IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 77/2016

In the matter between:

FRANS DU PONT	**Appellant**
and	
M.A RANCHES (Pty) LIMITED	**1st Respondent**
SARAH SIYAPHI TSABEDZE	**2nd Respondent**
THE REGISTRAR OF DEEDS	**3rd Respondent**
THE REGISTRAR OF THE HIGH COURT OF SWAZILAND	**4th Respondent**
THE ATTORNEY GENERAL	**5th Respondent**

Neutral Citation	:	*Frans Du Pont vs M. A. Ranches (Pty) Limited and 4 Others* (77/2016) [2018] *SZSC 25* (19/09/2018)
Coram:		**DR B. J. ODOKI JA, S. P. DLAMINI JA, R. J. CLOETE JA, J. P. ANNANDALE JA AND J. M. CURRIE AJA**
Heard	:	14 August 2018
Delivered	:	19 September 2018

Summary : *Applicant for review in terms of Section 148(2) of Constitution – Allegedly not granted fair hearing on Appeal – Not granted opportunity to address Court on vital issue – Record shows no ruling made by Court – That Counsel for Applicant in fact agreed that the issue is not important – No exceptional circumstances shown – In fact abuse of Section 148(2) – President Street Properties approved and followed – Not accepted that an invalid option could morph into a right of first refusal without credible evidence reflecting such clear intention of the parties – Having found 1st Respondent to be a Bona Fide purchaser Court should have instated his rights of immediate occupation – Right of Supreme Court sitting in its review jurisdiction to rectify an error of the Supreme Court Sitting in its Appeal jurisdiction clearly envisaged in Section 148(2) – In addition the provisions of Rule 33 of the Supreme Court Rules applied - Order duly amended.*

JUDGMENT

CLOETE - JA

BACKGROUND

[1] Sarah Siyaphi Tsabedze, the 2nd Respondent in these proceedings, inherited from the Estate of her late husband and was the registered owner of the property described as:

Certain: **Remaining extent of Farm 784, situate in the District of Manzini**;

Measuring: **262, 1502 (Two Six Two Comma One Five Zero Two) hectares**

("The Property")

[2] During on or about 07 February 2003 the 2nd Respondent and the Applicant, Frans Du Pont, entered into an agreement mysteriously referred to as the Caretaker Agreement ("CA").

[3] Clause 4 of that agreement, being the crux of this whole dispute, reads as follows;

"<u>Option to Purchase</u>

4.1 The First Party in her capacity as owner of the Property further grants to the Second Party (the occupier) <u>the sole and exclusive right and option</u> to purchase the Property at any time during the currency of this agreement, the duration of which occupation shall be at the discretion of the parties but, in any event, shall not be less than a period of fifteen (15) years.

4.2 **<u>The option to purchase</u> hereby granted to the Second Party shall during the lifetime of the First Party be exercisable by the Second Party during the period aforementioned <u>*only*</u> when the First Party has indicated to the Second Party her willingness and/or readiness to sell the Property.**

4.3 **In the event of the Second Party <u>exercising his option</u> to purchase the purchase price shall be determined in such fashion as to take into account the costs of the improvements which the Second Party shall have, at that point in time, effected on the Property. These costs shall be deducted from the purchase price."** (my underlining)

[4] I add here that this agreement was apparently drawn by an Attorney and not a layman.

[5] Throughout the Judgments of the Court *a quo* and this Court on appeal, mention has been made and some reliance placed on the provisions of Clause 5 of the agreement. I will not repeat the full *dictum* of this clause save and except to say that it begins with the words **"In the event of the death of the First Party hereto…"**... Accordingly, since the 2nd

Respondent being the First Party to the agreement still being very much alive, the provisions of this clause should simply have been ignored.

[6] At some point during the existence of CA, Applicant commenced payments of E3, 000.00 per month to the 2nd Respondent. These payments are equally mysteriously referred to as a "Stipend" by the Applicant in all of the papers relating to this matter.

[7] On record, is a letter dated 19 February 2008 from the then Attorney of the 2nd Respondent, Attorney CJ Littler, which indicated that the 2nd Respondent had referred the Applicant to him and he wished to confirm that as the registered owner of the Property, she was perfectly entitled to sell the Property. Interestingly there is no mention of an option or any other right in the letter concerned. At this juncture it is probably also important to point out that there is uncontroverted evidence in the papers that the 2nd Respondent was illiterate and as such relied on explanations of all things written from other parties.

[8] It is further common cause that the 2nd Respondent sold the Property to the 1st Respondent for the sum of E1, 500,000.00 and a transfer was effected into the name of the 1st Respondent in terms of Deed of Transfer No. 350/2016 on 19 May 2016.

[9] On 09 June, on the basis of urgency and relying on CA, the Applicant brought an Application to the Court *a quo* for an Order in the following terms;

"1. …

2. That a Rule Nisi do issue calling upon the Respondent to show cause on a date to be set by the Honourable Court, why;

2.1 <u>The option to purchase</u> the property being;

Certain: Remaining extent of Farm No: 784, situate in the District of Manzini;

Measuring: 262, 1502 (Two Six Two Comma One Five Zero Two) hectares

As contained in the Caretaker Agreement between the Applicant and the 1st Respondent should not be declared to be valid and binding upon both the Applicant and 1st Respondent.

2.2 The sale of the property referred to herein above and the subsequent transfer thereof from the 1st Respondent to the 2nd Respondent (sic) **not be declared to be null and void *abinitio,* and therefore set aside.**

2.3 The Applicant not be declared to be entitled to purchase and have the afore sated (sic) **property transferred to him <u>for the sum of E685, 000.00</u> (Six Hundred and Eighty Five Thousand Emalangeni), and further show cause why the registrar of this Honourable Court should not be authorised and/or directed to sign and execute all documents necessary to effect transfer of the property from 1st Respondent to the Applicant.**

2.4 The 1st Respondent should not pay the costs of this Application at Attorney and won (sic) **scale.**

3. That pending finalisation of these proceedings, the 2nd Respondent be interdicted from disposing of the property in any manner whatsoever, and that it further be interdicted from encumbering the property or placing same as security for any of

its (2nd Respondent) in any manner whatsoever." (my underlining)

[10] 1st and 2nd Respondents opposed the Application vigorously and filed Answering Affidavit dealing with all of the issues raised by Applicant.

[11] It bears to be mentioned that the Notice of Motion at 2.1 referred to an option. During the course of the hearing, the Court *a quo* at Paragraph [16] of its Judgment, states that the Applicant brought an Application to bring about two (2) amendments to its Prayers. The first one related to Prayer 2.1 which was not opposed and it basically was that the 1st Respondent was to show cause why the agreement should not be declared to be valid and binding on her which was duly granted.

[12] However the second amendment which was opposed by the Respondents was to the effect that the price to be offered by the Applicant was to be increased from the sum of E685, 000.00 to E1, 500,000.00. At Paragraph [28] of the Judgment of the Court *a quo*, it seemingly found that the proposed amendment added no value to the case and as such he did not grant the amendment. To use his words **"this is the only reason I am not granting the amendment"**. This is extremely baffling because the

Applicant and the Judgment in this Court sitting in its appellate jurisdiction seemed to indicate that the amendment was in fact granted.

[13] It is not necessary to deal in detail with the Judgment of the Court *a quo*, save to say that on the papers, without any relevant evidence or cogent argument, found that whilst the provisions of Clause 4 of CA did not stand up to the requirements of an option, that Clause 4 of CA was interpreted by him and that it in fact constituted a right of first refusal and that the 2nd Respondent was in breach of her obligations in terms of such right of first refusal. Again without any concrete evidence being heard, the Court *a quo* found that the 1st and 2nd Respondents had colluded in the matter (dishonestly) and that as such the sale between the 1st and 2nd Respondents was invalid at law and issued the following Order;

"1. It is hereby declared that clause 4 of the agreement annexure "FD1" between the Applicant and the First Respondent is valid and binding upon the First Respondent.

2. The sale and transfer of the immovable property 'Remaining Extend of Farm No. 784 Manzini' in terms of Deed of Transfer No. 350/2016 is hereby set aside.

3. The Registrar of Deeds is ordered and directed forthwith to re-register the immovable property described above into the name of the First Respondent. Should the need arise, the Registrar of the High Court is ordered to sign and execute such papers as may be necessary to effect the re-registration.

4. Costs of the re-registration of the immovable property, if any, to be borne by the First Respondent.

5. The First Respondent is directed to present to the Applicant in writing an opportunity to purchase the immovable property 'Remaining Extent of Farm No. 784, Manzini District' upon reasonable terms, such terms to take into account the price of E1.5 million that was agreed between the First and Second Respondents.

6. The option to purchase in terms 5 above is to be presented by the First Respondent to the Applicant within a period of fourteen (14) days from date of re-registration of the immovable property in her name.

7. Costs of suit to be paid by the First and Second Respondents jointly and severally, the one paying the other one to be absolved."

[14] The 1st Respondent immediately filed a Notice of Appeal to this Court in its appellate jurisdiction on the following grounds;

"1. The Learned Judge erred in holding at paragraph 40 of the judgment that the Memorandum of Agreement annexure "FD1" created a right of first refusal (pre-emption). The Learned Judge ought to have held that the Agreement created an option as per the terms of the Agreement.

2. The Learned Judge erred in holding that the applicant had a right of pre-emption in terms of the Agreement. The Learned Judge ought to have held that the first respondent (applicant a quo) had an unenforceable option in the Agreement in that the terms of the option did not satisfy the requirements of an option.

3. The Learned Judge erred in granting the first respondent (applicant a quo) the right to amend its prayers and in particular to include the purchase price of E1.5 Million.

4. The Learned Judge erred in holding that the appellant (second respondent *a quo*) was not an innocent purchaser or was "common cause with the second respondent (first respondent a quo)". The Learned Judge ought to have held that the appellant was an innocent and lawful purchaser of the property.

5. The Learned Judge erred when he held that the intention of the parties was to create a pre-emption. The court ought to have held that at the plain wording of the Agreement to determine the intention of the parties.

6. The Learned Judge erred by placing undue weight on the first respondent's (applicant *a quo*) contention that the payment of E3,000.00 was a stipend as opposed to a rental."

[15] The appeal was duly heard by this Court in its appellate jurisdiction and in summary, the issues will be dealt with in some detail below, and found *inter alia* that;

1. That Clause 4 of CA, quoting a plethora of Case Law and Authors, did not constitute an option and as such was not enforceable as an option, as the Court *a quo* had also found;
2. Again by reference to numerous Case Law, this Court found that Clause 4 of CA constituted a right of first refusal in favour of the Applicant and that the 2nd Respondent had simply repudiated the relevant provisions and as such she was liable for the damages suffered by the Applicant.
3. Despite the findings of the Court *a quo*, this Court found that the 1st Respondent was a *bona fide* purchaser and that the sale and transfer of the Property between the 1st and 2nd Respondents was "sustainable".

[16] This Court then handed down the following Order:

1. The judgment of the court *a quo* is set aside;

2. **2nd Respondent is liable in damages for the wrongful breach of binding agreement affording 1st Respondent a right of first refusal in respect of the sale of the property;**
3. **1st Respondent to prove his damages as inferred in (1) above;**
4. **1st Respondent is entitled to be compensated for the value of improvements effected on the farm. The said amount of compensation as proved to be made good by the Appellant.**
5. **1st Respondent may remain in the farm pending the payment of compensation referred to in (3) above.**
6. **The parties to bear their own costs.**
7. **The matter to be referred to the High Court for determination of the damages and costs of improvement herein referred to.**

[17] The Applicant then launched review proceedings before this Court in terms of Section 148 (2) of the Constitution of Eswatini based on two (2) grounds namely that:

1. The Applicant had not been granted a fair hearing by the Appeal Court; and
2. The unfair hearing coupled with the fact that the Judgment of the Court was based on irrelevant issues was a ground for review.

   This is accordingly the matter currently before this Court sitting in its review jurisdiction.

[18] The Applicant then brought an Application before a single Judge requesting a stay of execution of the Judgment of the Appeal Court pending the hearing of this review which was granted.

CORRECTION

[19] The Judgment handed down by this Court sitting in its appellate jurisdiction on 15 December 2017 erroneously stated that Dr. BJ Odoki was one of the panel of Judges whereas the panel was in fact Chief Justice Maphalala and Judges of Appeal MJ Dlamini and SP Maphalala. Both Counsel confirmed that this was their understanding and neither objected. Accordingly the record was duly corrected.

CONDONATION AND ANCILLIARY MATTERS

[20] Mr Jele on behalf of the 1st Respondent had brought an Application for Condonation for the late filing of the Answering Affidavit of the 1st Respondent and the late filing of the Heads and Bundle of Authorities of his client. He took personal responsibility and assured the Court that the costs that he had tendered to the Applicant would be borne by him in person. There being no opposition from the Applicant, condonation was duly granted.

[21] The Applicant's Replying Affidavit was handed in from the bar by Mr Simelane who was advised that no documents are accepted by this Court when they are out of time and when there is no Application for Condonation but in the interest of moving this matter forward and being adjudicated on without inevitable delay, the document was received. This is not to be seen as a precedent.

[22] Neither of the parties objected to the panel of Judges and both parties filed Heads of Argument but seemingly the Applicant did not file a Bundle of Authorities.

ARGUMENT OF APPLICANT

[23] Mr Simelane stated that this was an Application for review in terms of Section 148 (2) of The Constitution and that the first and seemingly main

ground was that the Applicant was not granted a fair hearing by the Appeal Court. He alleged that the Court had made a ruling that the matter of the 1st Respondent being a *bona fide* purchaser or not was not the main issue and that he had been denied the right to address the Court on that issue which he now considered to be of great importance. When pressed by this Court he referred the Court to Page 24 of the Transcript of the proceedings in the Appeal Court and I quote verbatim what I was referred to; (this was interaction between Mr Jele and the Judges):

"AC: **My Lord, I was just supplementing my case, maybe I will just leave that as set out in my heads, can I just emphasis** (sic) **the one point, that as His Lordship has just highlighted to me, whether or not this was a pre-emption or an option, re-emphasis what I said earlier on, the parties have a written agreement.**

JUDGE: **Court is just to interpret the contract?**

AC: **Correct my Lord**

JUDGE: **You have any other submissions Counsel?**

AC: No My Lord, I do not"

[24] When pressed further, Mr Simelane referred the Court to the Transcript at Page 42 onwards (this is an exchange between Mr Simelane and the Judges)

"RC: My Lords, we then come to the 2nd part of His Lordships in the court *a quo*, His Lordship Mlangeni's judgment My Lords. Where now we look at the rights of the appellant as an alleged bona fide purchaser, I will (INAUDIBLE) bona fide purchaser because in our application he was not a bona fide purchaser. And on the evidence that is before the honourable Court and on the evidence before the Court *a quo*…

JUDGE: <u>We asked the appellant's Counsel a question which I think we have to ask from you, that doesn't the appeal turn on where this is a right of pre-emption or option</u>…

RC: <u>It does My Lord</u>…

JUDGE: <u>The issue of innocent bona fide 3rd parties may not be that significant</u>?

RC: **I would also submit that it is definitely not that significant My Lord in particular because the trend of bona fide nowadays, in particular because the rules emanating from bona fides are rules of public policy matters, the courts usually shy away from deciding matters based on issues of public policy.**

It is (INAUDIBLE) horse as one might have learned a long time ago, therefore I would agree with Their Lordships and my learned friend that indeed the crux of the issue, the prime issue here is whether or not a right of pre-emption was created or an option was granted.

JUDGE: Other submissions Mr Simelane?

RC: **No submissions My Lord at this stage unless My Lords to seek to respond to any question that Their Lordship want to clarify".** (my underlining)

[25] Counsel further argued that the second ground for review went hand-in-hand with the first ground and that he could not take that ground any further.

[26] Despite the verbatim exchange with the Judges above in the Appeal Court, this Court invited Mr Simelane to address the Court on the issue of whether the 1st Respondent was a *bona fide* purchaser or not. Accordingly in that regard he argued that:

1. The Property was at all times under lock and key and if 1st Respondent had inspected the Property, he would have come to the conclusion that someone else was in occupation.

2. The 1st Respondent had not carried out a full investigation relating to the Property. He subsequently conceded that none of this was contained in the record of proceedings in any Court.

3. He alleged that at a meeting which the 1st Respondent had with the Applicant, he should have established that the Applicant had some personal rights.

4. The Court *a quo* adopted a robust common sense approach and found on the papers before it that the 1st and 2nd Respondents had colluded dishonestly and as such that the finding of the Court *a quo* that the 1st Respondent was not a *bona fide* purchaser should not have been impugned.

5. He relied heavily on a Judgment of **Meridian Bay Restaurant (Pty) Limited, BOE Bank Limited and Nedbank Limited vs D R Mitchell ZASCA 30 (2011)** which I will deal with hereunder.

[27] He argued that all of the above constituted the exceptional circumstances required in the **President Street Properties vs Maxwell Uchechukwu Appeal Case No. 11/2014 [2015] SZSC** and as such that the review should succeed and the Judgment of the Court *a quo* be reinstated.

[28] When questioned as to how the option referred to in Paragraph 4 of CA could morph into a right of first refusal, Counsel stated that the finding of the Appeal Court was correct in that regard and that it was not necessary for any other evidence relating to the intention of the parties to be put before any Court.

[29] When questioned as to what was meant by a stipend, Counsel indicated that it was some form of gratuitous payment and that as such CA could not ever be deemed to have been a lease agreement.

ARGUMENT OF THE 1ST RESPONDENT

[30] Mr Jele indicated that he had filed Heads of Argument and the he would just summarise his argument.

[31] He argued that the requirements of this Court as set out in **President Street Properties** read together with Section 148 (2) of the Constitution had not been met by any stretch of the imagination by the Applicant and that this Application was just an abuse of the said Section.

[32] He pointed out that all of the above quoted exchanges between both Counsel and the Judges in the Appeal Court had shown that it was simply not correct that the Judges had issued a ruling precluding Mr Simelane from arguing the issue of *bona fide*. On the contrary the exchange clearly showed that Mr Simelane had indeed agreed with the Judges that it was not a vital issue and that there is no truth in the allegation that Mr Simelane was precluded from addressing the Court on that or any other issue.

[33] He also pointed out that the alleged meeting between the 1st Respondent and the Applicant had taken place after the sale and registration of transfer had been concluded so there was nothing in that meeting to show that 1st Respondent was not a *bona fide* purchaser.

[34] As regards the issue of the option morphing into a right of first refusal, this was simply an error in that once it was found that there was no valid option, Clause 4 of CA was unenforceable. He further argued that the Law was clear in that what the Applicant should have done in the light of the dispute between him and the 2nd Respondent as to not only the validity of Clause 4 of CA but the interpretation thereof, was to seek rectification of the agreement to reflect the intention of the parties.

[35] As regards the issue of the stipend and CA being a disguised lease agreement, he appeared to indicate that CA could well be a disguised lease.

[36] On being questioned in that regard Mr Jele indicated that he believed that this Court sitting in its review jurisdiction was entitled, in terms of Section 148 (2) to amend or rectify a Judgment of this Court sitting in its appellate jurisdiction.

FINDINGS

[37] **President Street Properties** has clearly been the benchmark of all of the Judgments of this Court relating to review proceedings where **Dlamini AJA** said the following;

"It is true that a litigant should not ordinarily have a 'second bite at the cherry' in the sense of another opportunity of appeal or hearing at the Court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a flood gate of reappraisal of cases otherwise *res judicata*. As such this review power is to be invoked in a rare and compelling or exceptional circumstance …". And further on he states **"From the above authorities some of the situations already identified as calling for *supra* judicial intervention are an exceptional circumstance, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of alternative effective remedy."**

[38] I do not intend to go into great detail relating to the dismal failure of the Applicant to attempt to convince this Court that any of the circumstances referred to in **President Street Properties** apply to this matter save to say that;

1. It is clear from the exchanges in the Transcript referred to above that no ruling of any nature was made precluding the Applicant from addressing the Court on any issue. On the contrary, by his own admission, Counsel for the Applicant himself indicated that the issue of *bona fides*, was not important and accordingly it is completely disingenuous for him to now clutch at straws and attempt to show this Court that now all of a sudden it was of such crucial importance.

2. By his own admission, the second ground for review went hand-in-hand with the main ground which I find to be non-existent.

3. When given the opportunity to address the Court on the issue of *bona fides*, it transpired that most of the arguments were not contained in the papers and as such cannot be sustained.

4. His reliance on the **Meridian** Judgment is unfounded as it in fact dealt with a completely different set of facts including, importantly, actual prior knowledge of the purported sale in that matter and as such I find that that Judgment has no bearing on this matter.

[39] Accordingly no exceptional circumstances of any nature have been put before this Court and as such the review must fail.

[40] However, in the interest of Justice, I cannot allow the matter to simply end there. There are some anomalies which I believe need to be dealt with and addressed and rectified. I am satisfied that Section 148 (2) of the Constitution gives this Court review capacity over its own Judgments and I do believe that the issues set out below fall within the dicta in **President Street Properties**.

[41] Firstly, this Court on appeal, entirely correctly in my view found at Paragraph 50 of its Judgment that the 1st Respondent was indeed a *bona fide* purchaser and that the sale and transfer of the Property from the 2nd Respondent to the 1st Respondent was sustainable. With the greatest of respect, having found that, it should have followed that the 1st Respondent was entitled to all the rights accorded to the lawful owner of immovable property including the right of immediate occupation. The Order granted by this Court deprives the 1st Respondent of such right of occupation and seemingly for an indefinite period pending the determination of damages by the High Court as set out in the Order. I will deal with the other issues hereunder.

[42] At Paragraphs 32 and 33 of its Judgment, this Court on appeal commented, without actually finding, that CA smacked of a lease agreement and in my view that could have had a bearing on the Appeal had it been followed through. I will however leave it at that even though in my view the CA may well have constituted a lease by another name and guise and that the stipend was nothing more than some form of rental and as such the provisions of Section 30 of the Transfer Duty Act could well have come into play. A stipend is in fact defined by Wikipedia as **"a regular fixed sum of money paid for services or to defray expenses such as for apprenticeship or internship"**. It is not a gratuitous payment which the Applicant would have one believe.

[43] I have grave concern about the notion, as found by both the Court *a quo* and this Court on appeal, that what is clearly defined as an option can simply be morphed into a right of first refusal on interpretation of the papers before those Courts which, with respect, are flimsy as relates to the intention of the parties and again bearing in mind that the 2nd Respondent is clearly an illiterate person and as such whether she remotely understood the provisions of Section 4 of CA in the same light as the Applicant and the Courts for that matter. I again highlight the fact that Clause 5 of CA clearly only deals with the eventuality of the 2nd Respondent having passed away and since she has not, no weight of any nature should have been placed on that paragraph

including references to the purchase price which only would have kicked in on her death. The offer of E685, 000 was somehow based on the provisions of paragraph 5 of CA. This clause is not applicable as I have said and should not have been relayed on or in fact even referred to at all.

[44] Surely if, as the Courts found, that Clause 4 could not stand up to the test of being an option, that should surely have been the end of the matter namely an unenforceable provision in an agreement unless the intention of the parties clearly and unequivocally has been proven.

[45] I have turned to the Author **Kerr in The Principles of the Law of Contract, Fifth Edition** and refer to a number of aspects therein;

1. Firstly, as set out by **Innes JA** in **Joubert v Enslin, 1910 AD 6**, **"The golden Rule applicable to the interpretation of all contracts is to follow the intention of the parties"**.

2. That Rule was followed in **West Rand Estates Limited v New Zealand Insurance Company Limited, 1925 AD** where **Kotze JA** said; **"It is the duty of the Court to construe language with the purpose and object which they had in view and so render that language effectual"**.

3. Bearing in mind that CA was drawn up by an Attorney one should safely be able to assume that the Attorney knew that stark difference between an option and a right of first refusal.

4. It is clear from the Authors that where the parties dispute the meaning of provisions in an agreement that evidence relating to the intention of the parties is admissible. See Page 369 of Kerr and at 408 it is suggested that the evidence required to prove the intention of the parties is that it is sufficient to show what would, objectively, be regarded as reasonably sufficient to convey the intention of the parties.

5. As, correctly in my view raised by Mr Jele, what should have happened was that the Applicant, since there was a clear dispute between himself and the 2nd Respondent (and the 1st Respondent for that matter), should have applied for a rectification of the agreement if he in fact believed that it was in fact a right of first refusal and not an option. At 142 Kerr states that **"If a contract is reduced to writing and the written record does not correctly set forth the actual or apparent agreement, the written record can be corrected. This proposition holds even if the written record has the appearance of invalidity, i.e. even if what appears in the**

written record would not be a contract if the terms upon which the parties had agreed had been those in the written record. The reason is that the underlying agreement is the contract, the written record is merely evidence of it, its outward and visible sign".

6. On Page 143 Kerr states **"However he need not claim formal rectification of the contract, it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by the… as it stands to be corrected"**. (With reference to **Gralio (Pty) Limited vs DE Claassen (Pty) Limited, 1980 (1) SA, 816 (A))**.

7. At Page 146 Kerr states **"Evidence necessary to establish the true contract may be led even though it contradicts the written document"**. (With reference to **Van Aswegen vs Fourie, 1964 (3) SA, 94 (O))**.

[46] It is accordingly inevitable conclusion that the Court *a quo* and this Court sitting in its appeal jurisdiction, could not on its own and without any "relevant evidence" have concluded that what was clearly just an option

which could not be sustained, could be morphed into a right of first refusal without intense examination of the intention of the parties in terms of the golden rule. In my view Clause 4 of CA was nothing more than an invalid option which could not be enforced.

[47] In addition, it is clear from the evidence that the Applicant became aware of the fact that the 2nd Respondent was seeking to sell the Property and as such, acquiesced to the sale. As found by this Court on appeal at Paragraph 43 of its Judgment ***"In Casu,* 1st Respondent (Applicant herein) failed to notify the intending purchasers he must have seen coming to inspect the farm and also failed to take timeous measures to stop the sale and or the transfer"**. On that basis it is clear that the Applicant in fact knew that the Property was being sold and he did nothing about it until it was too late and as such it cannot in any way now be said, as was correctly found by the Court on appeal, that the Applicant was not a *bona fide* purchaser.

[48] As such I do not believe that it should have been found that the Applicant was the holder of a right of first refusal and that the 2nd Respondent was accordingly in breach of any obligation towards the Applicant in that regard.

[49] It is apposite at this juncture to make a reference to the jurisdiction of this Court which is found in Section 146 of the Constitution. Specifically, Section 146 (1) provides that:

"146 (1). The Supreme Court is the <u>final court of appeal.</u> Accordingly, <u>the Supreme Court has appellate jurisdiction</u> and such other jurisdiction as may be conferred on it by this Constitution or any other law" (my Emphasis).

[50] Therefore, this is not a Court of first instance. The issue of the Appellant being entitled to damages for any improvements he allegedly brought about to the Property concerned was not argued in the Court *a quo* and was not dealt with in any form in the Order of that Court. With respect, this Court on Appeal made an Order relating to alleged damages suffered by the Appellant despite the fact that it had not been argued in the Court *a quo*.

[51] That being the case I also do not believe that it was correct for the Court on appeal to make the Orders concerned relating to damages. It is trite law that an aggrieved occupant who has improved the property of another has a common law right to claim for such improvements against the person under whose authority he was on the property concerned and the Applicant will no

doubt be advised accordingly. Also bear in mind that the Applicant has to date had occupation of the property for more than 15 years and as such enjoyed the benefits of such occupation and any improvements thereon.

[52] This Court wishes to record its displeasure at the manner in which this matter has been litigated by both parties. The filing of documentation has been totally unacceptable and furthermore for the Applicant to bring before this Court a review Application on a ground which his own legal adviser has before the Appeal Court confirmed to have been insignificant, is in my view an unacceptable abuse of review proceedings. This displeasure is reflected in the costs Order which follows hereunder.

JUDGMENT

1. The review application of the Applicant is dismissed.

2. The interim stay of execution granted by a single Judge pending these review proceedings is hereby discharged.

3. The Judgment of the Court *a quo* and of this Court in its appellate jurisdiction is replaced with the following:

3.1 The 1st Respondent is declared to be the lawful owner of the Property being the subject matter of these proceedings with all the rights of a lawful owner attached thereto including the right of immediate occupation;

3.2 Each party is to bear their own costs in both the stay of execution and review proceedings.

R. J. CLOETE
JUSTICE OF APPEAL

I agree

DR. B. J. ODOKI
JUSTICE OF APPEAL

I agree

S. P. DLAMINI
JUSTICE OF APPEAL

I agree

J. P. ANNANDALE
JUSTICE OF APPEAL

I agree

J. M. CURRIE
ACTING JUSTICE OF APPEAL

For the Applicant : S. C. SIMELANE

For the 1st Respondent : Z. D. JELE

For the 2nd Respondent :

For the 3rd Respondent :

For the 4th Respondent :

For the 5th Respondent :

In a watching brief : L. R. MAMBA