we would like the process to be thorough and satisfactory.

(4) We regret the inconvenience which is being caused to the stakeholders in this claim including your clients, however we believe that for the process to be beyond reproach we are required to undertake proper investigations which we are currently undertaking.

(5) We are accordingly requesting you to exercise patience until the process is completed.'

[9] Faced with the delay the applicants' attorney wrote on 22 November 2004:

'My clients and the community are being severely prejudiced by the protracted delays;

My clients would therefore be willing, since you are unable to confirm a date by which your investigations would be complete, to accept your written undertaking that your Department would pay to my clients on registration of transfer, interest on the sum of [the purchase price] at bank overdraft rates from 20th September 2004 [in the Wevell Trust matter; 13 September 2004 in the Clarke matter] (the date by which transfer could have been registered had you not instructed me to withdraw the documents from the Deeds Office,) to date of payment, both days inclusive.

However, my client hereby nonetheless without prejudice, reserves his rights to institute proceedings in the Land Claims Court within 14 days from 9th November 2004, as set out in the penultimate paragraph of my letter to you of 5th November 2004.'

The suggestion made by the applicants' attorney seems to me to have been perfectly

reasonable. It was ignored.

THE APPLICATIONS

[10] Applications on notice of motion dated 9 December 2004 were brought in both matters. The relief sought in each matter was an order directing the respondents:

(1) within seven days of the order to authorise and instruct the applicants' attorney to lodge all the required documents with the office of the Registrar of Deeds, Pretoria, for the registration of the farms into the name of the Ndwandwa Community Trust;

(2) 'forthwith on or after the date of registration of transfer' to pay the purchase price agreed upon;

(3) to pay interest a tempore morae at 15,5 percent per annum from receipt of the date of demand ie 15 November 2004, to date of payment; and

(4) to pay the applicants' costs of suit.

[11] The founding affidavits in each case pointed out that the applicants were suffering prejudice consisting in the loss of interest on the purchase price. They concluded, with reference to the letters of 5 November 2004 quoted above:

'In the premises the First to Fourth Respondents are in default of their obligations under and in terms of the Agreement as the period allowed in the said notice . . . has now expired.'

The reply to these latter paragraphs in the answering affidavits was:

'Respondents dispute the allegations contained in this paragraph. I submit that despite the contention by the Applicant to the contrary, there is a rational basis for the investigations which led to the suspension of the transfer and registration process. The basis of the investigation is that there is a reasonable and well founded suspicion that the valuation of all the farms involving the Ndwandwa Community was tainted with irregularities. To that extent, the Third Respondent has appointed a suitably qualified valuer to review the valuation process which was used in the valuation of all farms which were bought on behalf of the Ndwandwa Community. In particular it is suspected that some of the valuation amounts affecting most of the subject farms were grossly and unreasonably inflated. I accordingly submit that having regard to the prejudice that the Applicant is alleged to be suffering and the considerable prejudice that is likely to result to the Respondents (and by extension to the public) should the investigations not be undertaken, the balance of convenience favours the Respondents undertaking a proper and thorough investigation without unnecessary pressure from the affected parties.

Wherefore the Respondents pray that it would please this Honourable Court to dismiss this application with costs on an attorney and client scale.'

That was the only point of substance raised in opposition to the applications. There was also a bare denial that the applicants were suffering prejudice. The answering affidavits were in each case deposed to by Mr Andreas, the legal advisor to the Chief Land Claims Commissioner.

[12] I pause to remark that the phrase 'balance of convenience' in the passage just quoted from the affidavit of Andreas is entirely inappropriate in the context in which it was used. The phrase is of course well known in applications for interim interdicts. And that indeed is the course the respondents should have followed. They should have applied for an order interdicting transfer of the properties pending a date by which they anticipated that the investigations would be completed, and applied to extend that date if necessary. In such a case the prejudice to the applicants would to a large extent have been eliminated by an undertaking to pay interest on the agreed purchase prices for the farms, should the investigation show that the valuations of their farms were not tainted by any irregularity. If there were irregularities, the applicants could hardly complain if they received no interest. And the prejudice to the fiscus if there had been irregularities would obviously have weighed with the court in considering an interim interdict. The Chief Land Claims Commissioner, however, has entirely misconceived his powers and those of the Minister. He said (in his replying affidavit in the application for leave to appeal to this court):

'It is respectfully submitted that we [ie the Minister and himself] were entitled to freeze the transfer of those lands in issue which had not yet been transferred and that the [applicants] were not entitled to proceed to Court to enforce the agreement once they had received my letter to that effect and my further letter of 15 November 2004.'

Neither the Chief Land Claims Commissioner nor the Minister had any 'entitlement' to stop, unilaterally, performance of the contracts of sale; and the applicants had every entitlement to go to court to enforce them.

[13] The replying affidavits, not surprisingly, pointed out that Andreas had had nothing to do with either matter at any stage whatsoever and that no attempt had

been made to obtain affidavits from the persons who did have knowledge of the events leading to the conclusion of the contracts. Notice was given that at the hearing application would be made for the striking out of the entire answering affidavits. The deponents to the replying affidavits also emphasised, as had their attorney in her letters of 5 November 2004, that the transactions with which they were concerned stood independently of the transactions for the purchase of other farms in the area; they alleged that their transactions were above suspicion; and they stated that no irregularity in regard to their contracts had ever been brought to their attention. They threw down the gauntlet by issuing a challenge to Andreas and the respondents 'to now come forward and give details of the investigations' against them. Further allegations of prejudice were made. In the Wevell matter, the following was said:

'Apart from the lost interest mentioned in my last affidavit I continue to suffer prejudice as a result of the totally unreasonable attitude of the Respondents. From the date of the sale to the end of December 2004 the applicant has lost the sum of R25 200 in lost rentals ie we could have rented out the farm and its house from June of last year. We have had to preserve the farm and this cost is about R800 per month again incurred since June of last year ie the sum of R7 200. In March and again in June of this year if nothing happens expenditure will have to be disbursed to maintain and build fire breaks in a sum of approximately R10 000. Lastly I have and will have spent funds on water levies of R6 600 per annum.'

In the Clarke matter, the deponent said:

'Apart from the lost interest mentioned in my last affidavit the Applicants continue to suffer prejudice as a result of the totally unreasonable attitude of the Respondents. From the date of the sale to the end of December 2004 the applicants have spent about R165 742.00 in closing down the farms and the holding costs per month until transfer is passed are R10 815.00 per month. This latter figure involves salaries for staff looking after the farms, water taxes, insurance, electricity, repairs & maintenance and guards. Also winter is approaching and the cost of fire breaks will be an approximate amount of R18 000.00. From March of 2005 there will be no income tax relief for me as there is no income from the farms to off set the expenses.'

[14] Subsequent the delivery of the replying affidavits the respondents delivered a supplementary answering affidavit in each case with a request to the court that they be accepted. The affidavits were again deposed to by Andreas. In the affidavits Andreas said:

'I am advised that the Respondents are not entitled to file a second set of affidavits. I pray, however, that this Honourable Court will permit the filing of this affidavit in that there are exceptional circumstances. First, in the answering affidavit, to the knowledge of the Applicant, the First to Fourth Respondents were investigating allegations of irregularities on the part of the Applicant. Secondly, subsequently to the filing of the answering affidavit new facts have emerged which enabled the First to Fourth Respondents to take a firm view in this matter, and who have . . . elected to cancel the agreement.'

Andreas went on to say that the Department had elected to cancel the contracts 'on the basis of a material misrepresentation on the part of the applicants alternatively fraud'. The affidavits continued:

'In support of the above submission, I bring the following facts to the attention of this Honourable Court which demonstrate that the seller's conduct is such which is tantamount to bad faith, fundamental breach, fraudulent behaviour, in short, conduct that entitles the Fourth Respondent to lawfully resile from the contract of sale. The Applicant repudiated and/or fundamentally breached the contract by acting in bad faith and/or fraudulently or negligently, and the Respondents, in particular the purchaser, hereby elect to cancel the agreement.'[4]

There followed a section entitled 'The Supporting Facts' in which Andreas pointed out that the applicants had had their properties valued by Mr Albert Roux. Andreas attached to his affidavit an unsworn and unsigned document purporting to be an affidavit by one Daniel in which he said that Roux had admitted accepting a bribe to inflate the value of a property known as 'Vygeboom' owned by a Mr Visagie which had been sold by Visagie to the Department; and Andreas also attached an unsworn report of Mr Derrick Griffiths, whose expertise was not established, which pointed out alleged shortcomings in valuations, inter alia by Roux, of properties in the area sold to the Department.

[15] The applicants delivered further replying affidavits in which they pointed out that Andreas' first supplementary answering affidavit was again wholly hearsay. They also denied in strong terms the fraud alleged against them and disputed the validity of the cancellation of the agreements they had concluded with the Department.

[16] On 14 April 2005 (p 145) a hearing in the Land Claims Court took place before Gildenhuys J. I quote from his judgment:

'When the matter came before me, I pointed out some shortcomings in the respondents' answering

[4]The only basis for cancellation persisted in on appeal was fraud.

affidavits. One of them was the unsubstantiated hearsay in Mr Andreas' affidavits. The respondents then asked for leave to deliver a second supplementary answering affidavit. I accepted the first supplementary answering affidavit, and granted leave to the respondents to deliver a second supplementary answering affidavit. I did so because the integrity of the restitution process in the Badplaas areas was at issue, and because public money was involved. I did not want to allow the inept drafting of the first two answering affidavits to impede a full venting of the serious issues raised therein.'

[17] Second supplementary answering affidavits dated 9 May 2005 were delivered, yet again deposed to by Andreas. The Daniel affidavit was annexed, this time properly attested. Further valuations (again not confirmed under oath) by Griffiths (whose expertise was again not set out) and which related specifically to the applicants' farms, were annexed. Also annexed was a document headed 'Department of Land Affairs. 1. Ndwandwa Community Project'. It appears from the minute of the pre-trial conference that this document was an extract from a report by Ernst & Young. The extract annexed was undated, unsigned and unattested and no indication as to its author(s) appeared from it. There was no reference to the document in Andreas' affidavit in the Wevell matter due apparently to some mechanical defect in the printing of the papers. That matter was nevertheless argued in the court *a quo* as well as on appeal on the basis that the missing allegations were the same as the allegations made in the second supplementary answering affidavit in the Clarke matter. In that matter Andreas identified the document as volume 2 of a report by Ernst & Young 'which has recently become available' (in fact it had become available more than three months previously on 7 February) and he claimed that

'the facts set out therein demonstrate, with respect, if proven that the fraud perpetrated on the Respondents [involves] the same role players associated with the Applicants' claim [who] include valuators, Pieter Visagie, and senior employees of the Second and Third respondents' personnel as well as potentially representatives of the [Ndwandwa Community Trust]'.

The Wevell transaction is not referred to in the document at all. The only reference to the Clarke transaction is a statement that they had been paid – which is untrue.

[18] In the second supplementary answering affidavit in the Wevell Trust matter Andreas repeated the allegation made in his first supplementary answering affidavit that Roux, the valuer of both the Wevell Trust property and Visagie's Vygeboom

property, was bribed by Visagie to inflate the value of the latter property; and Andreas went on to make the additional allegation that Roux had knowingly used the false and inflated valuation of the Vygeboom property to determine the market value of the Wevell Trust property. The answer to these allegations given in the second supplementary replying affidavit in the Wevell Trust matter was simple and conclusive: namely, that Roux could not have used the valuation of the Vygeboom property to support his valuation of the Wevell Trust property as the Vygeboom valuation did not exist at that time ─ it was compiled subsequent to the valuation of the Trust's property.

[19] Andreas also alleged that Visagie in his capacity as chairman of the Badplaas Development Forum had acted on behalf of the Wevell Trust and that the Trust had benefited from his fraudulent activities. In the second supplementary replying affidavit, the deponent on behalf of the Trust said that the Trust had had nothing to do with Visagie and that the negotiations in respect of the Trust's property had been carried on by Dr Pieter Kieviet, the coordinator of a subcommittee of Agri-Badplaas. Kieviet, as he confirmed in his supporting affidavit, negotiated directly with the Regional Land Claims Commissioner and those negotiations took place long before the formation of the body of which Visagie subsequently became the chair.

[20] Similar allegations were made by Andreas in the Clarke matter. There, too, Mr Clarke senior, the deponent to the second supplementary replying affidavit, demonstrated that the valuation of each of the Clarke properties antedated the valuation by Roux of the Vygeboom property, in some cases by several months, and said that he and his son had negotiated personally with the Regional Land Claims Commissioner and not through Visagie.

[21] It is quite apparent that in each of the two matters Andreas did not know what he was talking about. That is not surprising, as he was not involved in any way in the negotiations which led to the conclusion of the contracts. What is surprising is that he continued to depose to affidavits when he did not have the necessary knowledge. No

reason whatever was given why those involved in the negotiations and who had personal knowledge of what had transpired, did not depose to affidavits.

[22] A joint pre-trial conference in respect of both matters was held on 24 May 2005 with Gildenhuys J presiding. Paragraphs 5 and 6 of the minute read:

'5. The parties are agreed that if it is found that the deeds of sale were properly cancelled, the applications must be dismissed. On the other hand, if it is found that the deeds of sale were not properly cancelled, the applicant would be entitled to its relief.

6. The applicant has indicated that it will not seek a referral to evidence of any issue.'

[23] The matter again came before Gildenhuys J on 13 June 2005. At the earlier hearing on 14 April senior counsel then representing the respondents had handed up heads of argument which said the following:

'24. The applicant has not sought in this application to test the validity of the cancellation. The Applicant must elect whether it seeks to test the validity of the cancellation or not.

25. In the circumstances the appropriate order is to dismiss the application with costs.'

At the hearing on 18 June, the same senior counsel handed up a second set of heads of argument which said:

'[T]he Applicant made it clear at the pretrial conference that it does not seek to refer this matter to trial nor to seek any matter to be referred to oral evidence. The Applicant has elected to stand by the papers and if it cannot make out a case on the papers, to fail. . . . We accordingly submit that this application ought to be heard and decided on the basis of the facts contended for by the Respondents as well as those facts of the Applicant's contentions which are not controverted by the Respondents.'

[24] Gildenhuys J accordingly considered the issue isolated at the pre-trial conference on the papers before him, as he was expressly requested to do by both sides, and applied the following well-known test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:[5]

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the

[5]1984 (3) SA 623 (A) at 634H-635C.

denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E-H).'

[25] The learned judge's attitude to the hearsay evidence in Andreas' affidavit is set out in the following paragraph of his judgment:

'[Counsel for the applicants] applied for the striking out of the hearsay and other objectionable matter in Mr Andreas' affidavits. This Court may, under sec 30(1) of the Restitution of Land Rights Act No 22 of 1994, admit evidence which would be inadmissible in any other court of law. In terms of sec 30(3) of the Act, the Court must give such weight to any evidence so adduced as it deems appropriate. I did not strike out the hearsay and other objectionable evidence, but I will give it very little or no weight, especially where it conflicts with evidence adduced by the applicant.'

[26] In regard to the fraud alleged in the Wevell matter, Gildenhuys J reasoned:

'If . . . the papers before me do not contain sufficient acceptable evidence to support a finding that the agreement of sale was validly cancelled, I must hold that it is still in force.

[Counsel] for the respondents did not seriously contend that the allegations of fraud have been established. The respondents did not demonstrate any fraudulent conduct on the part of the applicant. They relied on jobbery by Mr Visagie particularly on the allegation by Daniels that Roux told him that he was bribed by Visagie to inflate the Vygeboom valuation. Apart from unsubstantiated hearsay proffered by Mr Andreas, there is no testimony of any evidential value which ties Visagie to the Wevell negotiations. On the contrary, Mr Wevell said Dr Kieviet negotiated on the applicant's behalf; Visagie was not involved at all.

. . .

In his heads of argument [counsel for the respondents] submitted that Roux was corrupted by Visagie, and that Roux knowingly used the false and inflated value of the Vygeboom property as a comparable sale to determine the open market value of the Wevell property. Therefore, so the argument ran, Roux acted fraudently, in a *mala fide* manner and/or was manifestly unjust in determining the market value of the Wevell farm to be R3 410 000. This determination was instrumental in reaching agreement on the purchase price for the farm.

. . .

During argument it became apparent that the criticism of Roux's valuation, as contained in [counsel's] heads of argument, was unfounded. Roux made his valuation of the Wevell farm on 4 March 2003. The so-called inflated valuation of the Vygeboom property was made by Roux during June 2003, some three months later.'

[27] In regard to the Clarke matter, Gildenhuys J reasoned:

'The applicants in the Clarke matter conducted direct negotiations with officials of the Regional Land Claims Commissioner. According to Mr JF Clarke, these negotiations occurred long before Visagie ever became involved with the formation of the Badplaas Development Forum. Neither Visagie nor Dr Kieviet were involved in the negotiations between the applicants and the officials.'

[28] The last two paragraphs of the judgment read as follows:

'I conclude that the contracts of sale in both cases have not been validly cancelled. The applicants are entitled to specific performance of the contracts. . . . There is also no basis for an order for interest.

This Court usually does not make costs orders, except in extraordinary circumstances. The circumstances of this case warrant a costs order. Although it is understandable that the respondents wanted to protect the state against losses caused by fraud, they continued defending the claims long after it must have been apparent to them that the cancellation of the agreements was invalid. The wild and unsubstantiated allegations made by Mr Andreas against the applicants were entirely unwarranted. If there was fraud or dishonest conduct on the part of other parties involved in other restitution transactions in the Badplaas area, that is no reason to tar the applicants with the same brush.'

THE APPLICATION FOR LEAVE TO APPEAL AND CONDONATION

[29] The judgment of the court *a quo* was handed down on 26 July 2005. Full reasons were given. Accordingly, in terms of rule 69(1)(b) of its rules, any notice of application for leave to appeal had to be delivered within 15 days after that date, ie by 17 August. The application was only received on 14 September. It was accompanied by an application for condonation in terms of rule 32(4) of the Rules of the Land Claims Court, which permits that court to grant condonation 'on good cause shown'. I propose examining first the reasons for the delay and then the prospects of success on appeal.

The reasons for the delay

[30] The judgment was received at the State Attorney's office on 26 July. The Registrar's covering letter did not indicate the name of the attorney dealing with the matter or the reference number of the State Attorney's office in respect of either of the applications. The staff in the registration section took three days to identify the correct person.

[31] On 1 August the State Attorney sent a copy of the judgment to the Department of Land Affairs by ordinary post. The State Attorney was informed by Andreas that the department's internet service was 'not available' to access the judgment — whatever that means.

[32] On 5 August the applicants' attorney advised the State Attorney by telefax that she would be relodging the documents in the Clarke matter as soon as the rates clearance certificates were obtained and indicated that she would expect payment of the purchase price in terms of the court order. On the same day the attorney asked the State Attorney to confirm that the letters of intent issued in the Wevell Trust matter would be paid on registration of transfer in terms of the court order.

[33] On 12 August the State Attorney replied to the letters of 5 August, saying that 'We are obtaining instructions from our client and will revert back to you in due course'. On 18 August, the day after any application for leave to appeal had to be delivered, the attorney telefaxed the State Attorney confirming that the Clarke papers had been lodged at the Pretoria Deeds Office and asking for confirmation that the purchase price would be paid into her trust account on registration of transfer as ordered by the court. The attorney undertook to advise the State Attorney as soon as the Clarke documents were on preparation.

[34] The judgment was received by the respondents in 'mid August' — the specific date does not appear from the record. It was discussed internally, and then with the Minister. These discussions took until 23 August. On 24 August Andreas instructed

the State Attorney to brief new counsel to advise on the prospects of success of an appeal and indicated that if the advice was that grounds existed, 'an application for condonation for the late lodgement of the appeal should be proceeded with forthwith'. On the same day that these instructions were received, the State Attorney briefed counsel with a copy of the judgment of the Land Claims Court and asked for an answer by 30 August (a week later) as both attorneys in the State Attorney's office dealing with the matter would be on leave until then.

[35] Also on 24 August the applicants' attorney sent a telefax to the State Attorney confirming that the Wevell Trust transaction had that day been lodged at the Deeds Office. On the same day, the State Attorney advised the seller's attorney by telephone that the respondents intended applying for leave to appeal and condonation for the delay. The attitude of the applicants' attorney, confirmed in a telefax dated 26 August, was that she was proceeding with registration of transfer in both matters. She said explicitly in the telefax: 'I will only desist from registering if a proper Application for leave to appeal is filed beforehand' and concluded:

'Please note that registration can be anticipated within 10 days of date of lodgement. I therefore await to hear from you **as a matter of extreme urgency**.' (Emphasis in the original.)

[36] On 30 August counsel advised the State Attorney that he was of the prima facie view that there were grounds to appeal but required a full copy of the application papers which had not been sent to him. On the same day the applicants' attorney advised the State Attorney by telefax that the Clarke documents were on preparation and again requested confirmation that the purchase price would be paid into a trust account on registration of transfer.

[37] On 2 September the applicants' attorney informed the State Attorney by telefax that the Clarke transaction had been registered at the Pretoria Deeds Office and requested payment of the purchase price into her trust account. In a telefax dated the same day, the State Attorney advised the applicants' attorney in respect of both matters that

'our office cannot give any guarantees, our client has instructed us to appeal the Land Claims Court

Order, the documents of which will be served on yourselves in due course'.

That telefax was only received by the applicants' attorney on 5 September, by which time the Clarke transactions had already been registered. The applicants' attorney replied to the State Attorney's telefax of 2 September on 5 September by pointing out that the time limit for lodging an application for leave to appeal had expired on 17 August and transfer had already been registered in the Clarke matter.

[38] The applicants' attorney advised the State Attorney on 6 September that the Wevell Trust transaction was on preparation at the Deeds Office, Pretoria, on that day. Also on 6 September the applicants' attorney sent a telefax to the State Attorney to make arrangements for the Ndwandwa Community Trust to take occupation of the Clarke property. On that day a consultation was held with counsel briefed by the State Attorney to enable an application for condonation to be drawn up.

[39] On 12 September the applicants' attorney confirmed that transfer had been registered that morning in respect of the Wevell Trust property and requested payment of the purchase price into her trust account. On the same day the applicants' attorney wrote letters to the Minister, the Director-General, and the Chief Land Claims Commissioner pointing out that no application for leave to appeal had been received, emphasising that more than three weeks had elapsed since the last day upon which such an application could be brought and informing them that unless payment was made within five days in the Clarke matter she would make application to the Land Claims Court to commit for contempt whoever was responsible for the delay. This letter was hand delivered to the addressees and telefaxed to the State Attorney on 14 September.

[40] The applications for condonation, dated 13 September, were then delivered. They were nearly a month out of time.

[41] As pointed out by the court *a quo*, the affidavit filed by the State Attorney merely sets out the course of events from the delivery of the judgment up to the lodging of the condonation application. There is no explanation why application for

leave to appeal was not made within the time limit prescribed by rule 69(1)(b) of the Land Claims Court rules. I respectfully agree with Gildenhuys J that the respondents adopted a very casual approach. They simply took the amount of time they wished and ignored the repeated written warnings addressed to them via the State Attorney. The applicants were fully entitled to proceed as they did ─ as Holmes JA said in *Federated Employers Fire & General Insurance Co Ltd v McKenzie*:[6]

'The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment ─ the time for noting an appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see *Cairns' Executors v Gaarn*, 1912 AD 181 at p. 193, in which Solomon, JA, said:

"After all the object of the Rule is to put an end to litigation and to let parties know where they stand."'

The amount of the selling price in each case was substantial and the court *a quo* had ruled on 26 July 2005 that the applicants were only entitled to interest after registration of transfer. The applicants proceeded with transfer after ample and repeated notice had been given to the State Attorney of their intention to do so and after the date by which an application for leave to appeal had to be made. In all the circumstances, a demonstrably good case on the merits would be required before condonation could be considered.

Prospects of success on appeal

[42] Counsel for the respondents advanced two arguments in regard to the prospects of success of an appeal. The first submission was that the facts alleged by the respondents in the three answering affidavits deposed to by Andreas created a dispute of fact on the papers as to whether the respondents were entitled to cancel the contracts because of fraud perpetrated by the applicants or their agents, and that this dispute of fact precluded final relief being granted to the applicants. In other words, the respondents' first argument was that the case fell within the second category enumerated in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[7] viz 'The respondent may (b) admit the applicant's affidavit evidence but allege other facts which the applicant disputes'. The second submission was that even if the respondents' affidavits did not raise an actual conflict of fact, the court *a quo* should,

[6]1969 (3) SA 360 (AD) at 363A.
[7]1949 (3) SA 1155 (T) at 1163.

in view of the allegations made, have referred the matter for the hearing of oral evidence.

[43] The allegations relied on by counsel for the respondents appear from the extract from the report prepared by Ernst & Young; the valuations of the applicants' farms performed by Griffiths; and the affidavit of Daniels and letters written by his attorney to the Land Claims Commissioner, Mpumalanga and the Registrar of the SA Council for Property Valuators Profession. Counsel also criticised Roux, the valuer appointed by the applicants, in certain respects. I shall deal with each in turn. Before doing so, it is necessary to emphasise two aspects. The first is that the only issue for the court *a quo* to decide on the merits was whether the respondents were entitled to cancel the sale agreements because of fraud. The second is that the case argued before this court was not properly made out in the answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paragraphs [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest ─ the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: *Transnet Ltd v Rubenstein*,[8] and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.

[44] The passage in the Ernst & Young report relied on in the argument advanced in this court comprises less than half a page of the 25 pages annexed. Specific attention was not drawn to this passage in Andreas' affidavit. The import of the

[8]2006 (1) SA 591 (SCA) para 28.

passage is that valuers who were appointed by or on behalf of the respondents met with Visagie during August 2003 to review the valuations of the farms made by the former; that the valuations were increased in a report backdated to 23 June 2003; and that the valuer principally responsible for the valuations was unable to justify the increases to Ernst & Young. The submission in argument was that all of this is evidence of a fraud perpetrated on the respondents. But the valuation submitted by the applicants was done by Roux, who is not implicated in the passage relied on in the report; and Roux did his valuation on 4 March 2003, some four months before the meeting to which the report refers. There is simply nothing to suggest that the applicants (or Roux) were a party to any fraud. The valuers present at the meeting were not appointed by the applicants; according to the applicants, they had nothing to do with Visagie (see paragraphs [19] and [20] above); and no such connection was remotely demonstrated by any credible evidence produced by the respondents.

[45] Much was made in argument of the valuations performed by Griffiths. I have already pointed out that Griffiths' qualifications are not set out. But that apart, the values arrived at by him do not suggest that the transactions were fraudulent. Griffiths valued the Wevell property at R2 300 000 and the Clarke properties at R8 609 000. Roux valued the Wevell property at R3 410 000 and the Clarke properties at R11 093 370. An independent valuer, Mr South, was retained by the applicants and filed an affidavit to counter the valuations by Griffiths. Gildenhuys J, whose expertise in the field of expropriation litigation is well known, found South's valuation to be 'fully motivated and well reasoned'. This valuation was not attacked on appeal. South valued the Wevell property at R2 900 000 which is R510 000 lower than the Roux valuation and R600 000 higher than the Griffiths valuation; and the Clarke properties at R10 250 000, which is R843 000 lower than the Roux valuation and R1,7 million higher than the Griffiths valuation. All this simply goes to show, as found by the court *a quo*, that values of the same property made by different valuers, all of them honest and competent persons, can be far apart. As Scott JA said in *Abrams v Allie NO*:[9]

'This Court has in the past frequently commented on the nature of the inquiry [to determine the market

[9]2004 (4) SA 534 (SCA) para 25.

value of property] and hence the approximate nature of its result. In *South African Railways v New Silverton Estate Ltd* 1946 AD 830 at 838 Tindall JA stressed the importance of bearing in mind that a valuation "is to a material extent a matter of conjecture". Ogilvie Thompson JA in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253A described a valuation as "essentially a matter which is in the realm of estimate". Botha JA in *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 391E similarly described it as "noodwendig 'n kwessie van skatting in die lig van al die omstandighede". Nothing, I think, demonstrates this more than the regularity with which good and honest valuers arrive at relatively widely different conclusions.'

[46] The Daniel affidavit and the letters written on his behalf do not implicate the applicants in any fraud. The affidavit does prima facie establish that Roux accepted a bribe from Visagie in return for which he increased the value of a property owned by Visagie. But as I have now repeatedly pointed out this occurred some months after he valued the applicants' farms. Daniel said nothing about the values attributed by Roux to these farms. Accepting in favour of the respondents that the honesty of Roux may be suspect, there is nothing to gainsay the evidence of the applicants that they were not guilty of any fraud.

[47] Other criticisms of Roux were advanced in argument. It was pointed out that Roux's valuation of the Wevell Trust property was performed for the purposes of the Capital Gains Tax legislation and was also used by the Trust to justify its asking price; but that does not suggest fraud. The very first paragraph of the report reads:

'1. INSTRUCTION

| | |
|---|---|
| From | : Mr. D. Wevell |
| Date Valued | : 04 March 2003 |
| Date of Valuation | : 01 October 2001 |
| Reason for valuation | : Determine market value For Capital Gains Tax.' |

The reason for the valuation was there for all to see. Had the respondents considered the report unacceptable because of the date at which or the purpose for which the Wevell Trust property was valued, they could have rejected it.

[48] Roux was also criticised because the only comparable sale to which he referred in his valuation of the Wevell Trust property was taken by him to have been

at a figure of R1,6 million whereas the price was in fact R1,2 million. But as pointed out by the court *a quo*, that does not have the effect of vitiating his report, much less provide support for an allegation of fraud on his part and even less fraud on the part of the Wevell Trust. The basis on which the report was done was not the comparable sales method in any case, but the depreciated replacement value method of valuation.

[49] There was an application for leave to adduce further evidence on appeal. The evidence comprised the introductory and first part of the report by Ernst & Young of which an extract had been annexed to the respondents' second supplementary answering affidavit, and an affidavit by Mr Wayne Fergusson. Fergusson was employed by Ernst & Young and headed the team investigating the land purchase project of which the applicants' farms formed part. His affidavit was annexed to the respondents' replying affidavit in the application for leave to appeal to this court. It contains allegations relevant to the merits of the appeal. In the event counsel representing the respondents moved only for the inclusion of the documents from the Ernst & Young report in the record of the appeal, and not the Fergusson affidavit.

[50] In my view the application even in its limited form should not be granted. There has been no acceptable explanation as to why the documents were not annexed to the respondents' second supplementary answering affidavits. They became available at the same time as the extract from the report annexed to those affidavits. The report was presented to the Department of Land Affairs on 7 February 2005 and the affidavit was deposed to on 9 May 2005 ─ more than three months later. The explanation for not annexing the part of the report which the respondents now wish to be included in the appeal record was that there was a misunderstanding (presumably between the State Attorney and counsel) as to what was to be annexed. But if that is so, steps should have been taken to put the missing pages before the court at the hearing on 13 June. In the absence of a 'reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is

sought to lead was not led at the trial'[10] ─ and there is none ─ the application must fail.

[51] The applicants asked for the costs of the application to lead further evidence to be awarded to them on the scale as between attorney and client. I consider this request to be amply justified. The founding affidavit was prolix and argumentative and included lengthy documents already before the court. The initial attempt to introduce the affidavit of Fergusson was clearly inappropriate. Even if the application was not intended to be vexatious, it had that effect and a punitive costs order is justified for that reason: *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd*.[11] The costs must include the costs of the applicants' application to strike out passages in the respondents' founding affidavit which was met by a further affidavit delivered by the respondents which cured the defect ─ although there is no basis for ordering the costs of this latter application to be paid on a punitive scale.

[52] In my view, when the evidence (such as it was) before the court *a quo* is considered in totality, it cannot remotely be said that the respondents created a dispute of fact, on the basis for which their counsel contended in his first argument, as to whether they were entitled to cancel the contracts because of fraud. I accordingly turn to consider the alternative argument, namely, that the court *a quo* should have referred the matter for the hearing of oral evidence in terms of its rule 33(8), which corresponds to Uniform Rule of Court 6(5)(g) and reads:

'Where an application cannot properly be decided on affidavit, the Court may dismiss the application or make any other order with a view to ensuring a just and expeditious decision. Without limiting this discretion, the Court may, on such conditions as it may determine ─

(a) order that oral evidence be heard on specific issues with a view to resolving any dispute of fact; and

(b) order any deponent to appear personally or grant leave for him or her or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or

[10] *S v De Jager* 1965 (2) SA 612 (A) at 613C-D; *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) at 824I-825B; *Chevron Engineering (Pty) Ltd v Nkambule* 2004 (3) SA 495 (SCA); see also *Staatspresident v Lefuo* 1990 (2) SA 679 (A) at 691C-692F.

[11] 1997 (1) SA 157 (A) at 177D-E.

(c) refer the matter to trial with appropriate directions on further procedure.'

[53] In the first supplementary answering affidavits in each case Andreas submitted that:

'[I]t is in the interests of justice and fair play that the Respondents be permitted to cross-examine Roux and to demonstrate that the property, being the subject matter of this sale agreement, is the result of fraudulent . . . over-valuation, and with the knowledge by the Applicant that the Respondents will rely on the valuations in determining the purchase consideration'.

In the same affidavit Andreas said:

'I also respectfully submit that this dispute if indeed the Applicant does not accept that the deed of sale had been lawfully cancelled, be referred to trial or oral evidence so that the version of Daniel set out in annexure "A2" [his unsigned affidavit] is presented under oath ─ he be subpoenaed to do so in the interests of justice and all other concerned parties be tested by *viva voce* evidence. In this way, the truth can prevail by way of a fair and just process.'

The affidavit concluded as follows:

'I pray that this Honourable Court dismisses the application for specific performance alternatively refers the matter to trial further alternatively refers the disputes to oral evidence.'

[54] In the second supplementary answering affidavit in each case Andreas said:

'If oral evidence was led, and if the Respondents' legal representatives were given an opportunity to cross-examine the Applicant and the original valuers, I am of the view that such evidence would clearly indicate the giving of a fraudulent valuation in respect of the Applicant's property, whether or not the Applicant was knowingly a party to that fraud.'

[55] No affidavits were filed by valuers employed by, or officials in the employ of or who had been in the employ of, the respondents who had personal knowledge of what had transpired when the properties were valued and the purchase prices determined. There was no indication that such persons were available to the respondents, or would give evidence in support of the allegations of fraud if subpoenaed.

[56] Where a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which prima facie establish that defence, the respondent should in my

view, subject to what follows, be entitled to invoke Land Claims Court Rule 33(8) or Uniform Rule of Court 6(5)(g). Such a case differs from the situation discussed in *Peterson v Cuthbert & Co Ltd*[12] and the *Room Hire* case,[13] alluded to in that part of the *Plascon-Evans* decision quoted in para [24] above which refers to those two cases. There, the respondent puts in issue the facts relied upon by the applicant for the relief sought by the latter. In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but does seek an opportunity to prove allegations which would constitute a defence to the applicant's claim. In the former case the respondent in effect says: given the opportunity, I propose showing that the applicant will not be able to establish the facts which it must establish in order to obtain the relief it seeks; and in the latter the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence. (It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent,[14] because *ex hypothesi* the respondent is unable to produce evidence in affidavit form in support of its version.) It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.

[12]1945 AD 420 at 428-9.
[13]*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-4.
[14]*Ngqumba v Staatspresident*; *Damons v Staatspresident*; *Jooste v Staatspresident*, 1988 (4) SA 224 (A) at 258H-263D.

[57] Gildenhuys J came to a different conclusion. In his judgment refusing condonation for the late noting of the application for leave to appeal, where it was argued for the first time by new counsel representing the respondents that the matter should have been referred to evidence or to trial, the learned judge said:

'[Counsel for the respondents] argued that, if the matter had been referred to evidence or to trial at that stage, the benefits of subpoena, discovery and cross-examination would have assisted the Court to determine where the truth lies. This argument comes down to the following: the respondents require a referral to evidence or to trial in the hope that they would thereby obtain the necessary evidence to substantiate their defence. Should they have presented evidence of probative value in their affidavits sufficient to defeat the applicant's case, I would on that evidence have dismissed the application. Fact is, the evidence was insufficient. The respondents cannot ask for a referral to evidence or to trial in order to make up shortcomings in their own case.

It is trite law that the respondents are not allowed to lead oral evidence to make out a case which is not already made out in their affidavits.'

The learned judge relied on passages in *Carr v Uzent*,[15] and *Dodo v Dodo*[16] and referred also to *Seton Co v Silveroak Industries Ltd*.[17]

[58] In the *Carr* case, the applicant, and in the *Dodo* case, the respondent, sought to supplement their affidavits by a reference to oral evidence. It was in that context that Price J said in the *Carr* case:[18]

'[The applicant] has failed, in my opinion, in his affidavits, read as a whole, to make out this case, and Rule 9 was never designed to enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case

[15]1948 (4) SA 383 (W).
[16]1990 (2) SA 77 (W).
[17]2000 (2) SA 215 (T).
[18]At 390; and see also pp 390-2.

ambiguous, uncertain, or fail to make out a cause of action at all';

and Wulfsohn AJ said in the *Dodo* case:[19]

'The respondent's case stands or falls on his own averment. I think the respondent's request for oral evidence fails in this regard. The respondent may not seek to lead oral evidence to make out a defence for the first time, by way of such oral evidence, where his defence is not already made out by him on the papers.'

The position stated in those cases is clearly correct. The parties concerned could have made the necessary allegations, but failed to do so. They sought to supplement the allegations made by a referral to evidence. That is not permissible. But the cases do not provide an answer to the problem faced by a respondent which is unable to produce an affidavit in support of its defence which contains sufficient allegations for the relief sought by the applicant to be refused, in the absence of a reference to evidence or to trial at the applicant's request – but who is able to show that there are reasonable grounds for believing that its defence will be established if the matter is referred for oral evidence or to trial at its instance.

[59] In the *Seton* case relied upon by the court *a quo* the respondent sought to lead the evidence of one Booysen to prove that a fraud had been perpetrated on the arbitration tribunal whose award the applicant sought to have made an order of court. Booysen refused to make an affidavit, but, according to the respondents, he would give the necessary evidence if subpoenaed. Hartzenberg J cast a jaundiced eye over the evidence before him in support of the application to lead further evidence and concluded:[20]

'I cannot but come to the conclusion that this whole question of Booysen not being willing to give evidence on affidavit is a ploy by the respondent to force a further postponement. In my view, it is generous to the respondent to categorise its application for the leading of Booysen's evidence as a fishing expedition. It is clearly not the purpose of Rule 6(5)(g) of the Rules of Court to allow *viva voce* evidence to be given in such circumstances. See *Hopf v Pretoria City Council* 1947 (2) SA 752 (T) at 768.'

In the *Hopf* case referred to by Hartzenberg J the applicants sought an order setting aside a resolution of the respondent City Council. Roper J said:[21]

[19]At 91H-I.
[20]At 231A-B.
[21]At 767-8.

'Upon careful consideration of all the facts put before the Court, therefore, I do not feel that I am justified in drawing the inference that the change of decision was due to an improper motive on the part of the Mayor or the councillors who changed their minds.

I come now to Mr. *Pollak's* alternative application for the personal examination of the Councillors under Rule 9(*a*). The power which this Rule gives the Court to order personal examination of deponents is intended to provide an expeditious method of settling disputed questions of fact. My inability to draw from the facts the inference which I have been asked to draw is not caused by a conflict as to the facts. I have in the main accepted the facts put forward in the petition and supporting affidavits but, as appears from what I have said, I do not consider that they compel me to the inference that there was an improper motive actuating the majority councillors. In the circumstances personal examination of the councillors would only be undertaken with the object, or in the hope, of eliciting from them admissions which might supplement the allegations in the petition. In other words, it would amount to a fishing excursion. In my view this is not the true function of the Rule, and accordingly I am not prepared to accede to the application.

In both cases the parties who sought a reference to oral evidence had not made out a sufficient case warranting such an order.[22] Neither case is authority for the proposition that a respondent is not entitled to seek a reference to oral evidence or to trial under any circumstances where it is unable to produce affidavits containing positive allegations that prima facie establish a defence.

[60] I return to the allegations made by the respondents in the present matter. It is unnecessary to traverse them again. It suffices to say that I am far from satisfied that this court on appeal would find that there are reasonable grounds for believing that a reference to evidence or to trial would establish the fraud relied on by the respondents, even assuming that it could be found that the court *a quo* should have made such an order where the respondents had not themselves asked for it ─ a question which has not yet been decided by this court[23] and which in itself is not free from difficulty.

CONCLUSION

[61] To sum up: The respondents' delay in bringing the application for leave to

[22]The same applies to *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) ─ see paras 28 to 32.
[23]See *Du Plessis v Tzerefos* 1979 (4) SA 819 (O) and *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T).

appeal was not satisfactorily explained. Prospects of success on the merits are not demonstrably strong. In the circumstances I am not prepared to hold that the court *a quo's* refusal to grant leave to appeal should be set aside.

[62] It remains for me to record that the respondents' application for condonation for the late filing of its counsel's heads of argument in this court was not opposed by the applicants and was granted. The costs occasioned by the application were tendered by the respondents on the scale as between attorney and client and an order to that effect will be made. So will an order directing the respondents to pay the costs of the application for condonation for the late application for leave to appeal to this court.

[63] The following order issues:

1. The application for leave to appeal is dismissed with costs, including the costs of two counsel where employed. Such costs shall include the costs of the whole of the record and the argument on all issues occasioned by the order of this court given on 28 August 2006.

2. The applicants (the respondents in the court a quo) are ordered to pay the costs of:

(a)(i) the application for condonation for the late filing of their counsel's heads of argument in this court; and

(ii) the application for leave to lead further evidence on appeal,

both on the scale as between attorney and client; and

(b)(i) the application to strike out, and

(ii) the application for condonation of the late application for leave to appeal to this court,

both on an opposed basis but on the scale as between party and party.

(c) In respect of each order set out in (a) and (b) above, the costs of two counsel, where employed, shall be allowed.

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Brand JA
Heher JA
Hurt AJA