IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: 1949/05

REPORTABLE

In the matter between:

COPPERMOON TRADING 13 (PTY) LTD	**APPLICANT/PLAINTIFF**
and	
THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE	**1ST RESPONDENT/1ST DEFENDANT**
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE GOVERNMENT OF THE PROVINCE OF THE EASTERN CAPE FOR THE DEPARTMENT OF ROADS AND PUBLIC WORKS	**2ND RESPONDENT/2ND DEFENDANT**

JUDGMENT

D VAN ZYL DJP:

[1] This is an application wherein the defendants in an action sought to introduce a further defence after the close of pleadings. The plaintiff in the action is Coppermoon Trading 13 (Pty) Ltd. The first defendant is the Government of Province Eastern Cape, represented by the Premier in his official capacity. The second defendant is the Member of the Executive Council for the Department of Roads and Public Works of the Government of the Province of the Eastern Cape. For convenience the parties will be referred to as they are in the action.

[2] The plaintiff's action is founded on a written agreement of sale, in terms of which the defendants sold an immovable property to the plaintiff during March 2004. The defendants repudiated the sale agreement whereupon the plaintiff instituted an action claiming specific performance, alternatively damages. The defendants defended the action.

[3] The defendants are the applicants in the present proceedings (**"the application"**). In the notice of motion, and in the papers filed in support of the present proceedings (the "application"), the defendants asked for the following relief:

3.1 that plaintiff be held to have surrendered and abandoned its right to continue with the action;

3.2 declaring that the plaintiff lost its right to proceed with the action against the defendants, and that it is barred from doing so; and

3.3 in the alternative, that the application be referred for the hearing of oral evidence on the question **"whether the plaintiff's action and its rights flowing from the deed of sale had been abandoned."**

[4] The background to the application is that, after the close of the pleadings, and before the trial, the plaintiff and the defendants concluded, what is titled, a **"deed of settlement"**. (Also referred to as **"the settlement agreement"**) In the preamble of the deed of settlement the parties declared to have reached an agreement regarding a settlement of their dispute, and that they **"now wish to record the settlement agreement and to have the terms thereof made an order of Court.**" The terms of the settlement agreement were recorded to be the following:

"1. The first Defendant shall lease to the Plaintiff the portion of erf 312 Bhisho and the buildings situated thereon, known as the Amatola Sun Hotel, Bhisho (hereinafter referred to as the "property") for a period of 49 years, subject to an option in favour of the Plaintiff to renew the lease agreement for a further period of not less than twenty years.

2. At the expiration of the initial period of 49 years, the parties shall negotiate a reasonable market related rental; the full terms whereof shall be incorporated in the lease agreement.

3. The amount of R5 million originally tendered by the Plaintiff for the purchase of erf 312 Bhisho shall be allocated in the following manner:

3.1 R3 million in respect of rental for the period of 49 years, and

3.2 R2 million as purchase price for the furniture and fittings contained in the Amatola Sun Hotel complex.

4. The amounts referred to in 3.1 and 3.2 above shall be payable on the date of signature of the lease agreement by the parties.

5. The Plaintiff shall be liable for all rates, taxes and municipal service fees for the property (as described in paragraph 1 above) during the currency of the lease.

6. The Plaintiff shall at its own costs, refurbish the Amatola Sun Hotel in order that it be upgraded to a four star status.

7. The Plaintiff attorneys shall be tasked with the drawing of the lease agreement necessary to give effect to the intention of the parties.

8. Upon signature of the finalised settlement agreement between the Plaintiff and the First and Second Defendant's, the Plaintiff shall withdraw its action and each party shall pay its own legal costs."

[5] The parties thereafter proceeded to negotiate the terms of a notarial deed of lease. Various drafts were exchanged. Several meetings were held with officials of the defendants to discuss, and attempt to settle the various amendments to the proposed lease agreements. However, in March 2009 when the negotiations were at an advanced stage, the defendants repudiated the settlement agreement when it informed the plaintiff that they were **"not in a position to proceed with the existing terms of the settlement agreement and the draft lease agreement".**

[6] The plaintiff then launched an application (the **“settlement application”**) wherein it sought to have the terms of the deed of settlement made an order of court, as the parties envisaged in the preamble thereto. It asked for the following relief:

> **“1. That the Deed of Settlement signed by the Applicant on 19 October 2007 and signed by the First and Second Respondents on 29 October 2007 and 23 October 2007 respectively, be made an Order of Court.**
>
> **2. That the terms of the court order be embodied in a written lease agreement to be concluded by the parties within 14 days of the date of this order”.**

[7] The defendants opposed the matter and raised a number of legal defences in response. Prompted by the employment of new counsel, the defendants later filed a further affidavit wherein it was contended that the terms of the settlement agreement were too vague to be enforceable, and what the parties contemplated, with specific reference to clause 8 thereof, was that a further, and a more comprehensive agreement still had to be negotiated.

[8] The settlement application was heard by Eksteen J. At the hearing the defendants elected not to persist in any of the substantive defences set out in their answering affidavit. They instead confined the issue to the one raised in the further affidavit. In dismissing the settlement application Eksteen J held that the settlement agreement was not a final agreement, and that it consequently could not be made an order of court. In arriving at this conclusion the learned Judge found that the **“finalised settlement agreement”** envisaged in clause 8 of the deed of settlement,

was the agreement of lease **"which it was envisaged would contain the intention of the parties including but not limited to, the ultimate agreement relating to the terms of the option period and the full terms relating to the manner of determination of the rental payable during the option period"**.

[9] The learned Judge further found that in clause 8 of the dead of settlement, the parties intended that the plaintiff's right of action arising from the sale agreement would remain alive, and **"may still be prosecuted until and unless a subsequent settlement agreement"** was concluded in writing. The plaintiff's obligation to withdraw the action would accordingly only arise upon the conclusion of the final settlement agreement. It was not in dispute that the plaintiff did not withdraw the action. Eksteen J found that the conduct of the plaintiff, in staying the action after the signing of the deed of settlement pending the final settlement of the terms of the final settlement agreement, was consistent with the intention of the parties, as expressed in the deed of settlement, that a binding compromise will only be reached upon the signing of a further agreement. The deed of settlement was consequently found to be nothing more than an agreement to agree (a *pactum de contrahendo*) that was, in the absence of a deadlock breaking mechanism, not capable of enforcement.

[10] The plaintiff applied for leave to appeal. Consistent with its argument before Eksteen J, the plaintiff contended in its application, that upon a proper construction thereof, the deed of settlement constituted a final agreement of compromise. The application for leave to appeal was dismissed.

[11] The plaintiff thereafter petitioned the Supreme Court of Appeal for special leave to appeal. That application was similarly dismissed.

[12] In February 2016 the defendants' attorney wrote to the plaintiff's attorneys. The letter served to notify the plaintiff that one of the grounds of appeal in the plaintiff's Notice of Application to Appeal constituted an expression of an intention to withdraw and abandon the action, that the plaintiff's decision was accepted, and that the action was considered as having been finalised. The quoted ground of the appeal read:

> **"1. The learned Judge erred in the following respects:**
> **…**
>
> **1.4 In failing to find that in causing the action to be stayed and in bearing the costs of the litigation the Applicant had withdrawn and abandoned the action."**

The plaintiff's attorney responded by denying that the action was withdrawn.

[13] The letter of February 2016 was clearly motivated by the fact that following the conclusion of the proceedings in the settlement agreement, the plaintiff took no steps to withdraw the action. In the absence of the parties having concluded, what Eksteen J referred to as the finalised settlement agreement, there was no obligation on the plaintiff to do so (clause 8 of the settlement agreement). In December 2016, the defendants then launched the present application. The relief claimed therein was premised on the contention that the plaintiff has made an election to waive or to abandon the action. The defendants averred that such an election or waiver is found in the following conduct of the plaintiff: (a) The plaintiff's election to pursue a remedy inconsistent with an action for an order for specific performance based on the agreement of sale, when it applied for relief based on the deed of settlement; (b) to thereafter seek leave to appeal the decision to dismiss the settlement application; (c)

the plaintiff's statements in the settlement application that from the signing of the deed of settlement, it had not taken any further steps to prosecute the action; (d) by raising as a ground of appeal, the failure of Eksteen J to find that by staying the action, and agreeing to bear the costs thereof, the plaintiff had withdrawn and abandoned the action; and (e), by failing to take any further steps in the action subsequent to the refusal of the applications for leave to appeal.

[14] The plaintiff raised two preliminary objections to the application. I intend to only deal with the first objection because it is in my view dispositive of the matter. The essence of the objection is that the procedure adopted by the defendants for raising the issue for determination is not sanctioned by the Rules of Court, and that it amounts to an abuse of the process of this Court.

[15] The issue raised in the application is stated to be whether the plaintiff is barred from proceeding with the action by reason of it having made an election to abandon or to waive its right to do so. The defence of election or waiver must be pertinently raised and pleaded (*Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 436 and *Montesse Township & Investment Corporation (Pty) Ltd and Another v Gouws, NO and Another* 1965 (4) SA 373 (A) at 381 B-D). By raising this issue in the manner in which they did, the defendants have clearly circumvented the Rules of Court. What they seek by way of application proceedings, is the introduction of a special plea in bar with the aim of quashing the plaintiff's action. That this is so, was acknowledged by the defendants in their replying affidavit.

[16] In action proceedings, a special plea is raised in a defendant's plea filed in terms of Court Rule 22. In the present matter the defence raised by the application

arose after the defendants had already filed their plea and the pleadings were closed. That in itself did not prevent the defendants from raising it. The appropriate procedure was however to seek an amendment of their plea in terms of Court Rule 28. A defendant will ordinarily be allowed to amend his plea where a new ground for defence comes to the defendant's knowledge for the first time after he has filed his plea, provided the application is **bona fide** and is not prejudicial to the plaintiff. (See *Flemmer v Ainsworth* 1910 TPD 81; *Combrinck v Strasburger* 1914 CPD 15; *Frenkel, Wise and Co Ltd v Cuthbert* 1947 (4) SA 715 (C), and *Erasmus Superior Court Practice* 2nd ed at page D-1-336.)

[17] In *Minister van die SA Polisie v Kraatz* 1973 (3) SA 490 (A) (at 512 E – H), and *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) (at 928 D), it was stressed that a litigant that seeks to add a new ground of relief does not claim an amendment as a matter of right, but rather seeks and indulgence. It will require the litigant to prove that he did not delay the application to amend the pleadings after becoming aware of the evidentiary material on which he proposes to rely. He must further explain the reason for the amendment, and that it *prima facie* raises a triable issue (Erasmus, *op cit* at page D1 - 338).

[18] The application also circumvents Court Rule 33 (4). This rule entitles any party to a pending action to seek on application, a separation of any question of law or fact which may arise in the action. The aim of Rule 33(4) is to facilitate the convenient and expeditious disposal of litigation (*Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at para [3]. Whilst it is incumbent upon the party opposing a Rule 33(4) application to satisfy the court that the application should not be granted, (*African Bank v Soodhoo* 2008 (6) SA 46 (D) at 51 E – H), it does not absolve the party seeking a separation of

issues to place sufficient information before the court to enable it to make an informed decision.

[19] In *Minister of Agriculature v Tongaat Group Ltd* 1976 (2) SA 357 (D) at 362 H, it was held that it is ordinarily desirable, in the interest of expedition and finality of litigation, to have one hearing only at which all issues are canvassed so that the court at the conclusion of the case may dispose of the entire matter. (See also *African Bank v Soodhoo supra* at 51 C.) In *Denel (Edms) Bpk v Vorster supra* at para [3], it was said that: "**And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately."** This caution was again sounded by the same court in *Transalloys v Mineral-Loy* [2017] ZASCA 95 at para [6].

[20] The relief contemplated in Rule 33(4) is therefore not a mere formality, and the court must be given sufficient information to place it in a position to determine convenience (*Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000 (2) SA 408 (SECLD) at 411 B – D). Although the court has a wide discretion under sub-rule (4), it has a duty to **"ensure at all times"** that **"there is a realistic prospect that the separation will result in the curtailment and expeditious disposal of litigation"** (*Privest Employee Solutions v Vital Distribution Solutions* 2005 (5) SA 276 (SCA) at para [27].) The court ought not to grant an application for a separate hearing, **"unless there appears to it to be a reasonable degree of likelihood that the alleged advantages would in fact result"** (*Minister of Agriculture v Tongaat Group Ltd supra* at 364H). Once satisfied that it is proper to make an order of separation, it is the duty

of the Court to ensure that the issues to be tried are clearly circumscribed in its order. (Denel (*EDMS) Bpk v Vorster supra at 485 C – D*).

[21] The question raised by the preliminary objection to the proceedings is whether the application should be entertained despite the failure of the defendants to comply with the Rules of Court. This Court has the inherent power to regulate its own proceedings so as to enable it to function effectively, and in accordance with justice and good sense. In appropriate circumstances a departure from the Rules of Court may be permissible. (*Neal v Neal* 1959 (1) SA 828 (N) at 832 F – 833 C). The exercise of the court's inherent power is a matter of discretion, and will be used only in appropriate cases. In *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (a) at 462 F to 463 B the Court said the following in this regard:

> **"I would sound a word of caution generally in regard to the exercise of the Court's inherent power to regulate procedure. Obviously, I think, such inherent power will not be exercised as a matter of course. The Rules are there to regulate the practice and procedure of the Court in general terms and strong grounds would have to be advanced, in my view to persuade the Court to act outside the powers provided for specifically in the Rules. Its inherent power in other words, is something that will be exercised sparingly. As has been said in the cases quoted earlier, I think that the Court will exercise an inherent jurisdiction whenever justice required that it should do so. I shall not attempt a definition of the concept of justice in this context. I shall simply say that, as I see the position, the Court will only come to the**

> **assistance of an applicant outside the provisions of the Rules when the Court can be satisfied that justice cannot be properly done unless relief is granted to the applicant."**

[22] In the context of the present matter the exercise of a discretion to depart from the aforementioned Rules of Court is in my view dependant on whether it can be said that the issue raised have been properly defined and ventilated without the need for pleadings, and can conveniently be determined simply on the papers without there being any prejudice to the plaintiff. The defendants made the submission in argument that there is no real dispute of fact, and that the application can be decided on the papers. I am not convinced that this submission is correct. In fact, the submission was made rather tentatively as demonstrated by the alternative relief claimed by the defendant's in their notice of motion, namely that the matter should be referred for the hearing of oral evidence.

[23] The law relating to the renunciation of rights is characterised by its inconsistent and imprecise use of the terminology, and the debate whether waiver is a unilateral or bilateral act. (See Bradfield Christie's Law of Contract in South Africa at page 508 and further, and Kerr The Principles of the Law of Contract 6^{th} ed at page 469 and further). Election and waiver have been described as being species of the same general legal concept that involves the abandonment of a right. (*Bekazaku Properties (Pty) Ltd v Pam Golding Properties* 1996 (2) SA 537 (C) at 542 F; *Moyce v Estate Taylor* 1948 (3) SA 822 (A) at 829; *Montesse Township & Investment Corporation v Gouws and Another supra* at 381 B. An election has also been said to **"generally involves a waiver: one right is waived by choosing to exercise another right which is inconsistent with the former. Indeed election and waiver have been equated as**

being species of the same general legal concept." **(***Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698 E – F. See also *North Vaal Mineral Co Ltd v Lovasz* 1961 (3) SA 604 (T) at 611F-H). Both concepts may be relevant in more than one context. (See by way of example *City of Cape Town v Mquqi and Another* 2006 (4) SA 355 (C) and *Administrator, Orange Free State and Others v Mokopanele and Another* (1990 (3) SA 780 (A)). They also overlap with related concepts such as abandonment and estoppel, and are all potentially relevant in the context of explaining jurisprudentially why it is that a litigant is barred from entertaining a right, or a privilege or power, an interest or a benefit.

[24] Election and waiver are legal acts and its requirements may be stated as follows: Waiver is the intentional and unequivocal renunciation or relinquishment of a known right (Mutual Life Insurance Co of New York v Ingle 1910 TPD 540 of 550 and Botha (now Griesel) and Another v Finanscredit (Pty) Ltd 1989 (3) SA 773 (A) at 792B-D). Election postulates a choice between two inconsistent rights each of which have different legal consequences. (Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at 627B). Common to both waiver and election is that it is a matter of the intention of the party said to have made the election, or waived the right in question. The intention is determined objectively, that is, it is adjudged by its outward manifestation in the form of words, spoken or written, or in the form of conduct or a combination of words and conduct (*The Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para (15) and *Absa Bank Ltd v The Master and Others NNO* 1998 (4) SA 15 (N) at 28 G – J).

[25] If a party does not expressly waive a right, and waiver is to be inferred, the conduct relied upon must be such as are more consistent, on a reasonable view

thereof, with an intention to waive the right in question. The outward manifestations of intention must accordingly be adjudged from the perspective of a reasonable person in the position of the other party. (*Palmer v Poulter* 1983 (4) SA 11 (T) at page 21A and *Mutlilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) at 27D – E). This does not mean that other factors such as the subjective motivation of a party for acting in the way in which he did, are irrelevant. (*Thomas v Henry and Another* 1985 (3) SA 889 (A) at 897D). In *The Road Accident Fund v Mothupi supra* the court said that: **"what the one party now says he then believed may still be relevant, although not necessary conclusive." (**at para [17]).

[26] Further, being a matter of intention, election or waiver can only occur when the party concerned had full knowledge of the legal right which he is said to have waived, and of the facts under which, or from which, the right arose. (*Ex parte Sussens* 1941 TPD 15 at 20; *The Road Accident Fund v Mothupi supra* at para [17]; and *Borstlap v Spagenberg* 1974 (3) SA 695 (A) at 704). As stated by Steyn CJ in *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) 772 (A) at 778H-779A:

> **"In the ordinary case of waiver, the *facta probanda* would be full knowledge of the rights in question and express waiver or waiver by plainly inconsistent conduct, i.e. knowledge of a particular kind and surrender of the right in a particular manner."**

In the case of an election, in the sense of a choice between rights, it means that the person making the election must similarly have knowledge of both the facts giving rise to the election, and of the rights (*Feinstein v Niggli and Another supra* 698A – 699B and *Pretorius v Greyling* 1947 (1) SA 171 (W) at 177). The required knowledge as an ingredient of the required intention must necessarily also include knowledge of the existence of a choice between, what are alternative and inconsistent rights.

[27] The burden of proof is on the party who alleges that an election has been made, or that a right has been a waived. By reason of the fact that no-one is presumed to waive his rights, clear proof is required of an intention to do so. (*Ellis and Others v Laubscher* 1956 (4) SA 692 (A) at 902E). In *Laws v Rutherford* 1924 AD 261 (at 263) the position was stated as follows: **"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."** (Also *Montesse Township & Investments Corporation v Gouws & Another supra* at 381B; *Borstlap v Spangeberg supra* at 704; *Feinstein v Niggli and Another supra* at 698H, and *The Road Accident Fund v Mothupi supra* at para [19].) The conduct from which waiver is to be inferred, must be unequivocal, **"that is to say, consistent with no other hypotheses"** (*The Road Accident Fund v Mothupi supra* at para [19]).)

[28] In the application the plaintiff acknowledged in answer, that it sought to enforce the deed of settlement when the defendants repudiated the terms thereof, rather than to prosecute the action. That decision, according to the plaintiff, was founded on the view it took of the validity of the settlement agreement and the legal consequences flowing therefrom. It was premised on the belief that the deed of settlement was intended to be a compromise, and that the only avenue available to it was to seek the enforcement of the terms thereof. If the deed of settlement was a compromise of the dispute in the action, as the plaintiff believed, it is correct that its remedy was to institute proceedings upon the contract of compromise, unless it expressly or impliedly

reserved the right to proceed with the action in the event of the compromise not being carried out. It is trite that the effect of the compromise in law is equivalent to that of a judgment, and is an absolute bar to an action on the compromised cause of action. It renders the matter *res iudicata*. (*Van Zyl v Nieman* 1964 (4) SA 661 (A) at 669H – 670A).

[29] Eksteen J in the settlement application found that the view which the plaintiff took of the deed of settlement was incorrect. He found that, whilst the parties thereto were in agreement that the settlement pursued in the action proceedings were intended to constitute a compromise, the parties intended a binding compromise only to be concluded upon signature of a further agreement. According to the plaintiff, its election to pursue a remedy based on the deed of settlement, first in the settlement application, and subsequently on appeal, was based on its continued misunderstanding of the true nature of the settlement agreement, and that it consequently acted in ignorance of the law. In reply the defendants denied that plaintiff made a mistake of law, alternatively, that if there was such a mistake, it could not in law avail the plaintiff.

[30] In the exercise of the court's discretion to allow a departure from the Rules of Court, the point of departure must be the question whether the issue raised can conveniently be decided on a purely legal basis that may decisively dispose of the matter. The defendants' case was that the plaintiff renounced its right to enforce the terms of the deed of sale. They interchangeably used the terms **"election", "waiver", "abandon"** and **"surrender"** in their papers, in the context of the contention that the plaintiff relinquished its right of action arising from the sale of the immovable property when it pursued the right of the action underlying the deed of settlement. The

defendants contention was that **"when the alleged breach of the <u>Deed of Settlement</u> occurred, plaintiff did not fall back on the summons and action based on the <u>Deed of Sale</u>, but <u>elected</u> to launch and proceed with an application for specific performance of the <u>Deed of Settlement</u> and the lease agreement, and to have it incorporated in a court order."**

[31] This, according to the defendants, meant that the plaintiff elected to pursue a remedy completely inconsistent with an action for specific performance based on the deed of sale. As stated, election is a choice between two inconsistent rights. (*Total South Africa (Pty) Ltd v Bekker NO supra* at 627B). In my view the making of a choice between two alternative remedies does not *per se* amount to conduct that is only consistent with an intention to make an election in law. There is no compulsion on a party to choose between two causes of action, or more correctly, two rights of action each with its on valid *causa*, Court Rule 10(2) provides that a plaintiff may join several causes of action in the same action. (See Erasmus **Superior Court Practice** at B1 – 96B and the cases referred to in footnote 1 on page B1-97). Two claims may be pleaded in the same summons, and if inconsistent, in the alternative. It is open to a plaintiff to later amend and add a claim, or substitute another, and no question of election arises.

[32] There is however in my view a more fundamental reason why the plaintiff's decision to institute proceedings based on the deed of settlement did not constitute an election. Purely from a legal point of view, just as there cannot be a waiver without a valid right (Bradfield *op cit* at page 510), there cannot be an election in the sense of making a choice, without there being two valid inconsistent rights. Eksteen J found that on the deed of settlement was unenforceable. It was in other words invalid *ab*

initio. It could not, and did not, create any rights that were capable of enforcement, and in relation to which an election could be made.

[33] The next question is whether there is a short answer to the plaintiff's alleged mistake or ignorance of the law as was suggested in argument on behalf of the defendants. The defendants' submission that it could not constitute a valid answer to a defence of waiver, was premised on the argument that the plaintiff's decision not to pursue the action, but to instead seek to enforce the deed of settlement, was made on the advice of its legal advisors. With reliance on the decisions in *Fehr v Gordon and Rennie NNO and Another* 1988 (1) SA 125 (A) (***Fehr***)*,* it was submitted that that being the position, the plaintiff's mistake could not provide an answer to a defence of waiver.

[34] The legal position is that an error of law or fact, in the context of an renunciation of rights is excusable, provided it is *iustus et probabilis*. The reason is found in the fact that, as stated earlier, proof of an intention to waive a right can only exist where there is knowledge of both the facts and the legal consequences that flow therefrom. Election or waiver in other words is a question of intention based on knowledge. (*Moyce v Estate Taylor supra* at 528). In the present case the plaintiff's alleged ignorance of the law arises in the context of its pleaded lack of knowledge of the facts and the rights it is alleged to have waived. In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) (***Willis Faber***) the Appellate Division held that, in the context of the *condictio indebiti*, there is no evidence of a general application of the *ignorantia iuris* rule in our law, and that on the contrary, there exists many instances where it is not applied. As authority for that statement the Court then proceeded to point to, what it considered to be the accepted legal position, in relation to the renunciation of rights. (at 221F to 222I) I quote from the judgment:

> **"As early as 1891 De Villier CJ said in *Watson v Burchell* 9 SC 2 at 5 that, 'no doctrine is better settled in our law that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that *he had full knowledge* of his rights and intended to part with them'.**
>
> **The reason is plain for, as De Villiers J remarked in *Tighy v Putter* 1949 (1) SA 1087 (T) at 1095, rights cannot be renounced unless the person concerned 'knew what those rights were both in fact and in law'. Save for a somewhat discordant note sounded in *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 at 185, this has always been and still is our law (*Laws v Rutherfurd* 1924 AD 261 at 263; *Martin v De Kock* 1948 (2) SA 719 (A) at 733; *Feinstein v Niggli and Another* 1982 (2) SA 684 (A) at 698F-G where an election to rescind or affirm an agreement received similar treatment." (at 221 F-G.)**

[35] The notion that relief may be granted in circumstances where a party renounced a right in ignorance is founded on what the Court in *Umhlebi and Fina* (1905) 19 EDC 237 at 249 said to be equitable spirit of our common law:

> **"The equitable spirit of our own Roman-Dutch law, to a large extent due to the influence of the Canon law, is indeed one of its leading features. Hence ignorance of one's right, if it be a just and probable ignorance, is good ground for restitution or relief**

> **according to the practice adopted in the Netherlands, as appears from an examination of the authorities….”**

This passage was quoted with approval in Willis Faber at 222 A-B. (See generally **Christie's Law of Contract in South Africa** op cit at page 512).

[36] The judgment in Fehr is not authority for the general proposition that conduct based on legal advice can never constitute an error that is just and probable. The effect of, or the extent to which a reliance on legal advice will bind a party must be determined in the context of the requirements for election and waiver. The legal advice given by the attorney in Fehr was in relation to what the Court in *Imata v MEC Environmental Affairs and Others* 1999 (4) SA 267 (NCD) at 281J described as advice on the general law. In the present context the error was in relation to the nature of the settlement agreement, put differently, what the common intention of the parties to the agreement was. That is also what Eksteen J was asked to decide in the settlement application. The advice which the plaintiff is said to have received accordingly related to what was essentially a factual matter.

[37] Further, on a reading of the judgment in Fehr the finding that an election made under Section 14(2) of the Sale of Land on Instalments Act, 72 of 1972 was not vitiated by mistake, was based on the fact that the appellant's attorney, on whose advice the election was made, could not claim not to have had full knowledge of the facts and the right to make an election (at 137 D-F). The knowledge of the agent was accordingly imputed to the client. That was also the basis of the finding made in the decision *Mthanti v Netherlands Insurance Co of South Africa* 1971 (2) SA 305 (N) on which the defendants sought to rely in argument. (at 315H – 316A)

[38] It follows that the necessity to prove knowledge of the rights said to have been waived or in relation to which an election is said to have been made, must equally apply to a case where the act of the alleged waiver or election was performed, not by the party personally, but by his agent. In *Pretorius v Greyling supra* at 177 Price J said that:

> **"It seems to me, however, that in the matter of waiver it cannot be said that the knowledge of the principal is that of the agent or that the knowledge of the agent is that of the principal, because before there is a waiver there must be an unequivocal act done with full knowledge of all the relevant facts as well as of the rights which it is argued have been waived. This knowledge, to be effective in the case of waiver, must be the knowledge of a single person, not partly of one and partly of another, because no intention to waive can be inferred unless the particular person himself who commits the act which is said to constitute waiver knew of the relevant facts and intended to waive the rights of which he was fully aware.**
>
> **If in this case it is the agent who waived the rights then it must be proved that he himself knew all the relevant facts as well as his principal's legal rights and intended to waive those rights, and it must also be proved that he was authorised to waive his principal's rights."**

(See also *Stoltz v Ho Kee* 1975 (1) SA 100 (E) at 1030.) In *Bikitsha v Eastern Cape Development Board and Another* 1988 (3) SA 522 (E) at 527J it was held that an attorney requires a special mandate to waive important rights on behalf of his client. What the plaintiff's instructions in the present matter were to his legal representatives is a factual issue that cannot be decided in these proceedings.

[39] The requirement of full knowledge of the right said to have been waived therefore means that a mistake, whether in fact or in law, may be excusable, provided it is just (*iustus)*. This is primarily a factual question, in that it essentially requires a determination of the reasonableness of the plaintiff's error. (*Logan v Beit* (1890) 7 SC 197 at 216) It is a determination that must be made on the facts, and in the circumstances of the case. In the present matter it may require a consideration of the plaintiff's submission that evidence of the conduct of the defendants before they repudiated the settlement agreement, point to the fact that all the parties thereto, initially shared the same error.

[40] On the assumption that the plaintiff's mistake was a mistake of law, the defendants' argument was premised on the allegation that the plaintiff acted on the advice of its legal advisors, and by necessary implication, that the legal advice was given with full knowledge of the right and its legal consequences. As the plaintiff did not state that to have been the position, the defendants instead sought to rely on the drawing of an inference from the plaintiff's statement in answer that, pursuant to the judgment of Eksteen J, it **"took advice to the effect that it enjoyed reasonable prospects of success in an appeal … that another court may hold a different view regarding the nature of the settlement agreement".** The defendants' submission was that it must follow as a necessary inference from this statement that

the plaintiff took advice regarding the nature of the settlement agreement and its conduct throughout the proceedings.

[41] There are several problems with this line of reasoning. One is that it is premised on the assumption that the plaintiff's attorneys advised the plaintiff with full knowledge of the facts and of the right the defendants say the plaintiff waived. As a general rule there can be no inference unless there are objective facts from which to infer the other facts which it is sought to be established. Another problem is that the defendants seek to draw the inference from a single passage in the plaintiff's answering affidavit. Inferential reasoning requires an evaluation of all the evidence and not merely of selected parts. *South African Post Office v De Lacey* 2009 (5) SA 255 (SCA) at para [35]). The drawing of an inference may further require a consideration of the probabilities. "**The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' and it must be the more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities."** (*South African Post Office v De Lacey supra* at para [35].) Decisions of fact can generally not properly be decided in motion proceedings on a consideration of the probabilities. (*Administrator, Transvaal v Theletsane* 1991 (2) SA 192 (A) at 197 A - B).

[42] The nature of the present proceedings is therefore not conducive to resolving the factual issue underlying the argument by way of inferential reasoning. However, as stated earlier, and putting aside the issue of the plaintiff's alleged mistake, that the party who is said to have waived a right can only do so with full knowledge of the facts and the legal consequences, is only one aspect of the requirement that the intention must be to surrender the right in issue. The question that remains in a matter such as

the present, where there has not been an express waiver, but where reliance is instead placed on the conduct or spoken word of the party concerned, is whether the outward manifestations of what is relied upon as the expression of an intention to waive, are more consistent, on a reasonable view of it, with an intention to waive, than with any other theory.

[43] This question must in turn be answered by bearing in mind that the burden of proof is strictly on the person who alleges waiver. It is an *onus* that is not easily discharged. As stated, the reason is the presumption that no-one is presumed to surrender his rights. The conduct must accordingly be clear and unequivocal, that is to say, it must be capable of one construction only. (*The Road Accident Fund v Mothupi supra* at para [19]). Conduct that is intrinsically contradicting, or oral statements they are contradictory or ambiguous and capable of more than on meaning, either standing on their own, or in the broader context in which it was spoken, will therefore be an obstacle. (*Ellis and Others v Laubscher* 1956 (4) SA 692 (A) at 702A and *The Road Accident Fund v Mothupi supra* at para [18]). It is furthermore not sufficient to point to conduct of a neutral character, or to conduct which may be equally consistent with another intention. (*Thomas v Henry supra* at 897B-C and *Multilateral Motor Vehicle Accident Fund v Meyerowitz supra* at 27D-G). The nature and position of the onus will mean that an interpretation that will leave the particular right in place, must be preferred. (*Ellis and Others v Laubscher supra* at 702 E).

[44] Whether or not a particular act evinces an unequivocal intention to either make an election or to waive a right is a question of fact in each case (*Segal v Mazzur* 1920 CPD 634 at 644 to 645; *Laws v Rutherford supra* at 263; *Borstlap v Spangenberg en*

Andere supra at F – H.) As stated, the test to determine the required intention to waive is objective. This however does not mean that the subjective motivation of the party who is said to have waived a right is irrelevant, unless the conduct in question can be said to plainly contradict it **"What the one party now says he then intended and what his opposite number now says he then believed may still be relevant."** (*The Road Accident Fund v Mothupi supra* at para [17] See also *Palmer v Poulter supra* at 20 F – H; *Thomas v Henry and Another* 1988 (3) SA 889 (A) at A – D.) The expression of what a party's subjective motivation was for his conduct may necessitate the presentation of oral evidence.

[45] Proceeding then to apply the requisites of waiver to the present matter, the conduct of the plaintiff by seeking to enforce the terms thereof and to exercise its procedural right to appeal the judgment of Eksteen J, does not in my view by itself evince, on a reasonable view thereof, an unequivocal intention to waive the right to fall back on the action. In Netlon Ltd and Another v Pacnet (Pty) Ltd 1977 (3) SA 840 (A) at 873 A – B, Trollip JA said that it was doubtful in his mind that conduct consisting of the entering into of an enforceable **"gentlemen's"** agreement could constitute conduct of the kind postulated. In the present matter the plaintiff of course went one step further by, acting on a perceived repudiation of the settlement agreement, seeking to enforce the terms thereof. The doubt expressed by Trollip J in my view remains. The fact is that the agreement which the plaintiff sought to place reliance upon, could not produce any legal consequences. It was void. It follows therefrom that there could not have been a repudiation of something which was incapable of producing any legal consequences, and it is difficult to see that any legal consequences are to be attached to a reliance on a non-existent repudiation. (See by analogy *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at para [71]),

[46] In the context of the requisites of waiver, this raises the question whether a reasonable person in the position of the defendants, who themselves took the view that the settlement agreement was unenforceable, would conclude that the intention of the plaintiff was to waive its right to fall back on the cause of action in the action. The position of the reasonable person is after all not determined in *vacuo.* It is done from the perspective of the defendants, and their position at the time. Of importance in this context must be that the defendants initially acted, as is strongly suggested by their conduct subsequent to the signing of the deed of settlement, as if they were bound by the settlement agreement, and that it was only much later after receiving the advice of counsel, that its validity was questioned. Further, as stated earlier, the issue that formed the basis for the dismissal of the settlement application by Eksteen J, was only raised shortly before the hearing of the settlement application.

[47] I am further not convinced that the statements of the plaintiff made in the settlement application, and what was later raised in the grounds of appeal, standing alone, can be said to be an unequivocal expression of an intention to waive the right to fall back on the action when the further agreement as envisaged in the settlement agreement did not materialise. What was said by the plaintiff, or for that matter on his behalf in the notice of appeal, must be considered in its context. That context was the proceedings in the settlement application, and further what the plaintiff says its motivation was for bringing the application, namely to enforce the settlement agreement under the mistaken belief that it was a compromise, and that the dispute in the action was *res iudicata.* The plaintiff's statement in the settlement proceedings, that since the signing of the settlement agreement, it did not take any further steps to prosecute the action, and that it had caused the action to be stayed, without having

withdrawn the action as contemplated in clause 8 of the settlement agreement, do not in my view represent unequivocal conduct required for waiver. The use of terminology such as **"stayed"**, in the same sentence as **"withdrawn"** and **"abandoned,"** is contradictory. After all, the word **"stayed"** in a legal context, ordinarily means to temporarily suspend something. (See *Ellis and Others v Laubscher supra* at 702 E). The *prima facie* contradictory nature of the statements in the different proceedings may raise issues of credibility. The present proceedings are however not the appropriate place to resolve that.

[48] The plaintiff has further denied that it had failed to take any further steps in the action proceedings subsequent to the dismissal of its applications for leave to appeal the judgment of Eksteen J. In response to the allegation of the defendants in this regard, the plaintiff stated that it since, within the relevant time period relied upon by the defendants, sought the advice of counsel how best to proceed with the action. It further sought to enforce an order of this Court in terms of which the defendants were ordered to furnish a reply to the plaintiff's notice in terms of Court Rule 35 (3).

[49] To summarise, the nature of the onus that rests on the defendants, and the factual nature of the enquiry envisaged for determining the plaintiff's intention, is not in my view conducive in the circumstances of this case, to determine the issue raised in the manner the defendants propose to do. There is no crisp legal basis for its determination. Also, the conduct relied upon was either denied, or does not *per se* support an intention to waive, and the written or spoken statements of the plaintiff on which reliance placed, requires a consideration of the broader context in order to determine whether it is capable of supporting the inference of waiver which is sought to be drawn therefrom. To this may be added that the issue of mistake or ignorance of

the law only arose on the papers in answer, and limited by the form of the present proceedings, the defendants were restricted to dealing therewith in their reply. Furthermore, the defendants' response to the plaintiff's alleged ignorance of the true legal position, has a factual basis that the defendant in argument attempted to establish by way of inferential reasoning.

[50] On a whole, my view of the matter that is that it is an instance where the plaintiff's own evidence of its intention is relevant, and is in the interests of fairness to be considered in proceedings where the defence raised was properly pleaded, and the issues have been allowed to become defined in the manner as contemplated by the Rules of Court. (*South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [202]. On the purpose of pleadings, see Cilliers, Loots and Nel **Herbstein and Von Winsen The Civil Practice of the High Courts of South Africa** 5th ed at page 559.) I do not think it is appropriate to refer the matter for the hearing of oral evidence as suggested. The issues raised by the defence are not of a limited nature. Furthermore, some of the issues raised in the founding affidavit were not actively pursued in argument, while others were developed in reply. I am also not convinced that the balance of probabilities are leaning in favour of the defendants, thereby justifying the hearing of oral evidence within the confines of the present proceedings. (Erasmus *op cit* at page D1 – 77). I therefore conclude that the defendants must plead their defence in terms of the Rules of Court.

[51] Accordingly, and for these reasons, the following order will issue:

"The application is dismissed with costs".

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D VAN ZYL

DEPUTY JUDGE PRESIDENT

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Date heard:	28 February 2019
Date delivered:	18 June 2019