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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2024-019326

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

26 May 2025

In the matter between:

FELTRE TRUST
(ID NO: 1[...])

First Applicant

RYAN WINS TON READ NO
(ID NO: 7[...])

Second Applicant

DAVID EDWARD RHODES SARGENT NO
(ID NO: 7[...])

Third Applicant

and

MIDDELVLEI TENACRES PROPERTIES (PTY) LTD
REGISTRATION NO: 2018/405958/07

First Respondent

EDWIN THABO LETOPA
(ID NO: 7[...])
Respondent

Second

KWA ATTORNEYS & CONVEYANCERS
Respondent

Third

JUDGMENT

NIGRINI, AJ

Summary: Application for leave to appeal. Effect of a failure to attach a resolution authorising 1 (one) of the trustees for the time being of a trust to an agreement of sale of an immovable property, and the effect of a failure to attach resolution to the founding affidavit. Cancellation and/or voidness of a written agreement of sale of a commercial property - forfeiture of amounts paid by the purchaser, case management - Court's discretion in terms of Rule 6(5)(g) - referral for the hearing of oral evidence of a specified issue - costs - substantially successful.

Background: Judgement was handed down and the orders quoted infra were made. The respondents apply for leave to appeal the whole of the judgement and the orders. The applicant claimed that an agreement for the sale of an immovable property was validly cancelled and that the deposit be forfeited to it. It was held that the agreement is not void and that it was validly cancelled by the applicant. A directive was issued that oral evidence be heard to determine the issue of proportionality of the penalty. The respondents claimed certain relief in a 'counterclaim' included at the end of its answering affidavit. The respondent claimed that the application be dismissed. It also claimed that the agreement was void and that the applicant breached the agreement by refusing to give occupation of the property before registration of transfer. The respondents further claimed the full deposit and raised the issue of proportionality. During argument of the application for leave to appeal the respondents conceded cancellation in the event that the agreement be upheld.

Judgement

1. For the sake of convenience I shall refer to the parties as in convention.
2. The first and second respondents (respondents) applied for leave to appeal my judgement and orders dated 11th February 2025. I made an order in the following terms:

'1. A declaratory order is hereby issued that the second and third applicants and the first respondent concluded a valid and binding Contract.

2. A declaratory order is hereby issued that the second and third applicants validly cancelled the Contract.

3. The issue relating to the proportionality and/or disproportionality of the penalty provided for in the Contract is referred to the hearing of oral evidence.

4. The Conveyancer is ordered to retain the remaining balance of the Deposit, together with accrued interest, in trust until the parties agree otherwise in writing, or the final determination of the issue of proportionality and/or disproportionality by the court.

5. This matter shall be case managed by Nigrini AJ.

6. The second and third applicants and the first respondent are directed to arrange a case management meeting to be held before Nigrini AJ within a period of 15 days from the date of this order.

7. The Uniform Rules of Court shall apply to discovery and qualifying of experts by the parties, if any.

8. The second and third applicants and the first respondent shall be entitled to apply for a date for the hearing of the matter upon certification by Nigrini AJ that the matter is ripe for hearing.

9. The first respondent is ordered to pay the costs of the application on an attorney and client scale, including the costs of counsel on scale C.'

3. The hearing of the application for leave to appeal was conducted virtually on 21 May 2025.

4. The respondents pray for leave to appeal to the Full Bench of the Gauteng Division, Johannesburg, alternatively, the Full Bench of the Gauteng Division, Pretoria, further alternatively, to the Supreme Court of Appeal, and that the costs of this application be costs in the appeal.

5. I deem it necessary to quote the expansive grounds for leave to appeal. The respondents contend that the court erred in the following respects:

'2.1. granting Orders [1] ; [2] ; [3] and [4] in favour of the applicants when the Applicants did not pray for the in the paragraph stated.

2.2. granting the costs of application to the Applicants at scale between attorney and client, despite that the Applicants did not plead for costs at that scale and did not pray for the costs to be awarded at the scale between attorney and client.

2.3. making the costs Order that is vague and embarrassing in that costs awarded are at the scale between attorney and client and the costs of counsel are on scale C.

2.4. in having misconceived his duties and descended from the Bench into the arena and raise objection to the effect that the counter-application does not comply with Rule 6(7) thus it constitutes an irregularity, in that the prayer in the counter application is set out at the end of the answering affidavit but not in a separate

notice of motion. From the pleading delivered there is no such an issue between the parties. Subsequent thereto the Honourable court ascended the bench again and to make a finding that favours the applicant namely that the counter claim is fatally defective.

2.5. in having overlooked that the rouwkoop term is not stipulated in the contract between the parties, and that the rouwkoop term is not pleaded in the founding affidavit, directed the parties to file heads in respect of rouwkoop term. Thereafter the honourable Court failed to apply constitutional interpretation provisioned by section 39(2) of the Constitution when the court ought to have applied section 39(2) of the Constitution and grant an order that promotes the spirit, purport and objects of the Bill of Right. The Order granted is contrary and irreconcilable with provisions of section 39(2) of the Constitution read with section 173 of the Constitution.

3. The honourable Judge erred seriously in having misconceived his duties in after deciding the matter violation of the principle of funtus officio and allocated to himself, the duty to continue to preside over the same matter in the proceedings styled case management despite that:

3.1. section 19(b) of Superior Courts Act 10 of 2013 confers the discretion whether or not further evidence should be lead upon Appeal Court and not the court of first instance.

3.2. Clause 21(1) to 21(6) Consolidated Practice Directive 1/2024 Court operations in the Gauteng Division set out terms regarding Judicial Case Management and the directive made is not consistent with the provision of Clause 21(3) of the Practice Directive that the DJP may assign a Judge to case manage the matter if it is apparent that such intervention shall be useful. Whereas the honourable Justice is not a DJP, in deciding to assign to himself to case manage the matter the honourable Judge seriously errs.

3.3 It is settled binding principle that the functus officio doctrine is received law and is to the effect that once a decision-maker has rendered a final decision, he becomes functus officio and cannot reconsider the decision made - See Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 (SCA) par [23].

3.4. The honourable Court erred seriously in having misconceived its duties in that referral to oral evidence may be ordered upon application in respect of any disputes of facts which cannot be resolved on affidavit. whereas non of the parties have alleged that there are disputes of fact that require oral evidence none of the parties

has applied for oral evidence in terms of Rule 6(5)(g). the aspect of the matter where there were dispute of facts that might have been referred to oral evidence is when was the resolution framed.

4. The honourable Court erred seriously in having overlooked that the applicants pleaded that their case was not based on Conventional Penalties Act thus the Applicants' case is not based on any averments of having suffered prejudice or damage as a result of the breach of the agreement. In the circumstances the case management before the same judge that might require expert opinion is not an issue between the parties but the issue that the court is creating and allocates itself to preside over proceedings in so doing honourable court erred seriously.

5. The honourable Court erred seriously in failing to determine the issues on the basis of pleading and evidence that had been canvassed before Honourable Court. The decision to refer some issues to oral evidence constitutes a decision that could be made upon application by one of the parties. The honourable Court ought to have made an Order dismissing the application and Ordering that the deposit paid be refunded to the First Respondent on the basis of the principle "that the applicants ought to stands or fall by his petition and the facts therein alleged. It is not permissible to make out a case on new grounds in the replying affidavit and on the basis the further opportunity to plead."- See Director of Hospital Services v Mistry 1979 (1) SA 626 (A-B) at 636A per Diemont JA.

6. The honourable Court erred seriously in having granted an Order declaring that the contract of sale is valid despite that from the face of contract the said contract does not comply with the peremptory statutory provisions of Section 2(1) of the Alienation of Land Act, No 68 of 1981 (ALA) which reads that no alienation of land shall be of any force and effect unless it is contained in a deed of alienation signed by the parties thereto or their agents acting on their written authority.

7. The honourable Court erred seriously in having made judgement that is against the binding authorities, which include the following :

7.1. McKenzie v Farmers' Co-Operative Meat Industries Ltd, 1922 AD 16 at para 23 lines 16-19 per Maasdorp JA in respect of the peremptory requirement of the signature by the seller and the purchaser of the immovable property or their Agent on the contract of sale should comply with provisions of section 2(1) of ALA. And failure to attach the resolution appointing Agent, and the Deeds of Trust to contract and founding affidavit constitutes failure to alleged one of the facta probanda of valid sale by the Trust.

7.2. *Goldex 16 (Pty) Ltd V Capper NO and Others (543/2018)* concerning: where the trustee contracted for the Trust the capacity in which the Trustee acted must as appear from the face of contract, to be complying with the terms of Trust Deeds otherwise the contract is invalid.

7.3. *Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 SCA* : where the trustee contracted for the Trust the capacity in which the Trustee acted must as appear from the face of contract, to be complying with the terms of Trust Deeds otherwise the contract is invalid.

7.4. *Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 SCA* at para [8] and [9]: where the trustee contracted for the Trust the capacity in which the Trustee acted must appear from the face of contract, to be complying with the terms of Trust Deeds otherwise the contract is invalid.

8. The honourable Court erred seriously in having overlooked that what is referred to oral evidence is a non-issue between the parties, in that the replying affidavit at paragraph 45, the applicants in writing elected to deny that their claim constitutes a penalty stipulation or damages as defined by Conventional Penalties Act 15 of 1962 and the provisions of CPA are not applicable in determining the relief sought. Thus applicant did not aver any liquidated damages to have been sustained.- See paragraph [45] of the replying affidavit. The honourable Court is referring to oral evidence what is non issue between the parties. To refer to oral evidence to determine proportionality which is deliberately not pleaded that constitutes violation of the respondents' right to have the matter presided over fairly without favour of any party.

9. The honourable Court erred in creating an issue for the parties in respect whereof the parties are required to prepare concerning the penalty or proportionality of damages despite that the applicants denies that their claim is not a penalty and that it is not the applicant case that the sustained damages or any prejudice from the conduct of the respondents.

10. The honourable Judge erred seriously in creating issues and ordering that such be referred to oral evidence, and the court should appear before the same judge who is functus including presiding over the proceedings styled case management, that in the view of honourable Judge would include discoveries and qualifying of experts to be filed by parties when none of the party have express intention to procure expert evidence. The case management proceedings ordered infringe the applicant's right to fairness provisioned by section 34, read with section 165(2) and

39(2) of the Constitution.

11. *The honourable Court erred seriously in having overlooked that fairness requires the Honourable Court should use of pleadings, and evidence canvassed before court to the determine the issues between the parties. It cannot be fair for this Honourable Court to at subsequent to making some final order direct the parties to appear before the same Honourable Judge presiding the case management concerning what they should have plead and file to satisfy the Court. The pleading are made for the courts, it is not for the court to frame the pleadings and refer the dispute to case management before the same Judge who made final decision as is sought to be done in this matter.*

12. *The honourable Judge erred seriously and misdirected himself in having made Judgment or Order that violates the doctrine of functus officio, upheld the matter Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another 2014 (3) SA 251 (SCA) par [23] namely: once a judge has articulated his judgment, he immediately ceases to be the Judge in that he has discharged his functions and duties in respect of the matter once a final decision has been made. The same honourable Judge has no capacity to correct the Judgment and/or Order made, in that the honourable Court has discharged its duty once and for all.*

13. *The honourable Court erred seriously in having overlooked that the impugned Judgment/Order violates the settled principle regarding what the functions of pleadings are, as stated in Halsbury's Laws of England 4th ed (Reissue) vol 36(1) para 5. Quoted in Cilliers et al Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa Vol 1 at p 558 namely:*

"to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties... It follows that the pleadings enable the parties to decide in advance of the trial what evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at the close if they are not subsequently amended."

14. *The honourable Court erred seriously in having made judgment that is contrary to the principle in Buchner and Another v Johannesburg Consolidated Investment Co Ltd 1995 (1) SA 215 (T) at 216I-J which is to the effect that:*

"The necessity to plead material facts does not have its origin in this Rule. It is fundamental to the judicial process that the facts have to be established. The Court, on the established facts, then applies the rules of law and draws conclusions as regards the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a Court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based."

15. The honourable Court erred seriously in having misdirected itself in having failed to interpret the contractual terms in respect of forfeiture clause, in a manner consistent with constitutional values of fairness, reasonableness and justice. Had the Honourable court not have misconceived its duties the honourable Court ought to have Ordered the Applicants to refund the First Respondent R3000 000 upon cancellation in that the applicant have not discharged the onus on balance of probability that the penalty is proportionate to the prejudice. To the refer the matter to oral evidence is to without justification give the applicants a second bite at the cherry.

16. The honourable Court misconceived its duties in having failed to order the applicants to refund the first Respondent the sum of R3 000 000 and incidental relief, consistent with the binding precedents in the following matters:

4.1. Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC) at para [35] and [72] Theron J.

4.2 Barkhuizen v Napier 2007 (5) SA 323 (CC) at 334 per S Ngcobo J.

4.3 Botha v Rich 2014 (4) SA 124 (CC) by Honourable Justice Nkabinde J.

4.4 Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd and Others (2015 (2) SA 539 (CC).

4.5 Sheriff of the Court, Pretoria East v Blessguy Enterprise (Pty) Ltd and Another (38529/2020) [2023] ZAGPPHC 1785 (6 October 2023) per Manamela AJ.

The Honourable Court in having failed to make an Order that the Applicants shall refund the First Respondent seriously misconceived its duties. The prospect of the Appeal Court doing the reasonable and fair and just order to the effect that the applicants shall refund the sum of R3 000 000 to the first respondent and the respondent are liable to pay interests at prime rate from the date of the application was instituted.

IN THE PREMISES it is submitted that the appeal would have a reasonable

prospects of success before the full bench taking regard of the grounds that the First and Second Respondents averred hereinabove.

WHEREFORE the first and second Applicants herein prays for an Order granting the Applicants herein leave to appeal to the full court as the court deems meet and that costs be in the appeal.'

6. The Respondent produced comprehensive heads of argument which was uploaded onto CaseLines during the course of the morning before the hearing of the application for leave to appeal. The applicant did not receive advance warning that the respondents intended to file heads of argument. It is not customary to file further heads of argument in applications for leave to appeal. For these reasons the applicant did not file heads of argument. Nothing precludes a party from filing further heads of argument. I specifically asked the applicant's counsel whether he required an opportunity to file heads of argument. I mentioned that I was prepared to stand the matter down for argument until Monday 26 May 2025. The applicant's counsel assured me that he had an opportunity to read the respondents' head of argument and that he is ready to proceed. Argument then ensued.

7. The respondents made a generalised statement that I presided '*...in the manner that violates the First and Second Respondents' constitutional right to fairness seriously in having presided in the manner that violates the First and Second Respondents' constitutional right to fairness provisioned by section 34 read with section 165 (2) of the Constitution Act 108 of in that the honourable Judge did not apply the law impartially and without favour or prejudice as may inferred from the grounds whereupon leave to appeal is sought.'*

8. The aforementioned point drowned when the fairness to the parties of the directive to refer the issue of proportionality dawned upon the respondent's counsel during argument - that the issue of proportionality of the penalty was referred to oral evidence *mero motu* to afford an opportunity to both parties to ventilate the issue fully and fairly. The issue of proportionality could not be fairly decided on affidavit. That was in my view the most fair, logical and practical way to deal with proportionality of the penalty. It would in my view serve the interests of the parties and the interests of justice. It will ensure an expeditious resolution of the issue. It is in any event illogical to subject a referral of an issue which has not been decided to the aforementioned description. An issue which has

not been adjudicated upon by the court cannot, per definition, fall within the confines of the respondents' aforementioned generalised statement.

9. The respondents alleges in 2.1 of the application for leave to appeal that 'the Applicants did not prayed for the in the paragraph stated.' (*quoted verbatim*) I disagree that it was not competent to grant orders [1] ; [2] ; [3] and [4] in favour of the applicants. The applicants specifically pray for an order and made out a proper case that the agreement was cancelled. The respondents claim in the 'counterclaim' which appears at the end of the answering affidavit that the agreement is *void* and the respondents specifically attacked proportionality in their 'counterclaim'. The issues relating to the first three orders are issues between the parties on the papers. The fourth order relates to the protection of the remaining balance of the Deposit in the *interim*. It was necessary to protect the funds pending the outcome of the application to maintain the status quo and prevent undue prejudice. It is in the interests of justice to do so. The directive that oral evidence be heard was the most efficacious manner of dealing with the issues. The finding that the parties concluded a valid and binding agreement is a necessary correlation of the finding that the agreement had been cancelled.

10. There is no merit in the respondents' contention that the principles enunciated in the Buchner case has been floated or that the agreement was interpreted in a manner that is not consistent with the Constitution. Clause 1 of the addendum is clear. It states clearly under what circumstances the applicants would be entitled to the deposit and the circumstances under which the respondents would be entitled to the repayment of the deposit. As more fully set out below the respondents conceded that the agreement had been validly cancelled if the agreement is upheld. The respondents main argument on the merits became that the agreement is void for failure to attach the resolution to the agreement. The respondents also argued strongly that the court erred by failing to preclude the resolution on the basis that it was attached to the replying affidavit.

11. There is no merit in the respondents contention that the applicants had to invoke Rule 30 proceedings to set aside its counterclaim. The applicants did not do so and it was not necessary to do so. The respondents counterclaim is by and large a request for the dismissal of the claim and it claims relief based on the facts set out in the answering affidavit. My comments regarding the unusual nature of the 'counterclaim' does not mean that the court did not deal with the relief sought therein in the judgement and the order

granted. Accordingly, the manner in which the 'counterclaim' was presented did not affect the court's findings. Furthermore, the manner in which the counterclaim was presented and the courts comments in relation thereto does not entail a decision in relation to the merits of the matter and is not, accordingly appealable. The court in fact took cognisance of the counterclaim.

12. I posed a hypothetical question to the respondent's counsel. I asked whether the respondents persist with its argument that the agreement was not validly cancelled if the agreement is indeed valid. The respondent's counsel conceded that the agreement was validly cancelled if the agreement is upheld. I agree with the applicants' contention that the respondents' aforementioned concession 'seals its fate'.

13. I am unpersuaded that the agreement is void for non-compliance with the prescribed formalities of the Alienation of Lands Act, 68 of 1981. The respondents counsel argued that the agreement is void because the resolution is not attached to the agreement.

14. The respondents counsel argued that public policy demands certainty and that this can only be achieved by an attachment of the resolution to the agreement. The respondents' counsel further argued that the failure to attach the resolution to the agreement at the time of the conclusion thereof is fatal and that such failure renders the agreement void. I quote para 7.4. of the respondents heads of argument again for the sake of convenience. Paragraph 7.4 reads, as follows: '*7.4. Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 SCA at para [8] and [9]: where the trustee contracted for the Trust the capacity in which the Trustee acted must appear from the face of contract, to be complying with the terms of Trust Deeds otherwise the contract is invalid.*' The respondents incorrectly paraphrased para [45] of Thorpe and others v Trittenwein 2007 (2) SA 172 SCA , as follows: '*It is public policy that the written authority which trustees or agent who relies on resolution by trustees in terms deeds of trust ought to attach the authorization to the deeds of sale for the deeds of sale to be valid.*'

15. The respondents' counsel specifically referred me to the first sentence of paragraph [15] of the Thorpe case in support of the ground for leave to appeal in paragraph 7.4 of the application for leave to appeal. I quote both paragraphs [15] and [16] of the Thorpe case:

'[15] As previously indicated, the very object of s 2(1) of the Act is, on grounds of public policy, to facilitate that proof by requiring the authority to be in writing and so

avoid needless litigation. Whether one regards Thorpe as having acted as a functionary of the trust and in that sense a principal or as both a principal (as co-trustee) and agent of the other co-trustees, the result in my view must be the same. Given the object of the section, it must be construed, I think, as being applicable on either basis. In other words, the reference in the section to 'agents' must be understood as including a trustee who may in a sense be said to sign as a principal (ie as the trust) but whose power to bind the trust is nonetheless dependent upon the authority of the co-trustees. To do otherwise would be to thwart the clear object of the section. It follows that in my view the agreement of sale (as supplemented by the addenda) is void ab initio and of no force and effect. (emphasis provided)

[16] The appellants in replying affidavits sought to rely in the alternative on a subsequent written ratification of Thorpe's conduct in entering into the agreement. In this court counsel abandoned the point. The concession was well made. Ratification relates back to the original transaction. There can be no ratification of a contract which is void ab initio. See *Wilken v Kohler* 1913 AD 135 at 143.' (emphasis provided)

16. The Thorpe case provides no such authority. I specifically asked both counsel for authority that supports the respondents' contention. None was provided. The other cases referred to by the respondents in the application for leave to appeal do not provide authority for the respondents aforementioned contention.

17. Paragraph 16 of the Thorpe case shows why the facts of that case is entirely distinguishable from the facts of this case. It is an unassailable fact that the resolution in this case was executed prior to the conclusion of the agreement. It follows that the legal principles enunciated in the Thorpe case relating to voidness is not applicable to this case. The respondents ignored that the facts of the Thorpe case is distinguishable from the facts of this case. The respondents' failure to recognise the distinguishing nature of the facts of the Thorpe resulted in the respondents' attempt to apply the *dictum* relating to voidness enunciated in the Thorpe case to the facts of this case. This is a typical example of a party referring to and relying upon case law in a vacuum. Case law can only be applied to the facts.

18. The respondents placed specific reliance upon paragraphs [8] and [9] of the Thorpe case in its application for leave to appeal. I also quote paragraphs [8] and [9] of the

Thorpe case *infra*.

*[8] Section 2(1) of the Act reads – ‘No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.’ The object of this provision, as in the case of its predecessors, is undoubtedly to put the proof of such an ‘alienation’ of land beyond doubt and thereby in the public interest to avoid unnecessary litigation. See eg *PhilMatt (Pty) Ltd v Mosselbank Developments CC* [1996 \(2\) SA 15](#) (A) at 25B-D and authorities there cited. The need for the authority of an agent to be in writing is no less necessary to achieve this object than the need for the deed to be in writing.*

*[9] As observed by Cameron JA in *Land and Agricultural Bank of SA v Parker and others* [2005 \(2\) SA 77](#) (SCA) para 10 at 83H a trust is ‘an accumulation of assets and liabilities’. Although forming a separate entity that entity, like a deceased estate, is not a legal persona. The assets and liabilities constituting the trust vest in the trustees and it is they who must administer them. They are therefore not the agents of the trust, nor for that matter of the beneficiaries (*Hoosen and others NNO v Deedat and others* [1999 \(4\) SA 425](#) (SCA) para 21). It is moreover trite that unless the trust deed provides otherwise, trustees must act jointly. In the absence of a contrary provision in the deed they may, however, authorize someone to act on their behalf and that person may be one of the trustees. (See *Nieuwoudt and another NNO v Vrystaat Mielies (Edms) Bpk* [2004 \(3\) SA 486](#) (SCA) paras 16 and 23.)’*

19. Neither of the aforementioned paragraphs lend any support to the respondents voidness argument. Section 2(1) of the Act does not contain a requirement that a resolution authorising a party to sign an agreement involving the sale of land/an immovable property on behalf of a legal persona/legal entity or a trust.

20. The respondents argued that the court erred by finding compliance with section 2(1) of the Alienation of Lands Act. The respondent’s counsel contended that the court “failed to act judiciously in having failed to applied the parol evidence rule or integration rule...” and referred to *Johnston v Leal* 1980 (3) 1980 (3) SA 927 (AD), per Justice Corbett JA, at 943B-C and at 943F and at 943B-C.

21. The craps issue is whether reliance upon the resolution to establish authority - which was not attached to the agreement - is precluded by the integration rule. In other words,

does it amount to an attempt to add or modify the agreement integrated into a single complete memorial of the parties' agreement or would the resolution 'redefine' the terms of the agreement?

22. I disagree with the respondents contention that there is an obligation to attach the resolution to the agreement at the time of the conclusion thereof or at all. For the reasons set out in this judgement I equally disagree with the respondents' contention during argument in reply that the resolution 'brings life to a dead contract' and that it is 'an addition' precluded by the parole evidence rule.

23. The respondents referred to *Director of Hospital Services v Mistry*,¹ per Diemont JA, for the trite principle that an '*applicant stands or fall by his petition and the facts therein alleged.*' and argued that the applicant had to make out its case in the founding affidavit. The respondents further argued that it was 'insufficient' to attach the resolution to the founding affidavit.

24. Although it may be preferable that resolutions relating to authority be attached to the founding papers I see no reason why resolutions cannot be attached to a replying affidavit, especially in these circumstances where the respondents never complained about authority when they paid a deposit in the amount of R3 000 000 (three million rand) and concluded an addendum to the agreement. Nor did they raise authority as a defence in the correspondence exchanged between the parties prior to the filing of the answering affidavit. The applicant in turn alleged in the founding affidavit that it concluded the agreement and validly cancelled the agreement. It could not in my view have been expected of the applicants to foresee that authority would be raised as an issue by the respondents. In such circumstances a party should be permitted to attach a resolution to its replying affidavit.

25. I disagree with the respondents proposition that the resolution constitutes '*...new grounds for the application...*' The court does not, by allowing the resolution, act contrary to the aforementioned trite principle that a party must make out its case in its founding affidavit, nor did the court allow the inclusion of new grounds in the replying affidavit, as envisaged. The founding affidavit contains the grounds for cancellation and established

¹ 1979 (1) SA 626 (A-B) at 636A

the cancellation of the agreement, as well as facts to demonstrate a degree of prejudice. The full amount of the deposit is claimed by the applicants. Clause 1 of the addendum constitutes a penalty in terms of the Conventional Penalties Act, 15 of 1962, and the respondents raise disproportionality in its 'counterclaim'. The issue has been properly raised.

26. I am of the view that it is implied in the applicants' allegation that an agreement had been concluded that the signatory was authorised to represent the trust. The fact that the applicants claim the full deposit brings the Conventional Penalties Act, 15 of 1962, into play, and with it, the issue of proportionality. The respondents in any event squarely raised proportionality in its 'counterclaim'. Reference to the resolution does not violate the parol evidence rule and it does not change the ambit of the agreement. The resolution does not amount to extrinsic evidence of how the agreement should be interpreted. The resolution merely provides proof of or clarifies the applicant's authority when it was challenged. I, accordingly, disagree with the respondents that the court '*...ought to have followed and applied the said principle.*'

27. It is important to note that the respondents did not raise that the resolution had been produced subsequent to the conclusion of the agreement or that fraud is at play. Furthermore, during argument, the respondents counsel conceded that Mr Read is empowered by the resolution to sign the agreement and the addendum thereto if viewed in isolation - excluding the point taken by the respondents that the resolution had to be attached to the agreement to breath life into the agreement.

28. The resolution was clearly signed by the 2 (two) trustees for the time being of the seller trust. It also constitutes common cause that the seller trust deed requires 2 (two) trustees to act jointly and that the 2 (two) trustees who signed the resolution are the trustees for the time being of the seller trust. Mr Read, who signed the agreement and the addendum on behalf of the seller trust, was specifically authorised to do so on behalf of the seller trust in terms of the resolution.

29. The respondent's counsel confirmed that it is not contended that the resolution was been produced after the conclusion of the agreement. It has not been raised either. If there was any notion of fraud the respondents would no doubt have applied for leave to raise it in a duplication. The respondents were not in my view prejudiced in the least by the

attachment of the resolution to the replying affidavit. Allowing the resolution ensured that the issue of authority, which was raised belatedly, be canvassed. Any other procedural approach would have resulted in incurable prejudice to the applicant.

30. The respondents' counsel presented a further paraphrased version of the law that restitution must take place in full upon cancellation of an agreement irrespective of whether or not a breach of contract occurred by a guilty party resulting in cancellation of the agreement by an innocent party. The respondent's counsel suggested that this applies in every instance irrespective of whether or not the innocent party suffered damages as a result of the breach or whether the agreement contains a penalty clause. I refrain from describing the level of my surprise with the aforementioned proposition.

31. I made sure that I understood the respondents' argument and requested the respondent's counsel to refer me to the relevant parts in his heads of argument and the case law relied upon. I am at pains to deal with the argument and misguided paraphrasing of authoritative case law. Unsurprisingly, the paraphrased version of the case law referred to by the respondent's counsel does not support any of his contentions. The inverse is true. I quote the following from the respondents' heads of argument.

'28. The honourable court cited the relevant and binding principle regarding what should follow when the contract cancelled, set out in Botha v Rich NO and Another 2014 (4) SA 124 (CC) but honourable court misconceived or misinterpreted the application of principle set out at para [50] read with [51] of the judgment and the comparable factual circumstances, and argument that was made and is made in this matter when the court ought not to have misconceived the principle. Paragraph 50 of the judgment under the Cancellation reads: It is another manifestation of the principle of reciprocity that where a contract has been lawfully cancelled, mutual obligations arise to restore the respective performances. Relying on the forfeiture clause in the agreement, (footnote 71 of the judgment) the Trust made no tender of repayment of what it had received. Ms Botha argued that the forfeiture clause is unfair and unconstitutional, alternatively that it is a disproportionate penalty that falls to be equitably reduced in terms of the Conventional Penalties Act (footnote 72 of the judgment) (CPA).

Paragraph 51 of the judgment under the Cancellation reads: For the same reasons mentioned above, granting cancellation - and therefore, in this case, forfeiture - in circumstances where three-quarters of the purchase price has already been paid

would be a disproportionate penalty for the breach. In their application for cancellation the Trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha. They took the view that the question of forfeiture and restitution was independent of, and logically anterior to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The Trustees' stance therefore meant that they could not justify this Court's awarding the relief they sought. In view of the above the cancellation application must fail.

29. The failure on the part of the honourable Court to follow the principle in para [50] read with para [51] indicates that the honourable court misconceiving its duties, in having failed to give judgment based on evidence and binding principles aforesaid.'

32. During argument the respondents' counsel initially referred me to paragraph [50] of the Botha Judgement in support of his aforementioned argument. I then asked the respondents counsel to read paragraph [51] of the Botha judgement quoted in the respondents' heads of argument which is in itself (apart from many other decisions) destructive of the aforementioned misguided argument.

33. The findings in paragraph [51] of the Botha case do not in any manner or form support the respondents argument that restitution must occur irrespective of whether or not an innocent party validly cancelled an agreement consequent upon a breach of a material provision by a guilty party.

34. The respondents' aforementioned argument goes against the grain of the entrenched principles of the law of contract relating to cancellation, breach and damages.

35. The respondent's counsel furthermore used the word 'distancing' in his argument with reference to proportionality. I clarified what was meant by the use of the word 'distancing'. It became apparent that the respondent contended that the applicant did not rely upon *rauwkoop* and that the issue of proportionality is not an issue before the court on the facts presented by the parties. I referred the respondents' counsel to clause 1.1 of the addendum which clearly contains a *rauwkoop* clause and paragraph 6 of the 'counterclaim' wherein the respondent expressly raised proportionality. I mention this because it was argued by the respondents' counsel that the applicant was 'distancing' it self from proportionality. I extracted that the respondent wished to convey that the applicant did not

rely on proportionality despite that both the applicants and the respondents claimed entitlement to the full amount of the deposit.

36. The respondents contended that the court descended into the arena and that my remarks regarding the non-compliance of the counterclaim 'counterclaim' amounts to an error which somehow - it was not stated how - affected the outcome. Despite the fact that the so called 'counterclaim' was procedurally defective I nevertheless dealt with each issue raised therein. I took counsel for the respondents through every single paragraph of the counterclaim and pointed out how I have dealt therewith. Accordingly, nothing turns on my comments regarding the procedurally defective counterclaim.

37. The counterclaim provides, as follows:

'WHEREFORE the first respondent Counter claim for an order:

1) Striking the application from the roll, with cost at the scale between attorney and client.

2) Alternatively to prayer 1 above, dismissing the applicant's case with costs at the scale between attorney and client.

3) Further alternatively granting judgment for the first respondent in the following terms:

3.1) Declaring that what purport to be a valid and binding contract of immovable property be declared invalid

3.2) Declaring that what purport to be a valid and binding contract of immovable property be declared unenforceable

4) Further, alternatively in the event the court finding that the sale contract is valid and enforceable then Declaring that the applicant first breached the contract and the basis of common law principle of exceptio non adimpleti contractus

5) Declaring the contract be cancelled in that the applicant having refused to allow the first respondent to occupy the property as a tenant despite having paid deposit and having demand occupation

6) Declaring that the forfeiture claimed by the applicant is out of proportion to the prejudice suffer by the respondent if any and that it is in the interest of justice that the penalty be reduced to zero

7) Declaring the contract be cancelled in terms of section 28(1) of the alienation of land act;

8) That the third respondent be ordered to refund the first respondent the R3 000

00.00 (Three Million Rand) plus interest;

9) That that the sale agreement be cancelled;

10) The applicant be ordered to pay the costs of this application at the scale between attorney and client.'

38. I reiterate that the agreement was not subject to any conditions and that the respondents refused to pay the balance of the purchase price based on an untenable right to premature occupation - prior to registration of transfer. Clause 10 of the agreement clearly provides for occupation upon registration of transfer. The respondents failed to apply for rectification of the agreement or the addendum. The respondents are, accordingly, bound by the 4 (four) corners of the agreement and addendum, and had to comply therewith. The fact that the respondents failed to comply with its obligation to pay the balance of the purchase consideration and cancellation of the agreement (if not void) constitute common cause, as set out *supra*.

39. Clause 10 of the agreement deals with occupation and provides that: *'10. Provided that the Purchaser has performed all his / her / its contractual obligations arising here from, including but not limited to, the payment of all transfer costs, payment of bond costs, signature of transfer and bond documentation (if applicable) and payment of the occupational rental as provided herein: -'*

40. Paragraph 10.1. of the agreement provides as follows: *'Vacant occupation of the Property shall be given and taken on registration ("the Occupation Date") from which date, should it precede Transfer, all revenue accruing from and expenditure in respect of the Property (excluding rates, levies, insurance premiums) shall be for the account of the Purchaser, on a pro-rata basis.'* The remaining sub-paragraphs of clause 1 are irrelevant.

41. Clause 1 of the addendum is clearly a typical rawwkoop clause. Clause 1. of the addendum provides as follows:

'1. The Purchaser and Seller hereby agree.-

1. 1.1. Should the Agreement become cancelled due the breach of the Purchaser the Purchaser will forfeit al monies paid in respect of the purchase price to the Seller upon the date of cancellation of the Agreement, together with any interest earned thereon to that date. The Seller will have the right to proceed against the Purchaser for any damage suffered due to such cancellation of the

Agreement,

2. 1.2 *Should the Agreement become cancelled due the breach of the Seller, the Purchaser wi be refunded all monies paid in respect of the purchase price upon the date of cancellation of The Agreement and wii have the right to proceed against The Seller for any damage suffered due to such cancellation of the Agreement.'*

42. The fact that I made findings in the matter and referred a specific aspect of the case to me for determination for the hearing of oral evidence was challenged by the respondents. There is nothing preventing me from doing so. I consider it to be in the interests of the parties and that the interests of justice would be served, as more fully set out *supra*. I am of the view that I have exercised my discretion judicially, and it is extremely unlikely that an other court will interfere with the exercise of my discretion to hear oral evidence on the issue of proportionality.

43. I am furthermore of the view that my aforementioned decision is not appealable. I refer to the case of International Trade Administration Commission v SCAW South Africa (Pty) Ltd where the Constitutional Court held that; *"In this sense, the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in Zweni v Minister of Law and Order which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal. The "policy considerations" that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes."* (emphasis provided)

44. I further refer to the case of Wallach v Lew Geffen Estates CC² where it was held that: *"It is plain that the order referring the matter for the hearing of oral evidence was an*

² 1993 (3) SA 258 (AD).

interlocutory order and that it was a simple interlocutory order of the kind referred to in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839 (A) at 870A. Furthermore this is not a case where '... the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed ...as in Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration 1987(4) 569 (A) at 585 F-G. The 'order' given by Coetzee J did not decide the merits. It was merely a direction that further evidence be given before deciding on the merits. It was no more than a ruling. This is clear from a long line of cases decided in this Court and in the provincial divisions."

45. Rule 6(5)(g) provides, as follows:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise

46. Rule 6(5)(g) provides a discretion to the court to direct that oral evidence be heard 'to ensuring a just and expeditious decision.' Rule 6(5)(g) does not contain a requirement that a party must apply that oral evidence be heard. The issue of proportionality could not in my view be decided on affidavit without the hearing of oral evidence. The applicant placed some evidence before the court and the respondents failed to produce any evidence to enable the court to decide the issue on affidavit. The referral placed both parties on an equal footing. The Conventional Penalties Act, 15 of 1962, evidently applies to this case and clause 1 of the Addendum is clearly a penalty clause, as envisaged. It is in the interests of the parties and the interests of justice that the issue whether or not the penalty is disproportionate be considered and be decided as soon as possible. The Conventional Penalties Act, 15 of 1962, entitles the court to examine the proportionality of the penalty. The court is, accordingly, entitled to determine whether a loss was suffered and the reasonableness thereof, and the penalty, if any, to be applied. Oral evidence is evidently required to decide is whether the penalty (the full deposit) claimed by the

applicant should be reduced in terms of section 3 of the Conventional Penalties Act, and if so, to what extent. In other words, it must be determined whether the penalty is out of proportion considering that the court has the power to reduce a penalty. In this case the respondents contend that the applicant did not suffer any prejudice and claims in its 'counterclaim' that the full deposit must be repaid to it.

47. I refer to Section 1(A) and Section 3 of the Convention Penalties Act 15 of 1962.

Section Section 1(A) provides as follows: "*A Stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall subject to the provisions of this Act, be capable of being enforced in any competent court*". That is what the applicant did by claiming the deposit.

Section 3 of the Convention Penalties Act, 15 of 1962, provides as follows: "*if upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated the court may reduce the penalty to such extent as it may consider equitable in the circumstances: provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question*".

48. It has been held in *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* (72/99) [2000] ZASCA 70; 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (A) (28 November 2000) at [9] that: '*It follows that although a claim for forfeiture arises ex contractu, its essence and function is to compensate the creditor for prejudice (including damage) suffered by it.*'

49. The procedural issues to ensure fairness going forward will be dealt with during case management. It cannot in my view be expected of a Judge to apply that a matter be case managed. In my view the Directive relates to parties who require case management. Case management in this matter would in my view be useful and keep the matter on the rails to ensure the speedy resolution of the issue of proportionality. Case management is aimed at ensuring that the outstanding issue of proportionality be properly ventilated.

50. It has been held in *Pfizer Inc v South African Druggists Ltd* that: "... *The Rule 6(5)(g) application was purely interlocutory, and the order given is no more than a ruling. It is true that the order is specific and contains elements of finality. It is, however, no less interlocutory than many other orders of a like nature which are frequently granted by our Courts and by the Court of the Commissioner of Patents in the course of a hearing and which have been held to be no more than rulings and consequently to be unappealable, such as for instance an order directing a litigant to supply further particulars (of Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A)); a temporary interdict (cf Frank & Hirsch (Pty) Ltd v Rodi & Wienenberger Aktiengesellschaft 1958 (1) SA 1 (T) (1958 BP 399)); a commission de bene esse (of Bell v Bell 1908 TS 887; or an order for security for costs (Zipotowski v Anglo American Corporation of South Africa 1972 BP 374).*'

51. I refer to *Mercury Fittings CC v Doorware CC*³ in which a passage in the *Civil Practice of the High Courts of South Africa* was quoted with approval, as follows: "The question whether or not the court may *mero motu* direct oral evidence to be heard is one regarding which there was until fairly recently scant authority. That this is possible was laid down on appeal in both the former Orange Free State and the former Transvaal. It has, however, been held that, for various reasons, it is a bold step for a presiding judge in an opposed application to refer the matter to evidence or trial *mero motu*."

52. I agree with the following finding in the *Mercury* case supra that: 'In terms of rule 6(5)(g) of the Uniform Rules, a court has a wide discretion with regard to referring matters to oral evidence where application proceedings cannot be properly decided by way of affidavit. In certain circumstances (and exceptional cases), the court may decide that a matter should be referred to oral evidence even where no application for such referral had been made.' The court in the *Mercury* case also referred to *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA) at para [20]; and also *Tryzone Fourteen (Pty) Ltd v Batchelor N.O and Others* (3535/2013) [2016] ZAECPHC 9 (4 March 2016) at para [38].

53. The respondent's point that the court is *functus officio* in relation to the directive that

³ (Case No: 00014/2023) [2023] ZAGPJHC 366 (24 April 2023).

oral evidence be heard is without merit. The fact that the court is *functus officio* in relation to its finding that the agreement be upheld and that the agreement has been validly cancelled cannot impact on the purely interlocutory decision to direct that oral evidence be heard.

54. I have motivated my decision to grant costs on an attorney and client scale in the Judgement. I stand by my decision. It is not necessary, as contended by the respondents that a party must seek punitive costs before a court can, in the exercise of its discretion, order a party who's conduct warrants the granting of punitive costs to pay punitive costs. I am of the view that another court would not interfere with the exercise of my discretion based on the facts of the case.

55. My decision to refer the issue of proportionality did not decide the merits of proportionality. It is, accordingly, '*no more than a ruling.*' My decision may be described as bold. Upon reflection I would have made the same order to ensure that the aforementioned specific issue be resolved in the most expeditious manner and to prevent that valuable resources of an already heavily burdened bench be saddled with the issue.

56. The court has a wide discretion in terms of rule 6(5)(g) of the Uniform Rules to refer matters to oral evidence in instances where an application cannot be properly decided by way of affidavit without the hearing of oral evidence. This is such a case which requires oral evidence. As the applicant produced some evidence on the issue and the respondents none the interests of justice favours the hearing of oral evidence.

57. I find the founding affidavit contains the necessary *facta probanda* for an order that the agreement has been validly cancelled. I further stand by my decision to uphold the agreement.

58. The application for leave to appeal is regulated by Section 17(1) of the Superior Courts Act, 10 of 2013 which provides:

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

(a) (i) the appeal would have a reasonable prospect of success; or ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

- (b) *the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (c) *where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

59. It was held in the case of *Doorewaard and Another v S*,⁴ per Hendricks DJP (as he then was), with reference to the general principle for the granting leave to appeal that: *"The test to be applied is now higher than what it used to be. It is no longer whether another court may (might) come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of appeal, would come to a different decision."*

60. The cancellation of the agreement is no longer in issue if the agreement is upheld. I am of the view that the court of appeal would not come to a different decision. Of particular relevance is that the court would not in my view come to a decision that the agreement is void.

61. Having considered the facts, the arguments presented and the test provided for for leave to appeal I find that the respondents have no reasonable prospects of success that another court will come to a different conclusion on any issue in the matter.

62. The respondents contended that costs should be costs in the appeal and the applicant contended that the costs should follow the result. The court must exercise a judicial discretion.⁵ In doing so am of the view that the costs should follow the result.

63. In these circumstances I make an order in the following terms:

1. *Leave to appeal to either the Full Court of this division or the Gauteng North Division, Pretoria, or the Supreme Court of Appeal is refused.*
2. *The respondents are ordered to pay the costs of this application for leave to appeal on a party-and-party scale, and counsels fees shall on scale C.*

⁴ (908/2019) [2020] ZASCA 155; [2021] 1 All SA 311 (SCA); 2021 (1) SACR 235 (SCA) (27 November 2020).

⁵ *Ferreira v Levin NO and Others*; *Vreyenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC); *Motaung v Makubela and Another*, NNO; *Motaung v Mothiba NO* 1975 (1) SA 618 (O) at 631A.

**DE WAAL K NIGRINI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

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