IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR638/17

Court *a quo* Case No: 1580/2015

In the matter between:

PATGONAN NAIDOO	**FIRST APPELLANT**
THAVANTHREE NAIDOO	**SECOND APPELLANT**

and

WAKEFIELDS REAL ESTATE (PTY) LIMITED	**RESPONDENT**

ORDER

On appeal from the Chatsworth Magistrates Court, Magistrate DST Khuzwayo presiding, the following order is issued:

1. The appeal is dismissed with costs.

JUDGMENT

Henriques J (Mlaba J concurring)

Introduction

[1] The dispute which gave rise to the appeal arose out of a claim for estate agent's commission allegedly due to the respondent in their capacity as estate agents in the sum of R40 000. The respondent alleged that on 25 March 2015, it had through its estate agent, Ms Jennifer Kim Badsey (Badsey) concluded a valid written purchase and sale agreement for the sale of an immovable property being Section 3, Ishkon Mews, 14 School Circle for the purchase price of R550 000. The respondent indicated that the appellants had failed in their obligation to perfect the agreement and refused to proceed with the sale of the property. It was common cause that the respondent represented by Ms Badsey was the effective cause of the sale.

[2] The appellants' defence to the respondent's claim for estate agent's commission was that it was never their intention to enter into a purchase and sale agreement with the respondent as they were purchasing the property for their daughter; the purchase of the property was subject to her approval as well as an assessment of the cost of renovations. No valid agreement had been concluded between the appellants and the respondent and in the event of the court finding a valid agreement to have been concluded, such agreement was lawfully terminated.

[3] In addition the appellants denied liability for payment of commission as clause 17 of the agreement had never been brought to their attention. Clause 17 of the purchase and sale agreement provided for the respondent to seek payment of estate agent's commission from the appellants in circumstances where the purchasers failed to carry out their obligations in terms of the agreement. It provided as follows:

"....However should the PURCHASER fail to carry out his obligations herein, Wakefields shall have the right to, but not be obliged to, recover their commission plus VAT from the PURCHASER....."

[4] In the court *a quo* the respondent led the evidence of two witnesses being the estate agent in its employ, Ms Badsey, and a trainee estate agent Adele Kleinschmidt (Kleinschmidt). After the application for absolution from the instance was dismissed, the first appellant testified. The second appellant did not testify.

[5] After considering the evidence and submissions of the legal representatives, the court *a quo* rejected the defences advanced by the appellants and granted judgment in favour of the respondent jointly and severally against the first and second appellants, the one paying the other to be absolved for payment of the commission in the sum of R40 000 and interest thereon at the rate of 9 percent from date of summons to date of full and final settlement, together with costs.

Facts

[6] A brief exposition of the facts presented in the court *a quo* warrants mentioning prior to this court dealing with the issues on appeal and whether or not the court *a quo* was correct in its findings and judgment. It is common cause that the respondent bore the onus in the court *a quo* to prove its entitlement to commission and that the appellants bore the onus in relation to the defences raised.

[7] Jennifer Kim Badsey (Badsey), an estate agent employed by the respondent testified that she had a mandate from the sellers David and Linda Reuben to sell their immovable property situated at Ishkon Mews described as 'a renovators dream'. She had run an advert in Property Junction and the appellants responded to the advert and made an appointment to view the property on 25 March 2015. She confirmed that the property needed repairs in that windows and aluminium frames needed to be replaced, there was damp on the walls and the cupboards needed to be attended to.

[8] She was contacted by the first appellant telephonically and they arranged to meet her at the unit. She testified that on their arrival outside the premises, she had mentioned to the first appellant that the property needed work. All she had was a remote to the property and did not have the keys as the aluminium door was not locked. The first appellant was accompanied by the second appellant and their grandchild and they walked through the property and also around the complex. The intern agent Ms Kleinschmidt was present at the time.

[9] They then met at their respective cars outside the premises and had a conversation. The first appellant asked her whether he could make an offer on the property and what price the sellers would accept. She had mentioned to him that the price on offer was R570 000 but he could make whatever offer he wanted and she would convey the offer to the sellers and try and negotiate a sale. At that stage she

offered to email the first appellant the purchase and sale agreement so he could read it at home.

[10] She had in mind the first appellant reading through the document and contacting her once he was ready to make an offer. He then questioned her as to exactly where her offices were and indicated that he would follow her to her offices to complete the purchase and sale agreement. On their arrival at the offices, she had requested the intern to prepare a cost calculator and she then retrieved a blank purchase and sale agreement. She and the first and second appellants together with the intern Ms Kleinschmidt sat around the table in the boardroom and went through the agreement and she explained the procedure to them.

[11] The offer to purchase was completed in the boardroom with the first and second appellants. After the offer to purchase had been signed by the first and second appellants, she then contacted the Reubens and advised them that she had an offer which was less than their asking price. In order to get the sale, she agreed to reduce her commission which she then reduced to the sum of R40 000 inclusive of VAT and this was an annotation made at clause 17 of the agreement.

[12] The amendment to the commission was made after the first and second appellants had signed the offer to purchase. After the offer to purchase had been signed, no other discussions took place between the first and second appellants save that the first appellant indicated he may want to come back and look at the premises with a contractor in order that the contractor prepare a quote for repairs.

[13] After the appellants left, she had a telephonic discussion with Mr Reuben who was overseas who informed her that she could accept the offer and requested that she contact his wife as she had a power of attorney to sign on his behalf. Mrs Reuben came into their offices after she had spoken to Mr Reuben and emailed the offer to purchase to him and he had given the 'go-ahead'. Mrs Reuben came in to the offices to sign the acceptance of the offer to purchase in the boardroom after lunch on the same day, and at the time she had the power of attorney. She took the remote for the property and left.

[14] After the agreement had been signed by Mrs Reuben, Ms Badsey telephoned the first appellant to advise him that the offer to purchase had been accepted and she would email it to him. The first appellant said to her that he needed to get access to the property again as either on the Thursday or the Friday he wanted to bring his daughter to have a look at the property which had been purchased. She informed him that she would contact Mrs Reuben and ask for the remote to be returned. Mrs Reuben then returned the remote on the same day a short while after her conversation with the first appellant.

[15] She did not hear anything further from the first appellant on that day, however on the following morning of 26 March 2015 there was an email from the first appellant indicating that he no longer wanted to proceed with the sale. She had sent him an email on 25 March 2015 at 3h15pm advising him of the acceptance of the offer to purchase and attached to the email the signed offer. The email requested him to arrange to deposit the funds and informed him that he could collect the remote after making such arrangements with him.

[16] The email received from the first appellant at 06h44am read as follows:

'Hi Kim.

I did some prices on revamping the place and the total amount will be too much and does not make the purchase feasible for me. I do like the place but the total price after renovations is too much for me to recover.

Therefore I hereby decline my offer to purchase and thanks for your time.

I tried calling your cell yesterday and you were not available.

Regards

Pat Naidoo.'

[17] Ms Badsey testified that on receipt of the email from the first appellant she responded at 09h09am on the same morning as follows:

'Hi Pat

Thank you for the mail below, I need to get legal advice as I am not aware if you can withdraw an offer after both have signed. Please let me revert back to you after speaking to the attorney.

KIM'.

[18] She confirmed that after speaking to the seller and the attorney she received advice that the seller wanted to proceed with the sale and she received confirmation from the attorney who informed her that a binding agreement had been concluded and the sale had to proceed. She subsequently informed the first appellant of this via email on 26 March 2015 at 10h59am. The response from the first appellant was to ask her why she was forcing him to proceed with a sale for a property that he did not want and could not afford.

[19] On 27 March 2015 an email was sent to the first appellant which contained a detailed response, including the allegations by the first appellant that the offer was subject to the approval of his daughter. Ms Badsey countered this and indicated that had this in fact been discussed between the parties, it would have been included as a special condition in the purchase and sale agreement. After she had advised the first appellant of the acceptance of the sale by the sellers, she confirmed that the only further discussion which took place between them related to the request for the remote to show his daughter the property. In addition, she placed on record that she had offered to email the purchase and sale agreement to him and his wife to consider before signing it. However, it was the first appellant who insisted that he follow her back to her offices to sign the offer.

[20] She confirmed that after the exchange of correspondence between the first and second appellants and their legal representatives on 30 March, the appellants were placed in breach and asked to make payment of the purchase price. It was only in default of same that the action was instituted for payment of the commission despite the fact that the sale did not proceed.

[21] During cross-examination she confirmed that the sellers elected not to proceed with the sale and that the property had subsequently been sold, although she had no knowledge of who had sold it. She confirmed that she did not receive a telephone call from the first appellant on the afternoon of 25 of March nor did she receive a voicemail message in which she was informed that the first appellant's daughter was not interested in acquiring the property and therefore cancelled the sale.

[22] During cross-examination she pertinently disavowed any suggestion that the appellants informed her that the sale was contingent on their daughter's approval as they were purchasing the property for her. She stated that the purchase price offered was the sum of R550 000. She also indicated that subsequent to their email exchange she did not have any telephonic contact with either of the appellants. She specifically indicated that in relation to the purchase price she would not have had any discussions with the first appellant regarding what the seller would have accepted or not but would have told him to put the offer in writing and she would transmit this to the sellers for them to make a decision on price as one of the sellers was overseas.

[23] She denied that she insisted that the appellants place their signatures on the offer to purchase. What she communicated to them was if they wanted to put in an offer, they should come to the offices and the paperwork would be completed and submitted. That is the extent of their interaction in relation to the purchase price. She was adamant that, firstly, she would have included a special condition that the sale was subject to approval from their daughter had any family ever been mentioned and, secondly, that she would have asked them to send an offer to the seller and would not have completed any documentation awaiting an indication from the seller if he would have accepted R550 000 as the purchase price. She confirmed that the only time the appellants' daughter was mentioned was when the first appellant asked for the remote to show her the property. There was no mention that the sale was contingent on her approval.

[24] Adele Kleinschmidt confirmed that she accompanied Ms Badsey on the day on which the agreement was concluded. They had a remote for the gate and the property itself did not have any keys and they met the two appellants and their grandchild. At the time after introducing themselves they explained to the appellants that the property needed a lot of work and they did not have keys to access the property. She confirmed that Ms Badsey showed the appellants inside and outside of the property as the inside was empty.

[25] The appellants also proceeded outside and looked around the common areas. When they were finished they had a discussion on the road where their vehicles were parked. The first appellant informed Ms Badsey that he would like to put in an offer

and wanted to know what offer the sellers would accept. Ms Badsey responded and told him that he could make an offer for whatever price he wanted to but it was up to the purchaser to decide whether or not such offer was acceptable.

[26] Ms Badsey then offered to email the purchase and sale agreement to the first appellant so he could have a look at it and come back the following day. The first appellant insisted that he meet them at their offices to sign the offer to purchase. She was not present for the entire conversation that took place between Ms Badsey and the appellants. She was present for a portion of the discussion specifically when the first three pages of the agreement were signed.

[27] During cross-examination she confirmed that a discussion did take place between Ms Badsey and the first appellant regarding the cost of renovations and the only cost that was discussed was that of the aluminium windows. She could not recall the exact words that were used but confirmed that the first appellant may have enquired about the costs of the entire renovation but she was aware that at the time the only quotation that they had was for the windows in the sum of R25 000. She was adamant that the discussion of the amount of R25 000 for renovations was confined to the aluminium windows.

[28] She confirmed that at no stage was there any discussion regarding the appellants purchasing the property for their daughter and the only discussion about their daughter was when she asked who the little girl accompanying the appellants was and it was mentioned that it was their daughter's child. She did confirm that a discussion took place between Ms Badsey and the first appellant concerning the purchase price of R550 000. The first appellant asked Ms Badsey what she thought the owner would accept as a purchase price.

[29] She testified that Ms Badsey informed the first appellant to put in the offer and she could take it to the seller who would then make a decision and that it was up to the seller to decide whether or not to accept the offer. It was not Ms Badsey's suggestion that the offer be put in writing, Ms Badsey indicated that she would email them the contract and they could look it over and decide whether or not they wanted to sign a formal offer of purchase and sale. She confirmed that it would have been made specifically clear to them that once there is an offer of purchase and sale signed

it becomes binding. She in addition disputed the appellants' version that Ms Badsey insisted that a written offer be made.

[30] That then was the evidence for the respondent. After the application for absolution from the instance was refused, the first appellant testified. I may add that his wife was not called to testify to corroborate his version. The first appellant testified that he responded to an advert placed by Ms Badsey for the property which was advertised as a renovator's dream. After making an appointment with Ms Badsey to meet at the property they attended at the property.

[31] Ms Badsey was accompanied by Ms Kleinschmidt. He informed her that he was looking for a house for his daughter and after viewing the property, he observed that renovations would have to be conducted on the premises. Ms Badsey informed him at the time that the seller had a written quotation for renovations of R25 000. After viewing the property, he informed Ms Badsey that he was interested in purchasing the property and enquired from her what the best offer would be to make to the seller. Ms Badsey indicated that she thought the best price would be R550 000. He then requested Ms Badsey to contact the seller telephonically to make enquiries as to whether or not the seller would accept the offer of R550 000. Ms Badsey's response was that she could not make a verbal offer but would have to make an offer in writing. He responded and indicated that he would make an offer in writing as long as the offer stipulated it was subject to a purchase price of R550 000 and his daughter agreeing to purchase the property.

[32] After they had viewed the property, they then made their way to Ms Badsey's offices where the offer to purchase and sale was prepared by Ms Badsey. He and his wife signed the agreement. He indicated that despite Ms Badsey's evidence to the contrary, she did not canvas all the clauses in the agreement with him. He specifically confirmed that clause 17 was not specifically canvassed with him nor did Ms Badsey have any conversation with them relating to payment of commission. After the agreement had been signed and they left the offices, Ms Badsey informed him that she would notify him if the seller agreed to the purchase price of R550 000 and he informed her that he would then bring his daughter in. After leaving the premises Ms Badsey telephoned him and advised him that the seller had accepted the offer. He

responded to Ms Badsey to say that he would send his daughter in after discussions regarding the property.

[33] After their arrival at home, he discussed the property with his daughter and informed her of the renovations that needed to be done. His daughter indicated that she did not want the property. After the conversation with his daughter he tried telephoning Ms Badsey on her phone to inform her that his daughter did not approve of the property. He was unable to contact Ms Badsey but did not leave a message and thereafter communicated this to Ms Badsey via email.

[34] He received the response from Ms Badsey the following day and there were several email exchanges between himself and Ms Badsey as testified to by Ms Badsey and canvassed during the respondent's evidence.

[35] The first appellant was adamant that he informed Ms Badsey that he was purchasing the property for his daughter and that it was subject to her approval. He disputed his liability for payment of the commission as he indicated that Ms Badsey was the one who insisted on a written offer. He confirmed that Ms Badsey did not inform him that if his daughter did not approve of the property he would be bound by the purchase and sale agreement. He also indicated that the commission clause was never canvassed with him.

[36] During cross-examination the first appellant confirmed that he signed the agreement and page 2. He acknowledged that having regard to his inspection of the premises there were several repairs needed, namely in respect of the cupboards, damp, bathroom, doors and windows. He disputed the suggestion that Ms Badsey informed him that the quote of R25 000 related only to aluminium doors and windows. He was adamant that she indicated the R25 000 was for the entire cost of the repairs. He indicated that he had no idea of what the costs would be.

[37] He indicated that he did not ask Ms Badsey to make the agreement subject to approval of his daughter as he was not an attorney and did not know he could do this. He disputed that he did not inform Ms Badsey that the purchase of the property was subject to his daughter's approval. The first appellant also conceded that there was no mention of his daughter in the emails exchanged with Ms Badsey. He was adamant

that Ms Badsey was aware he would be taking his daughter to view the property at a later stage.

The issues on appeal

[38] The issues as identified on appeal in both the written submissions and oral argument are the following:

(a) Did a failure by one of the sellers, Mrs Reuben, to sign the purchase and sale agreement twice (on her behalf as well as on her husband's behalf) invalidate the agreement;

(b) Did the alteration by Ms Badsey and Mrs Reuben of the amount of commission payable in terms of the written agreement impact on the respondent's right to claim commission from the appellants;

(c) Did the respondent's failure to communicate to the appellants expressly its acceptance of a commission payable in terms of the written agreement preclude the respondent from claiming such estate agent's commission;

(d) Did the respondent's agent, Ms Badsey, induce the appellants to sign the purchase and sale agreement through misrepresentation;

(e) Was the appellants' mistake that led them to signing the purchase and sale agreement *iustus*. The appellants contend that their mistake arose from the respondent's agent inducing them into signing the written agreement of purchase and sale. This issue relates to the payment of the commission.

Analysis

[39] Dealing with the first issue. Mr *Pitman* who appeared for the appellants submitted that the purchase and sale agreement called for the signature of both the sellers being Mr and Mrs Reuben. He submitted that s 2 of the Alienation of Land Act 68 of 1981 provides for the formalities in respect of the alienation of immovable property and non-compliance with the formalities of s 2 render an agreement null and void. He submitted that there were two owners of the immovable property being Mr and Mrs Reuben and having regard to the purchase and sale agreement only Mrs Reuben signed the agreement.

[40] The agreement made provision for two signatures and it is common cause that there was only one signature on the document. It was submitted that it is not relevant

that Mrs Reuben had a power of attorney to transact on behalf of her husband. Mrs Reuben was never called to testify as to whether or not she was signing in her capacity as seller and also in her capacity by virtue of a power of attorney acting on behalf of her husband. If she was purporting to sign the purchase and sale agreement by virtue of the power of attorney she would have had to affix her signature in a 'representative capacity'.

[41] In addition, he submitted that Ms Badsey testified that at the time of signature, Mrs Reuben had the power of attorney with her. She did not forward the power of attorney to the appellants after the agreement had been signed by Mrs Reuben and consequently the inference must be drawn that Ms Badsey was of the view that only the signature of Mrs Reuben on the agreement was sufficient.

[42] The appellants submit that in these circumstances the agreement was null and void as it is not evident that Mrs Reuben signed the agreement on behalf of both herself and her husband *ex facie* the document and consequently the agreement falls foul of the provisions of s 2 of the Alienation of Land Act. In addition, the appellants submit that the court *a quo* committed a misdirection as it did not provide any reasons why it rejected this submission by the appellants.

[43] Section 2(1) of the Alienation of Land Act provides that:

'No alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[44] It is correct that Mr and Mrs Reuben were the joint owners of the property and were married in community of property to each other. Section 2 of the Alienation of Land Act as quoted above requires any deed of alienation to be signed by the parties or 'by their agents on their written authority'. It is clear from the agreement that Mrs Reuben signed the agreement for both herself and her husband and as a result there is only one signature. The evidence of Ms Badsey was clear and communicated to the appellants that one of the sellers was overseas but that his wife was not. In addition, Mrs Reuben had a power of attorney authorising her to act on behalf of her husband.

[45] Secondly, s 14 of the Matrimonial Property Act 88 of 1984 provides that in a marriage in community of property a wife has equal marital powers to that of her husband especially when it comes to the disposal of assets of the joint estate. A spouse is permitted, provided that the spouse has the written consent of the other spouse, to alienate any immovable property that forms part of the joint estate. This is self-evident from the provisions of s 15(1) and s 15(2)(*a*) of the Matrimonial Property Act. I consequently agree with the submissions of Mr *Hoar* who appeared for the respondent that all that was required was for Mrs Reuben to sign the purchase and sale agreement and for her to have had the written consent of her husband to do so. It is evident that she did so as she had written consent by virtue of the General Power of Attorney given to her by Mr Reuben at the time. Such power of attorney was presented to Badsey at the time she signed the purchase and sale agreement and Badsey testified that she made a copy thereof at the time. Consequently, the signature of Mrs Reuben alone was sufficient to bind the joint estate to the purchase and sale agreement.

[46] The submission by the appellants that the court *a quo* did not consider the argument in relation to the authority to sign and the compliance with s 2 of the Alienation of Land Act is dealt with in the judgment. It is evident that the court a quo considered the submissions both at the time the application for absolution from the instance was made and also when all the evidence had been presented. The court had regard to s 2 of the Alienation of Land Act and also the evidence placed on record in relation to the power of attorney and the fact that it was not challenged. Consequently, the first ground of appeal is without merit.

[47] The second issue which arises on appeal for determination relates to the alteration of the commission clause in the agreement. It is common cause that at the time of signature of the agreement by the appellants clause 17 of the agreement made provision for estate agent's commission to be at the rate of 7.5 percent calculated on the purchase price together with VAT thereon. The appellants submit that clause 17 was never explained to them more specifically that they were unaware that they might have to pay commission if they were in breach of the purchase and sale agreement.

[48] They also submit that it would be unjust and inequitable to hold them liable to the respondent for payment of the commission in circumstances where, firstly the

clause was never explained to them and secondly, the amount of commission payable was amended without their consent. They submit that the appellants were never alerted to the possibility that they may have to pay commission in circumstances where they were in breach of the agreement and it was incumbent on Ms Badsey to explain this specifically if they became liable as a result of non-compliance with the agreement but more specifically in circumstances where clause 17 was altered without their knowledge.

[49] It is common cause that after the appellants signed the offer to purchase and sale it was presented to Mr and Mrs Reuben for acceptance. According to Ms Badsey in order to secure the sale she agreed to compromise on the commission payable and agreed with the seller that the commission payable to the respondent in terms of clause 17 would be a lesser amount of R40 000 inclusive of VAT. She indicated that as an agent she was entitled to do so without this having to be confirmed by any member of management provided it was within the parameters of her authority.

[50] She confirmed that this amount was within the parameters of her authority and management did not have to confirm this. She did so to ensure that she got the sale. It is evident that the *caveat subscriptor* rule provides that a person who signs a contract signifies their assent to the contents of the document, and they are bound by the document even if it subsequently turns out that the terms are not to their liking. In that event, they have no one to blame but themselves.[1]

[51] The evidence of both Ms Badsey and Ms Kleinschmidt was that the appellants had ample opportunity to read the agreement before signing. In addition, Ms Badsey's evidence, as corroborated by Ms Kleinschmidt whilst she was present initially, is consistent that the entire document was read out to the appellants before they signed. In addition, both her and Ms Kleinschmidt confirmed that she had offered to email the agreement to the appellants to read through it and consider same before they signed and placed their signatures on it. By signing the agreement, the appellants signified their assent to the terms of the document and agreed to be bound thereby. If, as the appellants want the court to believe, they did not read the agreement properly before

---

[1] *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E); *Mathole v Mothle* 1951 (1) SA 256 (T); *George v Fairmend (Pty) Ltd* 1958 (2) SA 465 (A) at 472A; *Moshal Gevisser (Trademarket) Ltd v Midlands Paraffin Co.* 1977 (1) SA 64 (N).

signing it, regrettably having regard to the rule of *caveat subscriptor* they only have themselves to blame.

[52] Although the appellants rely on the code of conduct of estate agents to avoid liability these submissions are without merit. The evidence of Ms Badsey was that she went through the contract point by point with the appellants. Consequently, she would have fulfilled both her ethical obligations and complied with the code of conduct in this regard. Even if she had failed to comply with the code of conduct it does not invalidate the agreement having regard to the rule of *caveat subscriptor*. In any event the appellants were free to lodge a complaint with the Estate Agency Affairs Board against Ms Badsey.

[53] It is accepted that clause 17 amounts to what is often referred to as a *stipulatio alteri* which is a benefit for a third party. Ms Badsey testified that the commission was payable by the sellers to the respondent. It was amended subsequently which had the effect of reducing the amount of commission payable by the sellers to the respondent. In addition, the appellants benefitted from such reduction and consequently were not prejudiced thereby.

[54] Mr *Pitman* submitted that there needed to be a specific acceptance of such benefit by the respondent. This is not correct as such acceptance need not be express and can be inferred from conduct. The acceptance likewise only had to be communicated to the sellers in order to bind the sellers to payment of the commission. Ms Badsey's evidence once again is that she as an estate agent of the respondent was entitled to negotiate the commission payable by the seller within certain parameters. This she testified she did and confirmed that she accepted the commission on behalf of the respondent. Consequently, there can be no dispute that through its agent, Ms Badsey, the respondent accepted the benefit of the commission conferred in terms of *stipulatio alteri*.

[55] The appellants submit that they were induced into entering into the agreement and have raised the defence of misrepresentation. They bore the onus in proving that there was a misrepresentation which entitled them to resile from the agreement. Ms Badsey and Ms Kleinschmidt were adamant that at no stage prior to signing the purchase and sale agreement did the appellants indicate that they intended to

purchase the property for their daughter or that her approval would be a precondition to the conclusion of a valid sale. It was Ms Badsey's evidence, corroborated by Ms Kleinschmidt, that Ms Badsey had offered to email the purchase and sale agreement to the appellants for their consideration prior to them making a formal offer and signing the agreement.

[56] They both testified that it was the first appellant who insisted that he follow them to the respondent's offices so that he could make a formal offer on the same day. In this respect their evidence was reliable and their evidence must be accepted. I agree with the finding of the court *a quo* that the first appellant's version is improbable when considered against the totality of the evidence. There is no mention made in the purchase and sale agreement that it is subject to the first appellant's daughter's approval for the property. Ms Badsey's evidence was that, had there been such a requirement, she would have inserted it as a special condition in the purchase and sale agreement. What it is also noteworthy is that the special terms and conditions clause which appears on page 2 of the purchase and sale agreement is blank. Both the appellants however have initialled next to such blank clause. I agree with the court *a quo's* finding that had this been a requirement Ms Badsey would have recorded such condition in the purchase and sale agreement.

[57] Secondly, when the appellants were informed by Ms Badsey in her email of 25 March 2015 that their offer had been accepted, the first appellant's response on 26 March 2015 was that he had done an estimate of the cost of the renovations and it would be too expensive for him to do so and consequently declined his offer to purchase the unit. However, there is no mention in the email that he made Ms Badsey aware that the sale would be subject to his daughter's approval and that she had not approved same. That he could no longer afford to purchase the unit was reiterated in his further email of 26 March 2015.

[58] Similarly, he once again makes no mention of the agreement being subject to his daughter's approval. One would have expected that if he was purchasing the unit for his daughter and if it was subject to her approval he would have mentioned this at the first opportunity. He had several email exchanges with Ms Badsey in which an opportunity presented itself for him to mention this but he failed to do so.

[59] In addition, I agree with the further submission of Mr *Hoar* that clause 27.2 of the purchase and sale agreement contains a relevant provision which reads as follows: 'This document shall form the whole and only contract between the SELLER and the PURCHASER and any representations made by or on behalf of the SELLER or Wakefields shall not affect it unless set out herein.'

[60] This is often referred to as a 'whole agreement' clause and the appellants would not be able to resile from the agreement because of the existence of this clause. The appellants have also not alleged or proved any fraud on the part of Ms Badsey and consequently they would be bound by the provisions of the agreement.[2]

[61] At the appeal hearing a further defence was raised by the appellants, that of *iustus error.* Although this had not been pertinently raised I deemed it in the interests of justice for the parties to file supplementary heads of argument in relation to this issue. Mr *Pitman* submitted that the appellants were unsophisticated persons who relied on the estate agent Ms Badsey. He once again submitted that the estate agent went through the agreement with them but did not inform them of the commission clause.

[62] Their case had been pleaded inelegantly and consequently they did not agree to the commission clause as it had not been explained to them. Their potential liability for payment of commission arising from clause 17 ought to have been explained to them. It is because of the failure by Ms Badsey to explain the contents of clause 17 to them and their possible liability emanating from the provisions thereof should they fail to comply with the agreement, that he submits that they were 'induced' into signing the agreement.

[63] The defence of *iustus error* has been raised at a very late stage and Mr *Hoar* is quite correct that it had never been pleaded. At the outset the below remarks in *Christie's The Law of Contract in South Africa* are apposite:

'When people say they made a mistake in entering into a particular contract a lawyer's response, after listening to the story, will often be that this is the sort of mistake for which the law can provide no remedy. Paraphrasing the description of the action as mistaken, the lawyer

---

[2] *Wells v South African Alumenite Company* 1927 AD 69 at 73.

will say that it was ill-advised or due to an error of judgment. If the law were to give relief from what, in retrospect, are seen as errors of judgment, the whole concept of a contract as a binding and enforceable agreement would be destroyed.'[3]

[64] In *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[4] the appellate division held as follows:

'If the respondent had been a natural person who had accepted a tender according to its terms, there is no doubt that a contract would have been made when the acceptance was communicated to the tenderer, as by posting it. It would not be possible for such a natural person, if he repudiated, to escape liability by proving that he had posted the wrong letter or the like. That follows from the generally objective approach to the creation of contracts which our law follows. . . . No other approach would be consistent with fairness or practicality. Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake *(error)* would have to be reasonable *(justus)* and it would have to be pleaded.'

[65] Mr *Hoar* is correct that it is not enough for the appellants to simply content themselves with an allegation that they were mistaken in concluding the purchase and sale agreement, or agreeing to certain of its terms. They must show that their mistake was *iustus* which involves them alleging and proving a misrepresentation by the respondent, whether intentional or innocent, that brought about their mistaken belief. The appellants must show a misrepresentation by the respondent before they can rely on *iustus* error to avoid the agreement.

[66] Ms Badsey's evidence was that she did not think it necessary for the appellants to initial the amendment to the commission clause as the sellers were responsible for paying the commission. She did not testify that she informed the appellants that they did not have to initial the commission clause as they were not responsible for payment of the commission or that the seller was solely responsible for the payment of

---

[3] GB Bradfield *Christie's Law of Contract in South Africa* 8 ed at 384.
[4] *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479E-H .

commission. There is no evidence to suggest that Ms Badsey told the appellants anything which would have misled them or would have amounted to a misrepresentation.

[67] I agree with Mr *Hoar* that if the appellants were mistaken as to the contents of the purchase and sale agreement and in particular the commission clause it was due to their failure to properly read the sale agreement and the commission clause before signing the document. They are bound under the caveat *subscriptor* doctrine. In my view there is no evidence to support a defence based on *iustus* error.

[68] Having regard to the record of proceedings and the court a quo's assessment thereof, and who had the benefit of assessing the witnesses credibility and demeanour, I can find no misdirection in the court a quo's acceptance of the evidence of Ms Badsey as corroborated by Ms Kleinschmidt and the rejection of the first appellant's evidence. In addition and in the light of this, the grounds of appeal advanced by the appellants cannot succeed for the reasons advanced in the judgment and fall to be dismissed.

Costs

[69] The appellants have been unsuccessful in the appeal and I see no reason to depart from the usual rule in relation to costs, namely that the successful party ought to recoup its costs.

HENRIQUES J

MLABA J

Case Information

Date of Argument:	19 August 2022
Date of Judgment:	22 September 2023
Supplementary Heads:	24 August 2022 & 05 September 2022
Counsel for the Appellants:	Murray Pitman
Appellants Attorneys:	Amith Luckan and Company c/o Mathew Francis Inc 21 Cascades Crescent Montrose Pietermaritzburg Tel: 031 404 9111 Email: roshan@luckanandco.co.za Ref: RS:N-124/15: GCL
Counsel for the Respondent:	S Hoar
Respondent's Attorneys:	Meumann White Attorneys 5th Floor MB House 641 Peter Mokaba Ridge Berea Durban Email: kirsty@meumannwhite.co.za Ref: 151806/V Govender/ KO c/o ER Browne Inc 167 - 169 Hoosen Haffejee Street Pietermaritzburg