CIV. CASE NO. 234/88

In the matter of:

1. PHINEAS MOJAPELO	1st Plaintiff
2. JOSEPH MATSEBULA	2nd Plaintiff
vs	
JOSEA POTGIETER	Defendant
CORAM	F. X. ROONEY
FOR PLAINTIFFS	SHILUBANE
FOR DEFENDANT	ZEISS S.C. AND VILAKATI

JUDGMENT

17/2/89

Rooney,_J .

This is an action in which the plaintiffs seek payment of E43,117-77 ejectment of the defendant from certain business premises at Manzini, interest and costs. It is alleged in the particulars of claim that the parties entered into an agreement of lease dated the 9th August, 1988 which lease contained clause five a stipulation that the defendant was obliged to pay the municipal rates in respect of the leased premises. It is further alleged that the defendant breached clause five by failing to pay the rates due on the property which amounted to E43,117-77 as at the 2 February, 1988.

In his original defence, filed on or about the 5th May, 1988 by Carlston & Company Attorneys of this Court, the defendant admitted that he signed the lease relied upon by the plaintiffs but he avered that "the same does not set out correctly end fully

the actual oral agreement arrived at between the parties". It was further admitted that the lease was prepared by the defendant's attorneys "and intended to embody the actual agreement between the parties" and "on the 9th August, 1985 the defendant and the plaintiffs in the common but mistaken belief that such memorandum of lease embodied the actual terms of their agreement, signed the lease". It goes on -

3.2 Defendant avers further that in terms of the actual agreement between the parties hereto the matter of the payment of municipal rates and taxes was never mentioned or discussed as it is a matter which is regulated purely by statute and the parties hereto were fully conversant with the statutory provisions relating to same and which require that payment of same is the responsibility of the landlord.

3.3. Defendant avers further that the inclusion of the terms of clause five (5) of the lease may be attributable to an error by the attorneys who prepared the memorandum of agreement of lease and that on immediately discovering such error, defendant discussed it with Mr Michael Barton of Nelspruit an auditor of the plaintiffs and who as such had commissioned the leasing of the flats to defendant and the drawing of the memorandum of agreement of lease by Messrs Carlston and Company. Mr

Barton and Mr Carlston agreed that the matter of the rates had not been discussed, 3.4 Defendant avers further that he discussed the

matter with the late Michael Matsebula who also never confirmed that the matter had/been discussed.

3.5 Defendant contends that had there been objection at the time he would immediately have applied for rectification which he has n ow done as set out in defendant's counterclaim hereto".

Before proceeding further, I may mention that paragraph 3.3 and

3.4 above offend against the rules of pleading as they contain to matters which relate to evidence and not/the facts in dispute.

However, no objection or exception was made to the defence to which the plaintiff's attorney filed a replication,, The defendant filed a counterclaim in which he seeks rectification of the memorandum of agreement to the extent set out in paragraph 3 of the defence. This is a reference to the "statutory provision" set out in 3.3 quoted above. It is to be noted that at no time during the course of the trial was this Court referred to any statutory provision which stipulates that payment of rates are the responsibility of the landlord.

It is not common for attorneys to rely upon their own errors in the protection of their client's interests. Mr Eric Carlston gave evidence on behalf of the defendant, and I was not surprised that during the course of his testimony he denied personal responsibility for the defence filed in this case. He explained that it had been drafted by his assistant, Mr Vilakati. Mr Carlston denied that clause five had been composed by his firm as a result for of an error/which he might be accountable. Instead, he said that specific instructions had been given to him in regard to clause five by one Barton who at the time was acting as an agent for the defendant. This, if it was correct, absolved Carlston from all responsibility for the contents of clause five of the lease-

The defence as filed could not be maintained in the face of Mr Carlston's evidence. The existing counterclaim rested upon common mistake and an error by the defendant's attorneys. That proposition could not be further sustained.

The defendant's counsel took advantage of an adjournment of the trial to submit an amended defence and counterclaim. This took the form of an alternative plea. The amendment was allowed on conditions which included the recall of the defendant and Carlston for further cross-examination,,

The amended plea is a lengthy document which among other things contains the allegations that the defendant gave Barton a verbal mandate to instruct attorney Carlston to draw up a lease on terms agreed upon between the defendant and Barton acting as agent for the plaintiffs, and which was to contain "standard terms as are commonly found in a contract of lease." The defence includes the following -
3 bis 4 "When so instructing the said Carlston to draw the lease, the said BARTON, wrongfully and unlawfully in excess and in breach of the terms of his mandate as received from defendant (but within the scope of the mandate which he had from plaintiffs) instructed the said Carlston to insert in the said deed of lease an additional term (not being a standard term such as is commonly found in a contract of lease) to the effect that during the currency of the said lease defendant, as tenant, was to pay "All Government and Municipal rates and taxes" in respect of the properties let as is set forth in

clause five of the said lease, annexure 'A' to the plaintiff's summons,

3 bis. 5 Thereafter the said BARTON, acting as the plaintiff's duly authorised agent, presented the said lease (which had already been signed by plaintiffs and/or on plaintiff's behalf) to defendant for signature.

3 bis, 6 When so presenting the said lease for defendant's signature the said BARTON (and through plaintiffs as the said BARTON'S principals) represented to defe-ndant that the said lease had been drawn in the for verbally agreed upon between plaintiff and defendant, alternatively failed to disclose to defendant that an additional term (not being a standard term such as is commonly found in a contract of lease) to the effect that defendant, as tenant, was, during the currency of the said lease, to pay 'all Government and Municipal rates and taxes' in respect of the properties let as set forth in clause five of the said lease annexure 'A' to plaintiff's summons, had been inserted in the said lease.,

3 bis 7 The said BARTON (and through him plaintiffs as the said BRTON's principals) by making the aforesaid representation, alternatively by his silence aforesaid, misled defendant as to the nature and purport of one of the terms of the said lease, in that defendant was led to to believe that the said lease contained only the terms set forth in paragraph 3 bis. 1 SUPRA and in addition thereto such standard terms as are commonly

found in a contract of lease.

3 bis 8 In the premises defendant was labouring under a Justus error when signing the said lease. Consequently, clause five thereof inasmuch as it provides that defendant, as tenant, was to pay 'all Government and municipal rates and taxes' in respect of the properties let is null and void and/or not binding on defendant.

3 ter. 2 After the said Carlston had drawun the said lease and handed same to the said BARTON some person or persona whose identity is unknown to defendant, altered the said draft by changing clause five thereof so as to provide that defendant, as tenant, was, during the currency of the said lease, to pay 'all Government and municipal rates and taxes1 in respect of the properties let as is set forth in c] use five of the said lease.

3 ter. 3 BARTON and plaintiffs, alternatively BARTON and through him plaintiffs as BARTON's principals, were at all material times aware of the said alteration,,

3 quat. 2 When plaintiffs and/or their representatives signed the said lease (being annexure 'A' to plaintiff's particulars of claim) they were unaware of the alteration said alteration, which/imported into the said lease a n additional term (not being a standard term such as is commonly found in a contract of lease)which was not in accordance with the common intention of the parties.

3 quat. 3 When defendant signed the said lease he was likewise unaware of the said alteration with the result that the parties laboured under a common error as to the terms of the said lease and defendant is entitled to rectification thereof,"

It must be assumed that senior counsel for the defendant settled the pleadings on the basis of instructions received. I take note that while 3 bis 4 above contains the allegation that Barton wrongfully instructed Carlston to insert in the lease the contents of clause five, 3 ter 2 above contains no allegation that Carlston acted on such instructions. Instead, it is alleged that after Carlston parted

with the draft lease "some person or persons unknown altered the draft"* These allegations stand in direct contradiction to the evidence already given by Carlston before the amended defence was presentede The defendant was apparently, not prepared to rely entirely upon his attorney's insistence that clause five was inserted at the instance of Barton and some other explanation had to be found beyond the doors of Carlston's office. The allegation that the lease was altered after it had been placed in Barton's hands implied fraud on the part of the plaintiffs and their agents

It is perhaps unfortunate that when the defendant and Carlston were recalled for cross examination, Mr Shllubane for the plaintiffs did not endevour to discover the extent of the consultations between the defendant and his attorney Carlston which led to the preperation of the original defence, which proved so embarrasing to them both. Nor were any questions put which might have explained what was intended by the allegation that the lease had been altered by persons unknown

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I shall now look at the evidence bearing in mind that the onus rests upon the defendant to establish on a balance of probabilities that clause five was inserted in the lease either as a result of fraud on the part of the plaintiff's and their agent Barton or as a result of a mutual mistake which defeated the real intention of the parties to the agreement.

The defendant told the Court that he had had property dealings with the plaintiffs in the past. There were three brothers. The second plaintiff is the sole survivor, the first plaintiff having died in 1987,
In July or August, 1985, Barton, an accountant who acts for the Plaintiffs, came to see the defendant at Manzini. He suggested that the defendant should lease the plaintiff's properties in that town. He said that his clients were not getting a good return by way of rent. Barton said that the properties were earning about E6,500 a month. The defendant, having examined the list of shops and tenants etc., concluded that the rents being paid were too low. He thus became interested in the proposal that he lease the buildings. He offered to pay E11,000 a month, increasing by 12% per annum. The defendant calculated that by increasing the rent paid by the existing tenants and paying the expenses, he could earn a profit of about E3,DQD a year. He did not include the rates and taxes in his estimate of the expenses.. He did not mention the municipal rates to Barton and had no idea of how much was involved.

Barton left the defendant's office and returned an hour later and said he would like to have an agreement prepared so that he could take it back to Nelspruit for signature by the plaintiffs.

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Barton suggested that Carlston be engaged to dram up the agree-ment. The defendant phoned Carlston from his office and, in the presence of Barton, explained the agreement just concluded mentioning in particular the agreed rent, the duration of the term and the option to renew. The defendant said that what had been agreed between him and Barton was contained in Carlston's record of his instructions (exhibit A) to which it will be necessary to refer later.

The defendant told Carlston that Barton wanted to take the agreement to Nelspruit as soon as passible and Carlston said that Barton should come and see him at his office immediately,,

A few days later (it has been established that it was the 9th August, 1985) Barton called at the defendant's residence. It was a Sunday morning. He was accompanied by his brother-in-law. The defendant was entertaining guests and members of his family,, Barton apologised for the intrusion, he said he had the lease agreement with him,, The defendant told Barton that he could not read the document through as he had visitors. He asked Barton if the agreement was what had been arranged and Barton assured him that it was so. The defendant glanced at the document, noticing that it

contained the clause relating to the escalation of the erent, and signed it. He did not notice clauses five and six. He said that if he had seen them he would not have signed the lease, He had no reason to think that Barton had been guilty of any wrong doing at that time.

The lease is dated 9 August and the reference to Nelspruit as the place of attestation is incorrect. Barton left a copy of the lease with the defendant.

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The defendant subsequently sent letters to the various tenants of the leased buildings increasing their rents with effect from the 1st October, 1985. Four tenants refused to pay the new rents. Some claimed they had valid leases with the plaintiffs. One tenant, Medipharm produced a binding agreement with the plaintiffs which protected against a rent increase. This was produced in December 1985. It was only then that the defendant perused the copy of his own lease. There was no mention therein of the existence of any tenants with valid leases. He discovered the contents of clause five and six and the obligations it imposed upon him. He said that as this had never been discussed, he got in touch with Carlston and told him that he had never agreed this clause with Barton.

Carlston's advice to the plaintiff was that he should get in touch with Barton, which the defendant did. He telephoned Barton and told him about the claims made by the four tenants and the obligation to pay the municipal rates.

Barton said that he knew about the agreement between the plaintiffs and Medipharm, but had forgotten about it. Barton agreed that the rates had never been discussed . He said he would "take care of it". He did not say what he would do about it. Barton assured the defendant that none of the other tenants held agreements which would be binding upon the defendant.

The defendant recounted a conversation he had with the late Michael Matsebula. The defendant complained about the tenants' reluctance to pay increased rents and that it was the Landlord's responsibility to pay rates and taxes. The defendant made it clear that he had not agreed to pay these. The defendant said that Michael agreed with this and said there was no problem.

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The defendant went on to tell the Court about other negotiations he entered into with the second plaintiff in relation to property owned by a Mr Van Heerden. The relevance of this evidence is not apparent.* Wo demand by the plaintiffs in respect of the outstanding rates due from the defendant under clause 5 of the lease was made at this time.

The defendant's complaints about his reluctant tenants led to a suggestion by Barton that he should buy the leased properties to avoid a costly court case. A price was agreed upon. The sale un might have been completed were it not for the/timely death of Michael Matsebula,

The defendant concluded that clause five contained a typographical error in that the word "Landlord" had been inadvertely been introduced instead of the word "tenant" in the second part of the clause.

He did not know that it was the practice of Carlston to make use of a standard form of lease.

The defendant in his evidence went on to accuse the second plaintiff of attempting to divert the rent payable for the property from the estate of his late brother Michael. His evidence on this point does not appear to have any direct connection with the issue before me and I decline to consider it further.

Arguement continued between the defendant and the plaintiffs in regard to the tenants and the rates

and taxes. The defendant said that the second plaintiff and attorney Matsebula came to his house and apologised for the total misunderstanding that had arisen over the terms of the lease. Attorney Matsebula agreed to draft a letter which would settle the matter leaving the parties with no claims against each other. When after a delay, the letters

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were produced and signed the attorney failed to give the defendant copies.

In cross examination the defendant said that apart from what he had told Carlston on the telephone, he gave Barton instructions in regard to the lease. He insisted (and this was before the defence was amended) that clause five was the result of a typing error. The defendant was giving evidence after Carlston had concluded his testimony in which he categorically denied that any such error had been made in his office. The defendant did not consider that he was careless in signing the lease without having re ad it .

When the defendant was recalled for further cross examination some weeks later, he described the circumstances in which the document was signed by him,, He was not shown any letter from Attorney Mojapelo of Nelspruit. All he asked for was Barton's assurance that the document was "as he had arranged". He said he did not allege fraud on the part of Barton "then or now" as that would be speculation. He agreed that he had phoned Carlston and told him that Barton would give the instructions., having mentioned the agreed rent and the escalation clause to the attorney over the telephone.

In his evidence, Eric Martin Carlston, who has been an attorney since 1964, said that he had been instructed to wind up the estate of the late Samuel Matsebula. He acted in other matters both for the plaintiffs and the defendant.

On the 19th July, 1985 he received a telephone call from defendant who told him about a lease with the Matsebula brothers. He said that Barton would call at his office. Although Carlston made no note of the telephone call received, when Barton arrived

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a short time later, he took instructions from Barton and recorded these in exhibit A. These notes do not mention which of the parties would be liable to pay the municipal rates.

Carlston handed exhibit A to a typist. She would apply the notes to a specimen form of lease. Barton made it clear that he wanted to take the lease back with him to Nelspruit.

Barton told this witness that his instructions were to make the tenant liable for the rates. Carlston passed this instruction on to the typist. Ha did not add this to the notes which the typist was using using to prepare the draft lease., In consequence clause a five appeared in its present form and/related consequential clause in the standard form (clause 6) was deleted. Carlston does not remember who typed the document. The draft lease was typed during the lunch hour as Barton wanted to leave for Nelspruit at 2 p.m.

He handed the completed lease to Barton. He did not discuss it with the defendant. He acted on the basis that Barton was carrying out the defendant's instructions.

It was some months later, which the defendant told him that there was a mistake in the lease, and that he, as tenant, should not have to pay the municipal rates. Carlston advised his client to take up the matter with Barton as the latter was the person he had dealt with. Later he was told by his client that

Una matter had been resolved. He was concerned with the proposed sale of the properties to the defendant, but, as has already observed, this never took place.

In a affidavit sworn on the 12 November, 1987 Carlston said that he was aware that his client had notified Barton and the late

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Michael Matsebula that an error existed in clause five of the lease and that his notes of the instructions received "reflected all salient points agreed upon between the parties but made no mention of liability for municipal rates". It did not occure to this witness to say any more in his affidavit.

It was Mr Vilakati, his assistant, who handled the court case and drafted all the papers in connection with it.

In cross examination, Carlston conceded that his affidavit was incorrect as it contained an omission. He had not made a note of the new instructions from Barton. The witness agreed that paragraph 2.2 of the unamended defence was correct. However, he disputed any error on his part. He denied any typist's error. He. accepted no personal responsibility for the papers drafted by Mr Vilakati. He agreed that clause five amounted to a variation in the usual terms of a lease, but, that the instruction was not in writing.

When recalled to give further evidence, Carlston said that he does not know attorney Mojapelo of Nelspurit. He could not recall this attorney telephoning him to discuss the lease agreement, after Barton had taken it away to Nelspruit.

The plaintiffs called two witnesses. The first was Phineas Mojapelo, the nominal first plaintiff in his capacity as executor of the estate of the late Michael Matsebula. He is an attorney practising at Nelspruit.

He was given a draft lease between the plaintiffs and the defendant by Michael Barton. Clearly this was the document prepared at Carlston's office. Mojapelo understood that he was to peruse the draft and advise his clients, the Matsebula partnership, upon it. He considered Carlston to be the attorney for the proposed tenant

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Having considered tha draft document, he thought certain changes desireable in his client's interests.

He telephoned Carlston and discussed with him the alterations in the draft which he proposed, Carlston agreed to these, and Mojapelo prepared a new lease agreement incorporating the amendments agreed upon. As none of the matters discussed affected clause five it is unnecessary to refer to these amendments. When the lease had been typed he gave it to Barton together with a letter addressed to Messrs Carlston, Landmark and Co., Manzini. It is dated the 7th August, 1985, and it refers to "the changes as discussed" . It invited signature by the defendant.

Mojapelo agreed in answer to questions put to him by Mr Zeiss for the defendant, that he did not discuss clause five with Carlston. The telephone conversation took place during the first week of August. He also discussed the lease with Barton and Joseph Matsebula.

Michael Barton described himself as an accountant practis ing as such at Nelspruit. He acts for the Matsebula brothers. He had been concerned with earlier business transactions between them and defendant.

In July, 1985 he discussed the flats owned by the Matsebula brothers at Manzini with the defendant who showed an interest in leasing them. The defendant said that he would pay all expenses and nett E11,000 as rent. No agreement was reached at that first meeting, but, a few days later he was at the defendant's office when the latter telephoned Carlston. Barton said he did not recall exactly what the defendant said, but, there was mention of drawing a lease and that the tenant would pay all expenses.

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Barton called around to Carlston's office to collect a draft lease to take to Nelspruit. He waited while the document was being typed. He denies instructing Carlston about what was to be included in the draft lease. He says that Carlston acted on the instructions of the defendant and he, Barton did not act as the defendant's agent in the matter. Barton took the lease to the Matsebula brothers who told him to bring it to Majapelo for approval.

Later Majapelo gave Barton certain documents including letters to the Matsebula brothers. He arranged for them to sign the enclosed lease. By prior arrangement with the defendant he took the lease to his house on a Sunday morning. The matter was now urgent as the lease commenced on the 1st August 1985, and that date had passed.

Barton was accompanied by his brother-in-law one Harold Greever. There were other visitors at the defendant's house., Barton gave the defendant the lease. The defendant appeared to read the document while he offered Barton and his companion a drink. He showed the defendant the letter addressed to Carlston by Mojapelo. The defendant asked no questions. He signed the lease and initialed each page. Bath Barton and Greever witnessed the defendant's signature. They stayed to lunch and departed thereafter leaving a copy of the lease with the defendant. This was necessary as the defendant might be required to show it to the existing tenants.

Although both parties were supplied with duplicate originals of the signed lease, none of these have been produced, but all parties agree that the photo copies retained are faithful copies of the missing originals. Barton agreed that the defendant

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contacted him subsequently in connection with the tenants who claimed to have binding leases. He denied that the defendant complained about the wording of clause five.

According to Barton, Carlaton collected rent from the tenants on behalf of the defendant and paid out expenses. He did not pay the accounts for municipal rates which were sent on to Barton to settle on behalf of the plaintiffs*

Cross examined by Mr Zeiss, Barton said that his relationship with the defendant has always been cordial. He agreed that he enjoyed the confidence of the plaintiffs and attended to their interests in South Africa. In Swaziland he was merely a consultant. The plaintiffs are substantial businessmen in the field of passenger transport.

He said it was the defendant who raised the question of leasing the plaintiffs' property. At the time the plaintiffs were earning a return of between E6,000 and E7.000 a year. The defendant offered E11,000 "and all expenses". The defendant did not ask what these expenses were. Barton assumed that, as the defendant was a resident of Manzini, he would know that the expenses would include electricity, water, rates and the cost of maintaining the leased premises. He assumed that the offer to meet the expenses included an offer to pay the rates . At the time he received the defendant's proposal he did not know if his clients would agree to lease the premises to him. He knew that they wanted a better

return from the buildings than they were achieving at that time.

Barton said that Carlston might have made some notes when he was at his office. He maintained that the defendant had

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not authorised him to discuss the terms of the lease with Carlston. That had already been done by the defendant when he telephoned the attorney while Barton was still at his office. Barton said he did not ask for any alteration to be madia in clause five, painting out that Carlston might be expected to act on his client's instructions and not those of Barton He agreed that the letter given to him with the lease by Mojapelo, was addressed to Carlston's firm. Instead of delivering the letter he decided to bring the lease to the defendant direct for execution, it being a Sunday morning.

This witness could not say how much attention the defendant paid to the agreement before he put his signature to it. He could not say if he perused it word for word. The defendant told him he was happy with the agreement.

Barton agreed that one of the tenants was able to establish that he held a binding lease which precluded the defendant from increasing the rent. Barton promised to look into it. At the time the lease was executed in August, 1985, thy rates for the current year (1-4-85 to 31-3-86) were already due on the 1/8/88. Barton did not draw the attention of either Carlston or the defendant to this. He made no attempt to apportion the rates for that part of the year during which the buildings were rented by the defendant. It appears that the defendant was not asked to pay rates until the following year. The plaintiffs paid the rates for the year ending 31st March, 1986 and the rates for the following year. It would appear it is the rates for 1986/87 that they are attempting to recover fromthe defe-ndant in this case. Barton did not appear to know very much about the Manzini Town Council rates or when they fall due.

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The evidence reveals a considerable conflict between the testimony of the defendant and Carlston on the one hand and that of Barton on the other. Some of the discrepancies may be due to the lapse of time. The agreement was negotiated in 1985 and the possibility of litigation and the giving of evidence may not have became apparent to any of the parties concerned for some time after that.

I shall consider first what interests the witnesses have to protect. If it is true, as the defendant asserts, that he never intended to assume responsibility for the payment of rates due to the Manzini Town Council, then he is the victim of a grave and costly error.

On the face of it, in executing the lease, without first satisfying himself as to its contents, the defendant on his own admission, behaved imprudently. This is not the action of a shrewed businessman and is a reflection on the defendant's reputation as a competent man of business. He has therefore a reason to find an excuse or explanation for his action which might retrieve his reputation.

Carlston is an attorney of this Court, aware of the implications of professional negligence. Not only does an attorney's reputation for care in the conduct of his clients affairs count in his favour, but, unless he is adequately insured, negligence may prove expensive.

Barton has a valuable connection with the plaintiffs who, by all accounts, are successful men. He may not wish to jeo-padise that relationship and may be anxious to further and protect the plaintiffs 1 interests in this and other matters.

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If Barton was guilty of fraud, as the defendant alleges, it was a fraud perpetrated in two stages; first, at the office, of attorney Carlston to whom he gave the false instructions on behalf of the defendant and secondly at the defendant's own house when he misrepresented the contents of the lease agreement and induced the defendant to execute it, knowing that it contained a term of which the defendant was unaware.

For his fraud to succeed, Barton had to rely upon his deception of Carlston remaining undetected and that the defendant would sign the lease without reading its contents. He had no reason to believe at the time that either circumstances would arise or that the plaintiffs would approve of what he had done.

The defendant said that he telephoned Carlston from his office and explained the agreement he had just concluded with Barton, Carlston asked the defendant to send Barton to his office at once. The notes recorded by Carlston conformed with the instructions which the defendant said he had given to him over the telephone. When he was recalled to give evidence, he said that he told Carlstan that Barton would give the instructions regarding the lease. There was a perceptable shift in the defendant's position here.

Carlston said that the defendant telephoned about the lease. He took his instructions from Barton and recorded everything, apart from the terms of the contentious clause five, which were given later when the document was being typed.

Barton says that he gave no instructions to Carlston,, He went to his office merely to collect the draft lease and take it to Nelspruit.

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The defendant said that it was Barton who suggested that Carlston be the attorney. It is clear enough that Carlston has been and still is the defendant's attorney and I see no reason why he should put the blame (if that was his intention) for Carlston's appointment on to Barton.

Carlston made his .notes of the instructioni in regard to the terms of the lease. If these did not come direct from his client, the defendant, he did not bother to note the name of the person who passed the instructions on to him. If Barton later gave him instructions to include in clause five the stipulation that the tenants would pay the rates, Carlston did not record it, although it is said that such a stipulation was not the usual practice. Carlston did not see fit to seek the defendant's confirmation Barton had conveyed his. instructions correctly, although the circumstances warranted it. When some months later the defendant told Carlston that he has received incorrect instructions from Barton, the attorney referred his client to Barton. He put nothing in writing either to his client or Barton setting out his instructions on the matter and by whom they were received. Carlston, as an attorney of experience, must have been aware of the implications. His client was questioning the contents of a document drawn up at his office, He had responsibility in the matter and might be expected to state his position clearly and unequivocally when the query first arose.

Carlston's professional assistant, Mr Vilakati, filed a document in this case in which an admission is made that clause five of the lease may be attributable to an error by the attorney who prepared the memorandum of agreement. That admission although repudiated by Carlston under oath has not been formally withdrawn.

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If Barton gave the instructions relating to clause five as Carlston contends, then he counted upon it being accepted without further reference to the defendant by Carlston.

I accept the evidence of attorney Mojapelo that he discussed the agreement with Carlston on the telephone and that he redrafted it and put it into the form in which it was eventually executed.

Carlston's lapse of memory in regard to this is convenient* It would be damaging for him to admit that he discussed the terms of the draft lease with the plaintiffs' attorney without noticing the contents of clause five end making some comment about it.

There may be a divergence in the evidence given in this reasonable Court, but, the only / explanation for the wording of clause five of the lease, is that originally given .It was a mistake which originated at the office of Carlston.

I do not think that the defendant would have undertaken the responsibility for paying the municipal rates payable on the properties, without first ascertaining precisely how much this would amount to in any given year, I am prepared to accept that the payment of rates was not discussed at all between the defendant and Barton. Barton believed that the defendant would pay "all expenses". He is not a resident of Manzini and might not have considered the question of rates at all,either,,

Carlston drafted the lease, for submission to the plaintiffs. He agreed to the amendment proposed to him on the telephone by attorney Mojapelo. What emerged was the lease in the form in which it was eventually executed by both parties and it provided for the payment by the defendant of the municipal rates.

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It Is alleged that Barton procured the signature of the lease by the defendant, by misrepresenting the terms of the lease and by not disclosing the contents of clause five. I have no reason to believe that Barton was aware of clause five and its possible financial effects. He should have given the draft to the defendant's solicitor, Carlston instead of to the defendant direct. The defendant was under no obligation to sign the lease there and then without advice. Whether he read the document or not before signing it was his own choice. He was not persuaded or pressured into it by Barton, who left with him a copy of what he had signed. He took no advantage of his posse-it ssion of the copy to read the lease or give/to Carlston for his comments.

The claim that Barton acted fradulantly in inducing the the defendant to execute /lease is without substance. The amended defence introduced late in the proceeding must be dismissed..

In the discussions entered into before the lease was signed no mention was made of liability for payment of the rates. Carlston, as agent for the defendant, put a clause in the draft lease which saddled his client with a liability of which he may have been completely unaware . The plaintiffs were satisfied with the lease as a whole and they executed it. The defendant added his signature to it. Has a case been made out for the recttfication of clause five of the lease by this Court?

I take no account of statements alleged to have been made by the late Michael Matsebula. It is easy to put words into the mouth of a dead man. This case must be decided on more substantial evidence.

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As for the allegation that the draft lease was altered by unknown persons after it was given by Carlston to Barton, not only is this a proposition in conflict with the evidence led by the defendant, but,

it is entirely unsupported by any other evidence. The lease executed by the defendant was finally settled in the office of attorney Mojapelo. It was never suggested that the mistake in the clause occured at that stage. In any event Mojapelo told the Court that he noted clause five in its ultimate form and made no comment upon it during his conversation with Carlston. I have no reason to disbelieve this witness or to suspect him of making changes in the draft lease which he did not discuss with Carlston,,

The mistakes were that of the defendant and his attorney and were not induced by the plaintiffs or their agents. The draft contained an undertaking to pay the municipal rates and this was accepted by the plaintiffs. Prior to that, there was no as express or implied agreement between the parties/to who would be liable to pay the rates. As far as the Manzini Town Council is concerned that liability rests on the plaintiffs. As between the parties to this action, it was a matter which required to be settled between them. If clause five had not been inserted in the lease at all, it could not be assumed that the defendant had contracted to re-imburse the plaintiffs for the rates paid by them.

The leading South African case on rectification of written contracts is Weinelein v. Goch buildings Ltd. 1925 A.D. 282. This laid own, after reference to English and Roman Dutch authorities, that a contract can be revised or rectified on the ground of mistake on good cause shown. This can be done to

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reproduce the real agreement between the parties where there has been a mutual mistake or fraud.

This is baaed upon consi-derations of equity. A court will refuse to permit the enforcement of an unconscionable claim where under the special circumstances it would be inequitable so to do.

Rectification may be claimed where a written agreement differs from the express verbal agreement even where the latter contained a clause that it contained the whole agreement between the parties and that no verbal subsidiary agreement had been entered into (Munick and Munick v. Sydney Clow & Co. Ltd (1965 (4) S.A. 312)

On the other hand where the mistake is on the part of one of the parties and has not been induced by any act or omission of the other an estoppel arises which is a bar to rectification.

The defendant through his agent, and by the mistake of that he agent, inserted into the lease a term which/had not intexxxxx.

The plaintiffs entered into a contract upon these terms and it cannot be said with any certainity that they would have concluded, the contract, if clause five had not been so drawn, Subsequently the defendant executed a lease which embodied the disputed clause.

In Freeman v. Cooke 1848 2 Ex. 654 Blackburn, J, said "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

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I have abstracted this quotation from Van Ryn Wine and Spirit Co. v. Chandos Bar 1928 T..P.D, 417 at page 423 from the judgment of Green burg J . The original report is not available here and the report at (1943 - 60) All F.R. rep. in 185 does not contain any reference to Blackburn J. as a member of the Court of Exchequer and attributes the quotation to PARKE B. at 169.

In the same case Greenberg J. said at 424 -
"In considering the question whether a person can be held to have assentsd to a contract when he had not any actual intention of assenting, I have referred only to the decision in the English Courts. But the principles on which these decisions are based are not founded on any doctrine peculiar to English law, and are portions of the Roman-Dutch law. The doctrine is one of estoppel, which, as was pointed out by SOLOMON J. A. , "in Baumann v.Txxmas (1920, A.D= , at 434) 'is as much a part of our law as it is of that of England'. And Gluck, in his Commentary on the Pandacts (Bk. 11 Title 14, s 290) says: 'To put it shortly, one deduces a person's meaning and his intention in accordance with commonsense . If therefore one cannot reasonably infer anything else from a person's conduct in a particular case than that he conducted himself in a certain manner because he accepted and agreed to what had happened, then one is entitled to accept such conduct as a tacit declaration of his consent. Nobody can aacape the result of such an interpretation of his conduct being given against him., Because should he desire this, then he really must claim to be judged according to different principles than those upon which all reasonable beings act,

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and he cannot do so as long as he is a unit of human
society".

I hold, therefore, that the defendant is bound by the terms of the lease which he signed, even if he did not intend to enter into all the obligations therein set out.

No witness was called who was in a position to prove by direct evidence the amount due by the defendant for rates in accordance with the terms of the lease. Mr Barton produced some copies of invoices said to have been issued by Manzini Town Council, but, these may have been inaccurate.

The plaintiffs sought to amend the statement of claim by increasing the amount to E70,889-69. As the application was opposed, I reserved a ruling on it until the end of the case. In the absence of proof that the additional amount claimed is now due, I now dismiss that application, it leaving/in the plaintiff's hands to institute fresh proceedings if that should prove necessary.

I note that in an affidavit sworn on the 12th November, 1987, the defendant admitted that the sum of E41,025-13 was owing as rates on the properties. As the affidavit was made in proceedings which related to the present action, I am not prepared to allow the defendant to insist on formal proof of the amount due as the matter is not really in dispute.

I therefore give judgment to the plaintiffs in the 3um of E41, 025-13 which is less than the amount claimed in the summons. There shall be absolution from the instance in respect of the balance of E2, 092-64

The lease terminated on the 31st July, 1988. I do not know

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if the defendant is still in possession or whether he has exercised his option to renew the lease for a further term of years. I grant an order of ejectment against him, but, not against persons occupying the premises through him, who have not been made parties to this action.

The plaintiffs shall have interest on the principal debt as claimed.

The counterclaim is dismissed,,

The defendant shall pay the costs of this action.

F X. ROONEY

JUDGE