

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 49230/2021

| | |
|-------|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |
| _____ | _____ |
| DATE | SIGNATURE |

In the matter between:

ANIOMA PROPERTY (PTY) LTD

First Applicant

and

DMFT PROPERTY DEVELOPERS

First Respondent

LINDIE LOMBARD ATTORNEYS

Second Respondent

PAM GOLDING PROPERTIES

Third Respondent

JUDGMENT

MAHALELO J

Introduction

[1] The applicant, Aniyoma Property (Pty) Ltd (the seller) claims specific performance by the first respondent, DMFT Property Developers (the purchaser), of the obligation to pay transfer costs for the registration of an immovable property into the names of the purchaser, which obligation arose from a written agreement of sale that was concluded between them during July 2021 (the contract). The immovable property, known as Portion 4 of Erf 208, is situated at 161 Empire Place, Sandhurst. The immovable property is owned by the applicant. The agreed purchase price consideration is R13 Million rand.

[2] It is common cause that the purchaser has paid the full purchase price which money is currently held in the trust account of the second defendant. The second defendant is appointed as the conveyancer of the applicant. No relief is sought against the second and third respondents, they are only cited as interested parties. It is also common cause that an amount of R 1 392 237,27 still has to be paid towards the registration of transfer of the immovable property into the names of the purchaser. The purchaser refuses to pay the transfer costs and take the transfer of the immovable property.

[3] The purchaser states in its answering affidavit in these proceedings that the seller or its representative deliberately failed to make disclosures of material facts notwithstanding an obligation to do so in that they failed to make disclosure of all conditions and/or endorsements on the title deed and/or circumstances that brought about the conditions or the endorsements. According to the purchaser, the seller or its representative failed to disclose to the purchaser that the immovable property in question is under hijack, that upon learning of the caveat to the title deed and

investigating it, it became aware that the immovable property was targeted by hijackers and is under attack. Those hijackers will have to be warded off in court and that will delay its plans to develop the immovable property. The purchaser says that the contract stands to be rescinded or cancelled. This was after it had sent correspondence to the seller and the second and third respondents through its attorneys on 3 September and stated its “resolve to withdraw from the transaction”, and further that the “second and third respondents cease all activities related to the transfer of the property” and that it be “reimbursed of all amounts it had paid in anticipation of the transfer”.

[4] The seller says that it has complied with its obligations in terms of the contract including instructing the second respondent to deal with the question of removing the caveat on the title deed in terms of clause 20.1 of the contract. The seller contended that the caveat served to inform the Registrar of Deeds not to issue a copy of the title deed to the property to anyone without leave of the court.

[5] The seller contended further that there is no truth about the hijacking issue. It argued that it is the registered and undisputed owner of the immovable property and is not fending off hijackers. It says that there has never been an attempt to hijack the immovable property either as alleged or at all. The seller argued that the averments by the purchaser in respect of hijacking of the immovable property and its effect are speculation and far-fetched. The seller stated that the caveat related to an attempt to liquidate it and had nothing to do with hijacking of the immovable property and in any event, clause 20.1 of the contract does not in any way impede the transfer of the immovable property. The seller considers the purchaser’s unilateral non-compliance

with the terms of the contract a repudiation which it refuses to accept and it demanded specific performance from the purchaser of its obligation to pay the transfer costs for the registration of the transfer of the immovable property into the purchaser's names. The purchaser did not heed to the demand and hence the present application.

The Caveat

[6] In the founding affidavit the seller (applicant) alleges that prior to 2020, a third party attempted to fraudulently liquidate the applicant. In early 2020, the applicant successfully approached this Court for an interdict to stop the third party. During the process it caused a caveat to be noted against the title deed of the property. The caveat provides, inter alia, as follows:

“On the 18th of February 2020, the registered owner [i.e Anioma] and its directors obtained a court order against various parties inter alia the Commissioner of the Companies and Intellectual Property Commission, the Master of the High Court South Africa, Johannesburg and Johannes Hendrickus du Plessis N.O. insofar as to reverse a stay and to subsequently reverse the unlawful and fraudulent liquidation in respect of the registered owner by the Third Respondent.

...

Accordingly the registered owner being the true applicant, hereby makes objection to the issuing of a certified copy and/or any subsequent transfer of the immovable property in respect of such copy unless leave has been obtained to do so and pending the outcome of any actions pending or to be urgently brought in the High Court.”

The Contract

[7] The material and relevant terms and conditions of the sale agreement were as follows: -

1. The immovable property was sold on a voetstoots basis, for the amount of R 13,000,000.00 (Thirteen Million), payable by a deposit of R 1,000,000.00 (One Million), within 3 business days after the date of the

signature of the agreement by the applicant and R 12,000,000.00 (Twelve Million) payable within 30 days thereafter.

2. Occupation of the immovable property to be given to the first respondent on registration of transfer of the immovable property.
3. Possession and ownership of and all benefits and risk in respect of the immovable property would pass to the first respondent on registration of transfer, from which date the first respondent would also be liable for inter alia all rates, taxes and/or levies pertaining to the immovable property.
4. Transfer would be effected by the second respondent as soon as reasonably possible provided that the first respondent has complied with the provision of the agreement, signed all necessary bond and transfer documentation and paid all necessary costs of transfer.
5. In addition to the purchase price, the first respondent would pay all costs and charges incidental to registration of transfer of the immovable property, including such administrative amounts as may be necessary to obtain a rates and/or levies clearance certificate to facilitate registration of transfer (excluding rates, taxes, levies and/or arear municipal charges for which the applicant is liable).
6. The first respondent would also be liable for VAT levied in terms of the Value-Added Tax Act No. 89 of 1991 (as amended) or transfer duty levied in terms of the Transfer Duties Act No. 40 of 1949 (as amended) (if applicable); legal costs charged by the second respondent and costs of registering any mortgage bond (if any).

7. The Applicant and the first respondent warranted in favour of each other that neither party was aware of the existence of any fact or circumstance that may impair its ability to comply with all of its obligations in terms of the agreement.

[8] Cause 20.1 of the contract provides that “[t]he seller shall remove all caveats that may be placed on the property and facilitate the transfer process”.

[9] The following questions arise for determination in this application:

- (a) Was the language of clause 20.1 of the sale agreement misleading and were pertinent facts omitted?
- (b) Was there a legal duty on the applicant to disclose the exact nature of the caveat?
- (c) Were the non-disclosed facts material thereby invalidating the contract?

Specific performance as remedy for breach

[10] Christie’s *Law of Contract in South Africa* 7 ed at 616 states:

“The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.” (Footnote omitted.)

[11] In *Farmers’ Co-operative Society v Berry*¹ the question was whether specific performance should be decreed. The case concerned a claim for the delivery of certain movables, alternatively for damages. Innes JA answered that question as follows:

¹ 1912 AD 343 at 350.

“Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson vs. Pullinger* (1 O. R., at p. 301), “the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt.” It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages.”

[12] As Zondi JA held in *Basson and Others v Hanna*,² there are many cases in which it was held that, if one party to the agreement repudiates the agreement, the other party at his election may claim specific performance of the agreement or damages in lieu of specific performance and that his claim will in general be granted, subject to the court's discretion.

Analysis

[13] Where a party has entered a contract, or otherwise been induced to enter said contract as a result of a false representation by the other party, this amounts to misrepresentation. Misrepresentation occurs when a false or incorrect statement is made by a contractor or agent to the contracting party, which consequently induces the latter party to conclude the contract. The effect of such misrepresentation is that the party who was induced into concluding the contract may rescind the contract. This can only be done if the misrepresentation was material, and is therefore essential to whether the contracting party would have entered into the contract or not. The duty to disclose a material fact arises when a party has sole knowledge of the material fact which the other party would have relied upon and must be in line with the *boni mores* of the community.

² 2017 (3) SA 22 (SCA) at para 23.

[14] Such actions are regarded as non-disclosure, which is often thought of as misrepresentation by silence.³ As a result, the failure to disclose a material fact to the other contracting party when there is a legal duty to do so constitutes misrepresentation. Non-disclosure and misrepresentation are treated in the same manner, in that they are both grounds for rescission of the contract if one party is under a duty to disclose such facts and fails to do so.

[15] The case of *McCann v Goodall Group Operations (Pty) Ltd* illuminates on instances when a duty to disclose exists:⁴

- “(c) A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.
- (d) Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid.

Examples of a duty of this nature include the following:

- (i) A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community.
- (ii) Such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require that the plaintiff be apprised thereof.
- (iii) Similarly, there is a duty to make a full disclosure if a previous statement or representation of the defendant constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.”

[16] Given the facts of the present matter, the only two grounds the purchaser can rely on in establishing that the seller had a duty to disclose the exact nature of the caveat are the “sole knowledge” ground and the “omission of pertinent facts or using misleading language” ground. These grounds are discussed in further detail below.

Sole knowledge of the material fact

³ *Bluegrass Trading 1112 CC t/a Rawson Properties v Ramsern and Another* [2021] ZAGPJHC 753 at para [40].

⁴ 1995 (2) SA 718 (C) at para 726C-G.

[17] A contracting party is under a duty to disclose any information that he has sole knowledge of, which the other party would have relied upon, and where silence and ultimately a lack of communication to the other party would amount to misrepresentation.⁵ In order to determine whether a failure of a duty to disclose will result in the defendant's failure amounting to unlawfulness, one must look at the general test for liability.⁶ This is expressed as follows:

"A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances'⁷

[18] In *Speight v Glass*⁸ the plaintiff purchased shares in a hotel in its entirety, and at the time of the conclusion of the contract he was unaware that the town council was exploring the possibility of constructing a road that would run through the property that the hotel was on. The seller on the other hand was aware of this possible construction, and as a result the purchaser was of the opinion that the court should cancel the contract, and he should be reimbursed for the purchase price of the property. The purchaser based his allegations on the basis that he would not have entered into the contract had he been aware of the construction. Furthermore, he alleged that the seller was under a duty to disclose the planned construction.

[19] The court ultimately determined that the seller had no specialised knowledge of the terms of the construction.⁹ The court further agreed with the counter allegation of the seller that the necessary information, and full details of the construction plan,

⁵ RH Christie *Christie's Law of Contract in South Africa* 7th (2016) 323.

⁶ *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 SCA at para 5.

⁷ *Pretorius and Another v Natal South Sea Investment Trust Ltd* (under judicial management) 1965 (3) SA 410 (W) at para 418E-F.

⁸ *Speight v Glass and Another* 1961 (1) SA 778 (D).

⁹ *Id* at 783.

was accessible to the purchaser through the town council.¹⁰ As a result, the claim for the cancellation of the contract of sale was dismissed due to the failure of the purchaser to prove that the seller had a duty to disclose the information to him.¹¹

[20] A parallel can be drawn between *Speight* and the present matter. In *Speight*, the Court found that the seller did not have sole knowledge of the construction and that this information could be easily accessed through the town council. Similarly, in the present matter, the information detailing the history of events that led to the filing of the caveat could be easily accessed through the Deeds Office.

[21] In *ABSA Bank Ltd v Fouche*¹² the court canvassed the notion of classifying information as being “exclusive” to a single person. The court found that, “information which is, if desired, [is] readily ascertainable..., should not be categorised as exclusive knowledge. 'Exclusive knowledge' in this sense is knowledge which is inaccessible to the point where its inaccessibility produces an involuntary reliance on the party possessing the information”.¹³ (own emphasis added)

[22] Here again, a parallel can be drawn between the present matter and *Fouche*. Given that the caveat could have been easily uncovered through a simple deeds search and subsequently accessed through the Deeds Office, it may not qualify as being exclusive knowledge or knowledge which the seller was the sole possessor of.¹⁴

¹⁰ Id.

¹¹ Id at 784.

¹² 2003 (1) SA 176 SCA.

¹³ Id at para [8].

¹⁴ See also *The Trustees for the time being of the SAS Trust v New Adventure Investment 193 (Pty) Ltd* [2003] JOL 11579 (SCA).

[23] Even if the information is qualified as “exclusive” to the seller, the second part of the test in order to establish a duty to disclose is that the right to have the knowledge communicated to him “would be mutually recognised by honest men in the circumstances.”¹⁵

[24] In the present matter, I am not persuaded by the presence of the caveat that the immovable property was hijacked. Further, the seller submits that the existence of the caveat would not have impeded the transfer. Importantly, in terms of clause 20.1 the applicant was bound to remove all caveats in terms of the agreement. Therefore, it would appear that disclosing all the facts surrounding the caveat was not considered necessary by the seller because there were, in fact, no title issues. Given that the property was never hijacked and the title deed was never compromised, and all litigation regarding the alleged fraudulent liquidation of the applicant was resolved, it seems reasonable to assume that an “honest man” in the circumstances would not deem it necessary to disclose the entire nature of the caveat. It is important to reiterate here again, the information in question was readily accessible had the purchaser performed his due diligence and simply conducted a deed search.

Omission or misleading language

[25] A legal duty to disclose in this instance occurs when the contractor has omitted pertinent facts or has used language that is misleading.¹⁶ Certain policy considerations may also necessitate the communication of certain facts or information to the other party.¹⁷ Often during the negotiation process the contractor

¹⁵ *Pretorius and Another v Natal South Sea Investment Trust Ltd* (under judicial management) 1965 (3) SA 410 (W) at para 418E-F.

¹⁶ RH Christie *Christie's Law of Contract in South Africa* 7th (2016) 323.

¹⁷ *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C).

may use vague, unclear or elusive language in order to secure a sale, or to ensure the conclusion of the contract. Nonetheless, a duty to disclose exists if such previously used equivocal terms require clarification.¹⁸ This indicates that non-disclosure or an omission in certain circumstances would result in the failure to disclose being wrongful.¹⁹

[26] In *Dormell Properties 658 (Pty) Ltd v Rowmoor Investments 513 (Pty) and Another*²⁰ the court held:

“Silence (non-disclosure) may amount to a misrepresentation where there is a duty to communicate the omitted information. There may be particular circumstances, usually associated with the prior conduct of the person who remained silent, that require such person to speak – Christie ... at 288 gives as examples where only part of the truth has been told and the omission of the remainder gives a misleading impression... . Outside of particular cases of this kind, there is in general no duty on one contracting party to tell the other everything material to the transaction – policy only requires him to speak if the information falls within his exclusive knowledge (so that the counterparty must needs rely on the other) and the information is such that the right to have it communicated ‘would be mutually recognised by honest men in the circumstances’ (*Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) para 5).”²¹ (own emphasis added)

[27] The court held further:

“At best ... the brochure was in this respect unclear. There is in my opinion an important difference between making a statement which the reasonable reader would understand as meaning X; a statement which the reasonable reader would understand as meaning Y; and a statement which would leave the reasonable reader uncertain whether the meaning was X or Y. The first and second would be statements of known content which might be true or untrue; the third would be a statement of unclear content, and in such a case it cannot be said that the maker was making statement X or that he was making statement Y at the election of the reader, because in the posited circumstances the reasonable reader would seek clarification. In the present matter, if the statements in the brochure did not in their context clearly convey that what had been approved ... the statements were at best for Dormell unclear to the reasonable reader A reasonable reader to whom this question was important would have made enquiry to clarify the matter. The fact that subjectively a particular reader latched onto one meaning which the reasonable reader would not have taken as the clear import of the statement is not relevant at the stage of determining whether a misrepresentation has been made.”²² (own emphasis added)

¹⁸ Id.

¹⁹ RH Christie *Christie’s Law of Contract in South Africa* 7th (2016) 287.

²⁰ [2013] ZAWCHC 152.

²¹ Id at para 105.

²² Id at para 112.

[28] The purchaser submitted that the language of clause 20.1 caused him to draw an inference that there were, in fact, no caveats but rather, the seller simply added the clause for the sake of being thorough.²³ The purchaser submits further:

“The signed offer to purchase did not record the existence of any Caveat on the immovable property, instead, the Applicant stated as follows:

The Seller shall remove all caveats that may be placed on the property and facilitate the transfer process.

The non-committal construct of the above underlined statement negates questions that ordinarily follow in the event of the positive statement that:

The Seller shall remove all caveats on the property and facilitate the transfer process.”²⁴

[29] The purchaser submits that had the seller phrased the clause as a positive statement, he would have followed up with questions relating to the nature of the caveat. However, this explanation does not appear plausible. Clause 20.1 is, at best, unclear - as was articulated by the court in *Dormell*. The seller had intentionally penned the clause in at the end and the purchaser, as an interested party, should have questioned why this was so regardless of the wording. The purchase of the property was going to cost the purchaser a substantial amount of money and as such, required a certain amount of due diligence from him. A reasonable person in the position of the purchaser would have sought clarity on the clause to ensure that there were no issues pertaining to the title of the property and to further ensure that there were no caveats on the title. A reasonable person, with as much investment in the matter as the first respondent, would have certainly questioned why the seller had specifically added that particular clause into the agreement.

Materiality of the non-disclosed facts

²³ First Respondent’s Answering Affidavit at paras 57-59.

²⁴ First Respondent’s Heads of Argument at paras 8-10.

[30] Even if I am wrong in deciding that there was no duty on the seller to disclose the precise nature of the caveat, the failure to disclose these facts would still have to qualify as material in order to affect the validity of the contract.

[31] As enunciated in LAWSA:

“A misrepresentation (or nondisclosure), to give rise to a claim for rescission, must relate to a material fact. The courts have not always formulated the requirement of materiality in precisely the same way but the test would appear to be essentially whether the statement would have induced a reasonable person to enter into the contract in issue (or, in the case of nondisclosure, whether disclosure of the relevant information would have persuaded a reasonable person not to enter into the contract). However, the desirability of applying an objective test where the representor has been dishonest or fraudulent has been questioned, and lately it has been held that the test to be applied in such cases is subjective: namely, whether the representee actually believed the representation.”²⁵

[32] In applying the above test to the facts of the present matter, it would appear unlikely that the disclosure would persuade a reasonable person to not enter into the contract. The existence of the caveat did not affect the title deed nor does it prevent transfer from occurring. Furthermore, the immovable property was not the subject of an attempted hijacking and has never, in fact, been actually hijacked. So the consequences of buying a hijacked property will not be suffered by the purchaser. As such, it could be argued that a reasonable man in the position of the purchaser would have proceeded with the sale. At worst, a reasonable man may have instituted a delictual claim against the applicant if he believed he suffered a financial loss during the negotiation of the purchase price however, it would appear unlikely that a reasonable man would attempt to rescind the contract entirely.

[33] For the foregoing reasons the following order is made:

²⁵ Van Rensburg “Contract” in LAWSA 3 ed (2014) vol 9 at 318.

1. The first respondent is ordered to pay to the second respondent, the amount of R 1,392,237.27 in respect of the registration of transfer of the immovable property known as Portion 4 of Erf 208 Sandhurst ("the immovable property"); and
2. Sign any/all documentation required by the second respondent for the purposes of the registration of transfer of the immovable property into the name of the first respondent; within 10 days of the handing down of this order.
3. That failing, the first respondent's compliance with the aforesaid is ordered, that: -
 - 3.1 The second respondent is directed to utilize the purchase price paid by the first respondent in respect of the immovable property, held on trust by the second respondent, for the purposes of the payment of the aforesaid transfer costs; and
 - 3.2 The Sheriff of the above Honourable Court is authorised to sign on behalf of the first respondent, any/all documentation required by the second respondent for the purposes of the registration of transfer of the immovable property into the name of the first respondent.
4. That the costs of this application be paid by the first respondent on attorney and client scale.

M B MAHALELO
JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was delivered electronically by circulation to the parties' legal representatives by e-mail and uploading onto CaseLines. The date and time of hand down is deemed to be 08 March 2023 at 10h00.

APPEARANCES:

Counsel for the applicant: Adv E.R. venter

Instructed by: JHS Attorneys

Counsel for the first respondent: Adv M Mphaga SC

Adv M.E. Manala

Instructed by: Manala & Co Inc.