



OFFICE OF THE CHIEF JUSTICE

CASE NO: 2872/2019

In the matter between:

ZUBEIDA HENDRICKS

Plaintiff

and

GADIJA BEHARDIEN NO and two others

Defendants

JUDGMENT DELIVERED ON THIS 26TH DAY OF APRIL 2023

1. This is a dispute between mother-in-law and daughter-in-law. The plaintiff, Mrs Hendricks (“**Hendricks**”) issued summons on 22 September 2019. The defendant, Ms Behardien (“**Behardien**”) is cited in her capacity as executrix of the estate of her late husband, Mr Hendricks – who was the son of Hendricks. I shall refer to the deceased son of Hendricks and former husband of Behardien as **Hendricks Jnr.**

Allegations in the particulars of claim

2. The dispute concerns a house in Salt River, Cape Town, which previously belonged to Hendricks and her late husband. Hendricks alleges that in 1993 Hendricks Jnr was in dire financial straits. She and Hendricks Jnr concluded an oral contract. In terms of the contract Hendricks undertook to transfer the property to Hendricks Jnr. He was to obtain a loan of R80 000 secured by a mortgage bond over the property in order to pay off his debts. Importantly, Hendricks Jnr was also to register a right of *habitatio* in favour of Hendricks as a *quid pro quo* for the transfer.
3. Hendricks Jnr died in May 2016. Behardien, as executrix, then applied to evict Hendricks. That revealed the failure to have registered the right of *habitatio*. Hendricks' countered with an action for an order that the sale be set aside.
4. Hendricks alleges that, as agreed, she gave transfer of the property to Hendricks Jnr. In breach of his obligations, he however failed to register her right of *habitatio*. Hendricks alleges that Hendricks Jnr's breach disclosed a misrepresentation to her that "*a right of habitatio has been registered in favour of [Hendricks] and that [Hendricks] was accordingly entitled to occupy the property for the rest of her life.*" The misrepresentation, continue the particulars of claim, was made with the intention of inducing Hendrix to sign transfer documents, and perpetuated by the conduct of Hendricks Jnr in that he permitted her to continue to occupy the property until his death on 17 May 2016. There is an alternative of negligent misrepresentation.

The two exceptions

5. Behardien raises two exceptions which are before me. The first is a no-cause of action complaint: a right of *habitatio* amounts to an interest in land, the alleged agreement is an oral agreement for the alienation of land, and in terms of section 2 of the Alienation of Land Act, written authority was required. The particulars, contends Behardien, therefore disclose no cause of action.

6. The second exception is a vague-and-embarrassing complaint - that the particulars are contradictory. One paragraph alleges that Hendricks Jnr was to sell the property for R80 000, the next that he would “*take out a bond for the purchase price of R80 000*”, use the money to pay his debt, and ensure that a right of *habitatio* was registered in favour of Hendricks as a *quid pro quo* for the transfer of ownership. A later paragraph is that Hendricks would not have agreed to transfer ownership of the property without receiving any purchase consideration if she knew that the right of *habitatio* was not included in the documents. The contradiction, says Behardien, lies in the tension between first alleging a purchase price of R80 000, and later that transfer was given without a purchase consideration.

First exception

7. I must construe the particulars benevolently.¹ Hendricks does not seek to uphold the oral contract. Hendricks will not need to prove the oral contract was lawful to succeed. Hendricks will be required to prove the misrepresentation.

¹ *First National Bank of Southern Africa Ltd v Perry* NO 2001 (3) SA 960 (SCA) at paragraph 6; *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 SA 493 (A) at 500E-F.

8. Hendricks' cause of action is arguably in delict, based on intentional, alternatively negligent misrepresentation.² Van Huyssteen *et al* write that “(a) reading of the decided cases shows that our courts generally accept that a misrepresentation in *contrahendo* which is either fraudulent or negligent is treated as a delict”.³ There may be further debate, at trial, about whether Hendricks' cause of action is in delict or contract.⁴ It may suffice for Hendricks to prove a mere misstatement; pleading the more onerous would permit proof of the less.⁵ But, at this stage, it need only be observed that a plaintiff is not required to attach any label to their cause of action; all that a plaintiff need do is “satisfy the Court that the facts pleaded and proved entitled him to the claims which he makes”.⁶ Hence, “(t)he importance of such distinctions often appears insignificant”.⁷
9. The alleged misrepresentation was by Hendricks Jnr: that it was possible for him to register a right of *habitatio* pursuant to the oral agreement and he would, when it was not and he could not; later, that he had registered the right, when he had not. That there may be no oral contract for *habitatio* therefore does not disclose the absence of a cause of action. The cause of action does not require the oral contract be lawful.

² Van Huyssteen *et al* Contract General Principles 6 ed paragraphs 4.17 – 4.22 pages 118 – 119.

³ Van Huyssteen *et al supra* paragraph 4.22 page 119.

⁴ Van Huyssteen *et al supra* also write, at paragraph 4.21 on page 119, that “(i)t is preferable, from the point of view of principle, to rather focus on the quality of the conduct involved as being improper and material without resorting to the more technical concept of delict. The importance of such distinctions often appears insignificant when one considers that in practical terms a misrepresentee is required to ‘Satisfy the Court that the facts pleaded and proved entitle him to the claims which he makes’ [referring to *Davidson v Bonafede* 1981 (2) SA 501 (C) at 505D]. So, if a misrepresentee has proved all the elements of the delict of misrepresentation and claims rescission and damages in the strict sense of the word he will not have to plead two causes of action, one contractual and one delictual.”

⁵ A misstatement is as wider and less technical concept than a misrepresentation. A misstatement includes such things as false opinions or predictions and negligent advice – see Hutchinson *et al* The Law of Contract in South Africa paragraph 4.2 footnote 21 page 120, citing *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 829E – G.

⁶ *Davidson v Bonafede* 1981 (2) SA 501 (C) at 505E.

⁷ Van Huyssteen *et al supra* paragraph 4.21 page 119.

Whether in contract or delict, the cause of action requires a misrepresentation or misstatement. Far from being fatal to Hendricks' case that there may be no oral contract for *habitat*io, if anything it may assist her. Her complaint is precisely that she did not get what Hendricks Jnr initially said she would and later conveyed she had. The first exception therefore must fail.

10. Behardien's counsel sought to persuade me that there can be no actionable misrepresentation as to a matter of law, with the consequence that the particulars disclose no cause of action for that reason.⁸ That however is not raised in either of Hendricks' exceptions. I cannot consider whether the contention is correct, and, if it is, whether it is fatal to Hendricks' case.

Second exception

11. It used to be the law that a vague-and-embarrassing complaint had to pertain "*to the whole cause of action, all of which must be demonstrated to be vague and embarrassing*".⁹ The correct position now is that a vague and embarrassing complaint can be made apropos particular paragraphs of a particulars of claim, regardless of whether the problem "*infects the whole cause of action*".¹⁰

⁸ I was referred to Hutchinson et al *supra* paragraph 4.2 page 120: "(a) misrepresentation is a form of misstatement. Whereas a misstatement is simply an assertion that does not accord with the true facts, in the law of contract, the term '**misrepresentation**' has gradually acquired a narrower, more technical meaning – namely a false statement of past or present fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance related to it." (Bold in original, underlining added.) I was also referred to *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GWLD) at 105H – 106B: "... a distinction must be drawn between a misrepresentation of fact and a misrepresentation of the legal effect of a contract. Where a party expresses an opinion that in law a clause has a particular meaning that does not constitute a representation of fact and is therefore not a representation inducing a contract."

⁹ *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 899G.

¹⁰ *Paulsmeier v Media 24 (Pty) Ltd* (15855/21) [2022] ZAWCHC 85 (20 May 2022).

12. Dealing with a vague and embarrassing exception, the court usually reasons in two steps: does the vagueness amount to embarrassment? Does the embarrassment in turn result in prejudice? And, a vague-and-embarrassing exception is not upheld unless the excipient would be seriously prejudiced if the offending allegations were not expunged.¹¹ On contradictoriness: an allegation has been held to be vague if it is either meaningless or capable of more than one meaning; or where the reader is unable to distil from the allegation a clear, single meaning.¹²
13. In this case the reader of the particulars is well able to distil the meaning of Hendricks' allegations. The true purchase consideration was the registration of a right of *habitatio*. The term-of-the-oral-agreement consideration of R80 000 was part of Hendricks Jnr's scheme, to enable him as owner in due course to borrow R80 000. The *quid pro quo* for Hendricks was the promised-and-not-delivered *habitatio*. Behardien is not prejudiced, let alone seriously. Behardien is able to plead. The second exception is therefore dismissed.

Order

14. The defendant's exceptions to the particulars of claim dated 9 April 2019 and 15 May 2019 are dismissed with costs on the party and party scale.

¹¹ *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298A.

¹² *Leathern v Tredoux* 1911 NPD 346 at 348, *Venter NO v Barritt Venter NO v WolfsbergArch Inv 2 (Pty) Ltd* 2008 (4) SA 639 (C) at 644B.

PATRICK, AJ

HEARING DATE: 17 APRIL 2023

DATE OF JUDGMENT: 26 APRIL 2023

REPRESENTATION FOR PLAINTIFF: IN PERSON - MR EBRAHIM TOYER

COUNSEL FOR 1ST DEFENDANT: ADV K PERUMALSAMY

INSTRUCTED BY: TOEFY ATTORNEYS

c/o VELILE TINTO CAPE INC