IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

MUNSTER ESTATES (PROPRIETARY) LIMITED · Appellant

and

KILLARNEY HILLS (PROPRIETARY) LIMITED Respondent

Coram: Wessels, Corbett, Hofmeyr, Kotzé JJ.A. et Trengove A.J.A.

Heard: 14 and 15 September 1978

Delivered: 10 November 1978

J U D G M E N T

WESSELS, J.A.:

Appellant (plaintiff) appeals to this Court against the judgment and order of PHILIPS, A.J., sitting in the Witwatersrand Local Division, dismissing with costs the action instituted by it against respondent (defendant) in which it claimed, inter alia, an order declaring that a written agreement entered into by the parties during October 1972 was of

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no force or effect. It is of some importance to note that the hearing of the action only commenced during March 1977. After the conclusion of the hearing, the learned Judge a quo reserved his judgment, which was thereafter delivered on 16 May 1977.

Although several alternative causes of action were detailed in plaintiff's particulars of claim, it appears that at the end of the trial only one of them required consideration. The substantial issue which had to be determined related to the averment that plaintiff had been induced to enter into the abovementioned agreement by a fraudulent misrepresentation made by Mr. R. B. Evans, acting on defendant's behalf, to Mr. M. A. Basserabie, acting on plaintiff's behalf, at a meeting which took place on 4 August 1972 in the office of Mr. B. Simler, who was defendant's attorney. Although it was averred in the particulars of claim, as amplified by further particulars, that the misrepresentation complained of was made to Basserabie in or about "the middle of July to the 1st August 1972", the evidence led on plaintiff's behalf at

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the trial related to a misrepresentation allegedly made on 4 August 1972 at a meeting at which there were also Messrs. A.I. Lerner, D.Oved, A.Gerson and I.S.Levy. Basserabie, Lerner, Oved and Gerson held shares in the plaintiff company. Levy attended the meeting in his capacity as plaintiff's attorney. With the exception of Gerson, the aforementioned persons were all called as witnesses by either the plaintiff or the defendant.

At all times material hereto, plaintiff and defendant were registered owners of immovable property in Killarney township, Johannesburg. Plaintiff was the owner of stands 614, 615 and 617 on which there had been erected a block of flats known as Montevideo. Plaintiff's property is on the northern side of 10th Street, and is situated roughly opposite stands 617, 618 and 619, which are owned by defendant. Defendant was also the owner of stands 620 - 624. On defendant's property there had been erected a block of luxury flats known as Killarney Hills. At all times material hereto up to the disposal thereof during 1973 Evans and his wife held all the shares in defendant.

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The former was defendant's managing director. Evans and his wife occupied a flat in Killarney Hills. The shares had been acquired in 1969 from a Mr. Moross, who is described in the judgment of the Court a quo as "a very highly placed person in the hierarchy of the Schlesinger organisation". At the time the shares were purchased, Evans was informed that existing parking facilities on the north side of 10th Street, although not situated on Killarney Hills property, were a permanent amenity for the use of Killarney Hills occupants, who were initially the members of the Schlesinger family. It further appears that the abovementioned immovable properties were originally owned by African Realty Trust Limited, a company in the group known collectively as the Schlesinger Organisation. It appears from the evidence that Evans and Moross were on a friendly footing with each other. The evidence reveals that there was some uncertainty as to the status of 10th Street, i.e., the extent to which it was a public road. It also appears from the evidence that Evans was not

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only concerned with the rights of persons to use 10th Street for various purposes, but also with the extent to which building operations on plaintiff's property could affect the view of the occupants of Killarney Hills.

During 1971 Lerner and Oved investigated the possibility of purchasing the shareholding in plaintiff. They had qualified as architects in Israel. They practised as architects in partnership in Johannesburg. At their suggestion Basserabie joined them in the venture to acquire the shareholding in plaintiff. An option to acquire the shares was exercised by them during February 1972. Plans were prepared for the construction of an additional building on plaintiff's land, variously described as an extension of the existing block of flats (Montevideo), or as the building of a second block of flats. The building was to be known as Hillside Village. The plans, which had been submitted to the Johannesburg City Council, were approved towards the end of February 1972. Plaintiff received the official notification of approval on 21 March 1972. This notification reveals

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that what was approved, was an addition to the existing building "subject to the conditions stipulated in the notes printed below". The notes referred to included:

> "3. Township Owner's approval to be obtained where necessary", and
> "6. The approval of this plan does not override any restrictive conditions in the title deeds concerned."

The "title deeds concerned", i.e., those relating to plaintiff's property, incorporated the following "restrictive conditions":

> ".....subject further to the following special conditions, which have been imposed by the said African Realty Trust Limited as the Township Owner of the said Township of Killarney, namely:
> ...(c) The abovementioned Lot (611) and the hereinafter mentioned Lots Nos.:612, 613, 614, 615, 616 Killarney Township (hereinafter referred to as "the said Lots") are transferred as one block and although they comprise separate Lots they are deemed to be tied to each other and no one or more Lots may be sold nor transferred apart from the others without the written consent of the African Realty Trust Limited or its successors in township title.
> (d) The said Lots shall be transferred for the purpose of erecting thereon a single Block of Residential Flats, to a height permitted by the Municipal Town Planning Committee, together with accessory outbuildings and garages according to the plans and

specifications.../7

specifications thereof which shall be submitted by the Transferee to and approved by the City Council of Johannesburg, and the African Realty Trust Limited or its successors in township title, and no building or other erection with the exception of such ornamental work approved by the African Realty Trust Limited or its successors in township title as the Transferee may desire for the layout of the ground, is to be built or erected on the said lots or any one of them, except according to the said Plans or any other plan approved of by the African Realty Trust Limited or its successors in township title. The erection of the aforementioned Block of Residential Flats, together with accessory outbuildings and garages, shall be built simultaneously and shall be the completed Block according to the Plans and Specifications approved and not partially completed and intended for completion at a later date... .

(h) That the African Realty Trust Limited or its successors in township title hereby reserves for the purposes hereinafter set out, the right over certain strip of land 30 (thirty) cape feet in width from Tenth Street along the Southern Boundary of each of the said lots to use in perpetuity the said strip of land for a right-of-way and/or a parking area for itself and/or its Licensees, and/or garden purposes.

(i) The African Realty Trust Limited or its successors in township title shall further have the right, but not be obliged to establish gardens and plant trees on the said strip of land.

(i) The...../8

(j) Neither the Transferee nor the African Realty Trust Limited or its successors in township title, shall have the right to erect any buildings on the said strip of land but the African Realty Trust Limited or its successors in township title shall be entitled to do such work and make such improvements on the said strip of land for purposes incidental to the aforegoing rights.

(k) The African Realty Trust Limited or its successors in township title shall have the right and option at any time hereafter to purchase the said strip of land for the sum of £25-0-0 (Twenty Five Pounds) whereupon conditions (h), (i) and (j) hereof shall be cancelled against the registration of transfer.....".

Notwithstanding the above-quoted notes appearing on the written notification of approval, plaintiff proceeded with its preparations in regard to building operations on its property without seeking the township owner's approval and without having regard to the effect of the above-quoted restrictive conditions in its title deeds. It instructed a land surveyor to undertake a preliminary survey of the site on which it was intended to erect the proposed block of flats. During April 1972 plaintiff observed the activities

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of the surveyor, and noticed that certain marks had been made in and in the vicinity of the abovementioned parking area used by the occupants of Killarney Hills, which was situated in the abovementioned servitude strip of land. Evans became alarmed at the possible threat to the amenities of the occupants of Killarney Hills. On 27 April 1972 Evans sent a telex message to Moross, who was then living in England. The following relevant portions of the message are quoted in the judgment of the Court a quo:

> "A serious problem is looming regarding Killarney Hills in that the owners of the building Montevideo, which is below us, intend building a new wing on the existing building. They plan to utilise 10th Street for access and expect to have the facility of the private road in front of our building available to them for their builders trucks etc., etc. As you can appreciate, this will constitute a terrible inconvenience and problem to me.
> I understand the section of the road in front of Killarney Hills is privately owned by a Schlesinger company and there is no servitude whatsoever. This means that, if the Schlesinger company concerned denies the use of this road, the builders cannot use it.
> I should be most appreciative if you would ask Manfred Gorvy to co-operate with me in denying the owners of Montevideo access through this road. I am prepared to purchase the road from your company, if you are agreeable, in order

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to safeguard my interest ... Hope you can assist me as you can appreciate I am very worried about the consequences".

It appears that Mr. Gorvy was an important official in the employ of the Schlesinger organisation. At this stage, it seems that Evans had not yet had sight of plaintiff's building plans, and did not appreciate the fact that they were in certain respects in conflict with the restrictive conditions in plaintiff's title deeds. His main concern at that stage was the status of 10th Street, and the inconvenience that could be caused if it were to be used in connection with building operations on plaintiff's site. At the instance of Moross, Gorvy referred Evans's problem to the attorneys of Townsview Estates (Pty.) Ltd. (Townsview), the successor-in-title to African Realty Trust Limited. During the latter part of May 1972 it became known to Evans that the attorneys of Townsview were of the opinion that their client did not own 10th Street and could, therefore, not dispose of it to Evans. At this time, Evans had approached his attorney, Mr. Simler, with instructions to investigate the position.

On 17 May 1972, Oved and Lerner addressed a letter

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to Townsview on behalf of plaintiff informing it that in regard to stands 614 - 616:

> "as the property was not fully developed, our clients have now resolved to proceed with extensions to the building, and plans relating to the further development have been submitted to the Town Planning Department of the City of Johannesburg and have been approved".

On 20 July 1972 Simler addressed a letter to plaintiff in which he referred to the latter's intention to erect "a further block of flats" on plaintiff's property. It was stated that such additional construction would constitute a contravention of plaintiff's conditions of title and a written assurance was requested that plaintiff would not embark on the contemplated building operations. It appears that defendant's attention had shifted away from the question of 10th Street being a private road, and was now concentrated on the building of a second block of flats on the Montevideo site, which it had been advised would be a contravention of plaintiff's conditions of title.

By this time, plaintiff's preparations were well advanced. Besides Messrs Oved, Lerner and Basserabie, a

Mr. Kristal had obtained a minor share in the venture, and Gerson had been given a participation of 10% in plaintiff's shares as remuneration for procuring a bond for plaintiff. It appears that Gerson was experienced in and knew a great deal about the intricacies of property dealings and the legal technicalities bound up therewith. On 24 July 1972 Gerson addressed a letter to Levy in which he raised various problems relating to the letter received by plaintiff from defendant's attorney (Simler). It appears from the contents of this letter, that Gerson had probably acquainted himself with the terms of plaintiff's title deeds and was aware of the problems facing plaintiff in connection with its contemplated building operations. The questions posed by Gerson in this letter came as a shock to plaintiff's shareholders and caused them considerable anxiety. A consultation was arranged at Levy's office on 28 July 1972, and this was attended by Gerson, Basserabie, Oved and Lerner. There is no evidence as to what was discussed at this consultation. On 2 August 1972 Levy formally acknowledged receipt of Simler's letter dated 20 July 1972, and informed him that the matter was being

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investigated. On a date between 28 July and 4 August 1972, Gerson had a discussion with representatives of Townsview. Although Gerson was not called as a witness, it is probable that he had been informed that Townsview had not given Evans or any one else the right to decide whether the restrictive conditions in plaintiff's title deeds were to be enforced or not.

In the meantime, Simler had conducted certain investigations and had taken senior counsel's opinion in regard to the effect of the restrictive conditions in plaintiff's title deeds. The results of Simler's investigations and the purport of counsel's opinion were conveyed to Evans on 28 July 1972. I do not propose to set out the details of this report at this stage of the judgment. On the same day Evans sent Simler's report to Moross, and in a covering letter asked him to ascertain the reaction of African Realty Trust Limited. On page 2 of the letter, the following appears:

> "If you are in a position to arrange for African Realty Trust Limited to give me their full support, I will arrange a meeting with the owners

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of Munster Estates (Pty) Limited, and try and reach a compromise, whereby their proposed new block of flats affects the vista of Killarney Hills to the minimum extent, obtain their assurance that they will not interfere with the parking area in front of Killarney Hills and refrain from using 10th Street for access to the construction site.

Notwithstanding the decision of African Realty Trust Limited regarding their consent to amend the Title Deeds, I trust they will certainly not agree to the contractors using 10th Street for access to the construction site, and that they will assist me to exercise the option to acquire the strip of land subject to the servitude .... If either African Realty Trust Limited or myself exercises this option, we can at least stop the contractors from interfering with the area in front of our building."

After Moross had received this letter, he telephoned Evans and informed him, inter alia, that he would defer the grant of consent to plaintiff to enable it to proceed with the contemplated building operations pending the conclusion of an agreement between plaintiff and defendant regarding matters in dispute between them. Evans told Motoss that he would like to discuss the possibility of acquiring the strip of land referred to in paragraph (h), (j) and (k) of the above-quoted restrictive conditions in

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plaintiff's title deeds. Moross said that he would have to go into the matter, and added that if there were no difficulties he would favour its being discussed.

Plaintiff had in the meantime entered into a contract with a building company in regard to the construction of the first stage of the proposed block of flats. The commencement of construction had become a matter of urgency in so far as plaintiff was concerned.

What I have set out above constitutes an outline of the events which led up to the meeting between representatives of the parties on 4 August 1972. It was attended by Lerner, Oved, Basserabie, Gerson and Levy (representing plaintiff) and Evans and Simler (representing defendant). As I have already indicated above, Gerson was the only one of those who attended the meeting who was not called as a witness to testify at the trial. The learned Judge a quo dealt exhaustively in his judgment with the evidence of the various witnesses as to what was discussed at the meeting. I shall at a later stage have occasion to refer briefly to this evidence

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It was plaintiff's case on the pleadings that during the course of the discussions, Evans represented "to the said Basserabie" that the defendant "had the right to take cession from Townsview of its rights under the restrictive condition, and that the said Evans had in his possession a letter to that effect." As to the making of the representation by Evans, plaintiff's case rested on the evidence of Lerner and Basserabie. Oved stated in his evidence that the representation was made by Simler. Levy had no positive recollection that a representation as pleaded was made at the meeting. Evans denied making the representation in question. He admitted that defendant had no right to take cession from Townsview of its rights under the restrictive conditions in plaintiff's title deeds. Evans also denied that he claimed to have a letter in his possession evidencing defendant's right to acquire Townsview's rights. In fact, no such letter existed. Simler, like Levy, had no clear recollection of all that was discussed at the meeting. In this connection it must be borne in mind that at the trial the witnesses testified to a

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discussion which had taken place during August 1972. He could not recall Evans making a representation of the nature complained of. He (Simler) stated that if Evans were to have made such a representation in his presence, he would have realised that it was not the truth. Plaintiff's witnesses stated that they did not ask Evans to produce the letter because, so they said, they believed him. Because they believed that defendant was in a position to frustrate plaintiff's building programme, plaintiff's representatives thought it wise to secure defendant's co-operation by conceding some of the demands made by Evans at the meeting. The meeting concluded on an amicable note, and Levy was instructed to draft an agreement to reflect the consensus reached by the parties.

The draft agreement was submitted to Simler under cover of a letter dated 29 August 1972. It is apparent from this letter that there must have been further discussions between the parties after the meeting on 4 August and prior to the submission of the draft agreement. Clause 3

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of the draft agreement deals with "Warranties by Killarney Hills". For present purposes it suffices to quote paragraph 3(f) thereof, which reads as follows:

> "KILLARNEY HILLS represents and warrants that it will, immediately subsequent to the signature of these presents, take all steps necessary to acquire all the Township owners' right, title and interest in and to the strip of land more fully referred to in paragraph 1(a) above, whereafter it irrevocably agrees and undertakes to waive and abandon all rights of whatsoever nature which might then vest in it to object to the erection of Hillside Village, and to the extent that such waiver and/or abandonment is now tenable, the terms hereof shall have a deeming effect as and from the date of signature of these presents".

In regard to the incorporation of this paragraph in the draft agreement, the learned Judge a quo remarked as follows in his judgment:

> "This clause is very interesting, because it means that the instructions Mr. Levy had received from his clients, perhaps combined with his own recollections of the meeting of the 4th August 1972, had caused him to insert in the agreement, not a warranty that Defendant possessed the rights to Townsview's rights in respect of the servitude area and a right or option to purchase that area for R50, but an undertaking to acquire all the Township Owners' right to the area." (The under-

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lining is that of the learned Judge a quo).

The draft agreement was not acceptable to Evans, who had been advised by Simler that it was inadvisable for defendant to agree to the warranty incorporated in clause 3(f) thereof. After discussion with Levy, Simler drafted an amended agreement which did not contain any provision similar to paragraph 3(f). Moreover, provision was made in the new draft agreement for the payment by plaintiff of substantial penalties in the event of any breach by it of the provisions of the agreement. According to Basserabie, the amended agreement was discussed at a meeting during September, which was attended by him, Evans "and probably" Simler. Levy was not present. Basserabie stated in evidence at the trial that at this meeting Evans mentioned that defendant could not obtain transfer of the servitude area because it was less than 5 000 square feet in extent and that, for that reason, defendant could not agree to the warranty provided for in paragraph 3(f). The deletion of paragraph 3(f) was apparently accepted without demur by Basserabie. Although

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he subsequently discussed the matter with his associates, the decision to agree to the deletion of the paragraph was his alone. On 13 October 1972 Basserabie signed the amended agreement on plaintiff's behalf. In due course defendant withdrew the objections it had raised against plaintiff's contemplated building operations. It was not suggested at any stage that defendant failed to comply with the provisions of the agreement. It is, furthermore, clear from the terms thereof that defendant was not required to take any action of the nature contemplated in paragraph 3(f) of the original draft agreement.

Plaintiff continued with its building operations, which involved encroachment on the strip of land referred to in special conditions (h), (i), (j) and (k) incorporated in its title deeds. These conditions were regarded as constituting a servitude in favour of African Realty Trust Limited or its successors in township title. The existence of the servitude created a problem in regard to plaintiff's intention to dispose of individual flats and to grant sectional title

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to purchasers. It is common cause that the existence of the servitude was a bar to the grant of sectional title to purchasers of flats. It appears from correspondence handed in as exhibits at the trial that on 2 July 1974 plaintiff raised this matter with Townsview and requested it to consent to the cancellation of the servitude in question. Thereafter, on 23 October 1974, Basserabie (acting on behalf of Hillside Village (Pty) Limited), addressed the following letter to Townsview:

"re: PORTION OF LOT 661 IN THE TOWNSHIP OF KILLARNEY

1. We are the registered owners of the above-mentioned property held under the deed of transfer No.17073 of 1973.
2. You are the successors in township title to the African Realty Trust Limited in respect of the township into which the above property falls.
3. In terms of clause (e) of the deed of transfer you have reserved the right over a certain strip of land 9,45 metres in width from 10th Street along the Southern Boundary of the property ("the servitude area"), for use as a right-of-way and/or parking area for yourself and/or your licencees, and/or garden purposes.
4. We have constructed a building known as Hillside Village on the property. With your consent the building has been constructed in

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such a manner that the building, is supported by pillars situated within the servitude area, overhangs the servitude area.

5. As the construction of Hillside Village is near completion we request that you advise us in writing as to your election of the use to which the servitude area will be put in terms of clause (e) of the deed of transfer."

This letter elicited the following reply from Townsview:

"Thank you for your letter of 23rd October 1974. Whitehall Court (Pty) Limited is in fact the successor in township title in the township of Killarney to African Realty Trust Limited and as such is entitled to the rights reserved in your title to the above property in favour of African Realty Trust Limited.

As far as we are aware neither African Realty Trust Limited nor Whitehall Court (Pty) Limited at any time granted consent to the encroachment by your building, or the pillars supporting it on to the servitude area, and we must therefore reserve the rights of the township owner to take such action or to make such claims against the owner of the land or the persons who constructed the encroachment as it may be entitled to as a result of the invasion of its rights.

In terms of the rights reserved to the township owner the strip of land may be used for either parking or gardening purposes, or both these purposes, and we do not therefore feel that the company can be called upon to make an election as you suggest. We point out further that it is open to the township owner in terms of Condition "H" in your title deed to acquire freehold title to this strip of land. The company at present proposes to retain all its rights in respect of this land."

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At the time this correspondence was taking place, Evans no longer had any financial interest in defendant; his shares and that of his wife had been sold to a Mr. B. Mouton. During the beginning of November 1974 a meeting took place between Mouton, Evans and Basserabie at which various matters were discussed. On 28 November 1974 Basserabie addressed a letter to Mouton in which he purported to summarise matters which were "discussed and cleared up" at this meeting. A copy thereof was apparently sent to Evans. In this letter the following paragraph appears:

> "4) Notwithstanding that Townsview maintain that they have the rights to the servitude area as defined in the Title Deeds of Hillside Village, Rex is of the opinion that in terms of a personal letter given to him by Mr. Moross, he can control the destinies of said servitude. In consequence thereof Rex has undertaken to personally approach Mr. Moross with a view to removing the said restrictions for the Title Deed for a nominal sum not to exceed R50.00. As a result thereof, Hillside shall then register in favour of Killarney Hills a servitude of approximately 12 feet from its southern boundary line so that Killarney Hills' other basic rights are protected. The objective of all this is to enable Hillside Village to open

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a sectional Register, and at the same time to protect the basic rights of Killarney Hills."

The reference to Rex is to Evans.

I next refer to a letter dated 18 December 1974 addressed by Evans to Moross. In so far as it is material hereto, it reads as follows:

"You will recall that when I was faced with the problem of Hillside Village being erected in front of Killarney Hills, I solicited your assistance, which you were kind enough to give me. Your assistance enabled me to enter into an agreement with Hillside Village (Pty) Limited, restricting them from building a block of flats which would be detrimental to Killarney Hills. The agreement I entered into was forwarded to Townsview Estates (Pty) Limited and the matter was discussed in full with Mr. Gorvy at the time.

In essence, it was agreed that the rights over the Servitude would be ceded to Killarney Hills (Pty) Limited, in order to allow me to enter into the agreement in question. In the second paragraph of Mr. Gorvy's letter, it appears that he is contradicting the arrangements I made at the time.

I should be most appreciative if you would look into the matter and advise me whether in fact the arrangements I made with you still stand. I would be very happy to give you further details if you require them.

I hope you can assist me to sort out this matter, as obviously it is creating some embarrassment to me." (My underlining).

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This letter elicited the following reply from Townsview:

"We refer to your letter of 18th December 1974 addressed to Mr. M.D. Moross, which has been handed to us for attention and reply.

The discussions with Mr. Moross and Mr. Gorvy referred to in your letter are recalled and there was no agreement that the rights of the Township owner in respect of the servitude referred to would be ceded to Killarney Hills (Pty) Limited.

In your letter of 17th October 1972 you informed us that an agreement giving you the protection you require had been signed by Killarney Hills (Pty Limited and Munster Estates (Pty) Limited. At the same time you placed on record your desire to take over from the Township owner the servitude on the property of Munster Estates (Pty) Limited. We fail to see therefore how you can claim that 'it was agreed that the rights over the servitude would be ceded to Killarney Hills (Pty) Limited in order to allow (you) to enter into the agreement in question' since according to your own letter the agreement with Munster Estates (Pty) Limited was finalised without any agreement with the Township owner concerning the servitude.

We consider that it is not possible for the Township owner to cede to anyone its rights in respect of the servitude under discussion. We may however be able to be of assistance to you with regard to the embarrassment that is being caused to you if we are informed of its nature. We accordingly suggest that if you wish to you contact Mr. Moore of this company to discuss this matter further."

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On 10 February 1975 plaintiff's attorneys wrote as follows to Evans:

"We have been consulted by Munster Estates (Pty) Limited who have advised us as follows:

1. Prior to the commencement of the construction of Hillside Village, Killarney Hills (Pty) Limited, represented by you, represented to our client that Killarney Hills (Pty) Ltd., had the right to a cession from Townsview Estates (Pty) Ltd., of the rights over a certain strip of land, 9,45 metres in width, from Tenth Street along the southern boundary of the property on which Hillside Village was to be constructed ("the servitude area");
2. You further represented to our client that you had in your possession a letter confirming such cession;
3. On the basis of this representation our client entered into an agreement with Killarney Hills (Pty) Limited on 13th October 1972, in terms of which our client undertook, inter alia, not to provide ingress and egress to and from Hillside Village by way of Tenth Street, not to build higher than 38 feet above Tenth Street, and to provide, at the option of Killarney Hills (Pty) Ltd., a garden or under-cover parking in the servitude area;
4. Our client would not have entered into this agreement but for the representations referred to in 1 & 2 above;
5. Our client has obtained a copy of a letter which you wrote to Mr. M. Moross of Townsview Estates (Pty) Ltd., together with a copy of the reply from Townsview Estates (Pty) Limited.

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In their reply, Townsview Estates (Pty) Limited say: "We fail to see therefore how you can claim that 'it was agreed that the rights over the servitude would be ceded to Killarney Hills (Pty) Limited in order to allow (you) to enter into the agreement in question' since according to your own letter the agreement with Munsten (sic) Estates (Pty) Limited was finalised without any agreement with the Township owner concerning the servitude";

6. It accordingly appears that you did not have any rights in respect of the servitude area at the time that the agreement was entered into or at all.

In view of the letter from Townsview Estates (Pty) Limited we would appreciate your comments in this regard, specifying whether or not there is any dispute of fact." (My underlining).

On Evans's instructions Simler replied to this letter as follows on 17 February 1975:

"We have been instructed to deny that our client made the representation to your client set out in paragraph 1 of your letter or, in fact, any representation whatever. Your client was at all times fully aware that our client acted on the basis of the servitude incorporated in your client's Title Deed and, on the further basis on the required support from Townsview Estates. In this regard you may refer to your Mr. E.A.L. Lewis, who acted at the time for Townsview Estates.

In the circumstances set out above, there does not appear to be any necessity to deal specifically with the remainder of your letter, save to record that a material dispute of fact apparently exists. We

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take the opportunity of recording that the copy of the letter to which you refer in clause 5 of your letter was handed to your client's Mr. Bessarabe by the writer solely for the purpose of assisting your client to negotiate with Townsview Estates relative to a cancellation of the servitude, and we consider your client's present action in even referring to such copy in the context of your letter under reply to be a breach of faith. In any event, in the circumstances set out, such copy is not material to the issue and such explanations as may be required, should your client choose to take the matter any further, will be furnished at the appropriate time before the appropriate tribunal."

Finally, I refer to a letter dated 3 March 1975 addressed to defendant by plaintiff's attorneys. It reads as follows:

"On the 12th and 13th October, 1972, our clients Munster Estates (Pty) Limited entered into an agreement with you in terms of which our clients agreed to certain restrictions in regard to the use of their properties, lots 614, 615 and 616, Killarney, and in respect of the erection of the building thereon.

Our clients were induced to enter into this agreement by an express representation made by a then director of your company, Mr. Rex Evans, to the effect that you had acquired by cession the rights of African Realty Trust Ltd., in terms of paragraphs (e), (f), (g) and (h) of our clients' title deed and, in particular, that you had acquired the option at any time to purchase the servitude

area...../29

area referred to in those paragraphs (and being certain strip of land 9,45 metres in width from 10th Street along the Southern boundary of each of our clients' properties) for the sum of R50. It was because of your representation that you had acquired and were vested with these rights and the threat that if our clients did not enter into the agreement you would exercise your right to purchase the servitude area that our clients entered into the agreement; otherwise they would not have done so.

The agreement, by restricting our clients' use of their properties and the erection of the building thereon, has caused them substantial financial loss, quantum of which is at present being computed. In the meantime they have instructed us to advise you, as we hereby do, that they cancel the agreement on the grounds of the abovementioned misrepresentation which gave rise to it. We shall in due course advise you and claim payment of the damages which our clients have suffered." (My underlining).

In this case, the judgment is based on the trial Judge's critical assessment of the credibility of the various witnesses who testified before him and a careful evaluation of the probative worth of their evidence. He noted the demeanour of the witnesses while they were in the witness-box. In so far as plaintiff's witnesses are concerned, both Lerner and Basserabie created an unfavourable impression on

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him. The reasons which prompted the learned Judge a quo to comment unfavourably on the demeanour of Lerner and Basserabie are detailed in his judgment, and I consider it unnecessary to make reference thereto in this judgment. A perusal of the record satisfies me that the learned trial Judge's comments on the demeanour of Lerner and Basserabie were justified. In addition, he enjoyed the advantage of observing them while they were testifying. Neither Oved nor Levy created an unfavourable impression on the trial Judge. For reasons to be referred to later in this judgment, it was held that their evidence did not materially strengthen plaintiff's case. In so far as defendant's witnesses are concerned, it was held that they could not be faulted on the score of their demeanour.

A finding of credibility based on demeanour is deserving of great weight and the resulting conclusion based thereon will ordinarily not be lightly disturbed on appeal, unless it is apparent from the judgment of the trial court that it failed to give due consideration to the

probabilities ..../31

probabilities and their effect on the credibility of the witnesses. See, Germani v. Herf and Another, 1975(4) SA 887 (A.D.). In my opinion, however, it is clear from the judgment of the Court a quo that its ultimate assessment of the credibility of the witnesses was not based solely on demeanour. It is patent from the judgment that the learned Judge a quo gave careful consideration to the probabilities and their effect on the credibility of the witnesses. It was, indeed, this approach which led the Court a quo to conclude that, notwithstanding the favourable impression created by Evans in the witness-box, his evidence was in certain material respects unreliable to an extent which would have disabled defendant from discharging the burden of proof if it were to have rested on defendant. In considering the argument addressed to this Court on plaintiff's behalf, I am mindful of the fact that, in giving weight to the findings of the Court a quo, over-emphasis of the advantages which

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the trial Court enjoyed is to be avoided, lest the plaintiff's right of appeal becomes illusory. See, Protea Assurance Co. Ltd. v. Casey, 1970(2) SA 643(A.D.) at p.648 D - E. Nevertheless, this Court is only entitled to reverse the findings of the Court a quo if it is satisfied on adequate grounds that they are wrong. See, Wessels v. Johannesburg Municipality, 1971(1) SA 479(A.D.) at p.482 G, Marine and Trade Insurance Co. Ltd. v. Mariamah and Another, 1978(3) SA 480(A.D.) at p.486 E and the oft-quoted judgment of Davis, A.J.A. in R v. Dhlumayo, 1948(2) SA 677 (A.D.) at p.705/706.

At the hearing of the appeal, plaintiff's counsel intimated that it was not his intention to challenge the trial Judge's findings as to the credibility of the witnesses who gave evidence at the trial, or his approach to their evidence. It was, however, submitted on plaintiff's behalf:

(a) that many of the trial Judge's inferences and conclusions on material matters were not justified by

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the admitted facts, taken together with the facts found by him;

(b) that in material respects the trial Judge misdirected himself on facts; and

(c) that the trial Judge had an incorrect approach to the admitted facts and the evidence before him; more particularly in that it appeared that he reached a conclusion on the only material issue, i.e., the alleged representation, and that that conclusion coloured his approach to and evaluation of the evidence both oral and documentary.

The argument on appellant's behalf was presented with meticulous attention to detail. Although I have given careful consideration to the argument, I consider it unnecessary to deal in detail with all the submissions made by counsel. For the reasons which follow, I am of the opinion that a consideration of the more fundamental probabilities and their bearing on the credibility of the witnesses fails to disclose any adequate grounds for holding that the learned

Judge...../34

Judge a quo erred in any material respect in his assessment of the credibility of the witnesses or in his findings of fact based on an evaluation of their evidence in the light of such assessment.

It was submitted on plaintiff's behalf that the Court a quo adopted an incorrect approach in relation to the two parts of the representation. It was contended that if a material fraudulent misrepresentation is proved by a plaintiff and such misrepresentation is covered by the pleadings or fully canvassed at a trial, there can be no basis in law for non-suiting such plaintiff only because the terms of such fraudulent misrepresentation are not as wide as those pleaded. The material part of the misrepresentation pleaded was that defendant had the right to take cession from Townsview of its rights under the restrictive condition. The further allegation that Evans said that he had in his possession a letter to that effect takes the matter no further. In my opinion, the submission overlooks the fact that on the evidence of both Lerner and Basserabie the reference to a

letter...../35

letter was an integral portion of the misrepresentation. The fact in issue on the pleadings was whether Evans made the representation in question. On the evidence given at the trial there was no basis for a finding that Evans made a portion of the misrepresentation only, i.e. that he referred to the right to take cession, but not to any letter evidencing that right. In my opinion, no fault is to be found with the approach of the Court a quo.

Whilst subsequent conduct and correspondence might furnish important evidence affecting the credibility and reliability of witnesses as to their testimony regarding the circumstances in which the agreement of 13 October 1972 came to be executed, I am of the opinion that regard must in the first instance be had to their evidence as to what was discussed at the meeting of 4 August 1972 and to test that evidence in the light of the probabilities.

It is the plaintiff's case that Evans (acting on defendant's behalf) made a fraudulent misrepresentation at the meeting on 4 August 1972. It was stated in Gates v. Gates

1939 A.D. 150 at p.155:

> "It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."

The approach set out in Gates's case has been followed in such cases as Mine Workers Union v. Brodrick, 1948(4) SA 959(A.D.) and Regional Magistrate Du Preez v. Walker 1976(4) SA 849(A.D.) at p.855 H. I would add that even on the somewhat cynical approach that in so far as the conduct of business affairs is concerned men are as honest as they can afford to be, Evans had no need nor motive to resort to fraud. He had been advised that he had locus standi to object to plaintiff's plans because it involved a breach of condition

(d) of...../37

(d) of the special conditions incorporated in the relevant title deeds. Moreover, in so far as plaintiff's plans involved an encroachment on the servitude area referred to in conditions (h), (i), (j) and (k), Evans knew that Townsview would withhold its consent to such encroachment pending the successful negotiation of an agreement with plaintiff acceptable to defendant. It was submitted on plaintiff's behalf that Evans made the misrepresentation in order to ensure that Basserabie and his associates would not approach Townsview. Since Evans knew what Townsview's attitude was, it was unnecessary for him to resort to fraud in order to stop plaintiff's representatives from raising the matter with Townsview.

There are further improbabilities which stand in the way of the acceptance of plaintiff's version, in so far as it is based on the evidence of Lerner and Basserabie. In this connection it must be borne in mind that the trial Court held, rightly so in my opinion, that Oved's version of what was said at the meeting on 4 August 1972 does not assist

plaintiff...../38

plaintiff to discharge the onus of proof resting on it in regard to the misrepresentation relied upon. For one, Oved refers to a representation made by Simler and not by Evans. Furthermore, his evidence as to what was represented differs materially from the version testified to by Lerner and Basserabie. Levy who was regarded as an honest witness by the learned Judge a quo, had only a vague recollection of what was discussed at the meeting. It was submitted on plaintiff's behalf that the learned Judge a quo overlooked the significance of evidence given by Levy that he recalled a discussion regarding the servitude in question. I quote the evidence relied upon by plaintiff's counsel:

> "MR. REICHMAN: (Cont.) Were those Title Deeds discussed at the meeting, as far as you can recall? -- I recall that reference was made to the question of the rights of African Realty, yes.
>
> The rights of what? --- The rights of African Realty under the Title Deed.
>
> Now, they were the township owners? --- Correct.
>
> Was mention made of any individual connected with the township owner? --- I am relying over here on my hazy memory, with regard to the meeting itself. I do recall that something was discussed, of a relationship which Mr. Evans enjoyed with the township owner. Now I cannot recollect whether

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the name Moross was debated, whether the name Schlesinger was debated, but I do recall that there was some reference to that.

What sort of relationship? --- I believe in the context that Mr. Evans had either acquired the rights, or that he enjoyed the rights to the strip of land referred to in the Title Deed, by way of some form of arrangement with the township owner. I must emphasize that my memory on this is vague.
BY THE COURT: Or enjoyed the rights? --- Or enjoyed the rights.

By virtue of? --- By virtue of some relationship which he had with them, either some form of agreement which he had with them, I cannot specifically recall at this point in time, what it was. But I do recall that there was some discussion, centering around this.

Your recollection is of something being said, to the effect that Mr. Evans either had acquired the rights, or he enjoyed the rights? --- Or he enjoyed the rights by virtue of some form of agreement, which he may have had, which he thought he had with the township owner. I can recall that the matter was debated, as I say, I must emphasize that my recollections are vague and that I cannot say with any sheer conviction as to what was said.

Well I am just trying to get it as precisely as you can remember. Or thought he had with the township owner? --- Correct.
MR. REICHMAN: (Cont.) Can you add anything to that, on that topic? --- No."

This matter was pursued in cross-examination. As to this the record reads as follows:

"You...../40

"You see, did you consult with my learned friend, Mr. Reichman, before you gave evidence in this court? --- I certainly did. I also consulted with yourself. ~~You see, because~~ my learned friend in opening this case - and I refer My Lord to page 16 of the record, he said, about line 8, I just want to know if this accurately reflects the situation. 'Mr. Levy, I must tell Your Lordship, will not remember, does not remember that being said at the meeting, that relating to Mr. Evans having said that he had a letter to the effect that he had a right' (I am coming to that in a moment) I see you winced at that, you did, didn't you, Mr. Levy? --- I did, yes.

'I must tell Your Lordship, will not remember, does not remember that being said at the meeting, but from the way he drafted the agreement later, he must have been told at one time that there was an agreement about a certain - (His Lordship intervened) Mr. Levy will say, yes, Mr. Levy will say that he must have been told that there was an agreement between the parties about a warranty to be given by the defendant, by Killarney Hills, otherwise he would not have inserted it into the agreement he drew for signature. Court: I am sorry, Mr. Reichman, would you just repeat that? That Mr. Levy will say that he doesn't remember that being said at the meeting, but he drew the agreement, it wss left to him to draw it and submitted, My Lord. He said he didn't draw a draft agreement, he drew the final agreement after being told - Court: That from what he drew he draws the inference that he is satisfied My Lord, that he must have been told that the parties had agreed on this warranty, otherwise he would not have put it into the agreement and then Mr. Reichman referred to the warranty on page 10.' Now, what I am

getting...../41

getting at is that my learned friend, at any rate, appears to have been under the impression that your evidence will be that you had been told about this warranty. Do you get my point? --- I follow that, I am just trying to analyse it in my own mind. I think perhaps Mr. Reichman has put it a little strongly. If I can perhaps just go through it. My recollection of the events are that something arose, when I say something arose, something was discussed at the original meeting, in the sense that whether it emanated from my clients at the outset, or from Mr. Evans, I certainly cannot recall. I believe that there was a discussion which centered around a relationship which existed between Mr. Evans on the one hand and the township owners on the other. As to how far this developed I cannot say."

The significance of Levy's evidence must be considered in the light of Evans's evidence-in-chief that his relationship with Moross was discussed at the meeting on 4 August 1972. As to this Evans testified as follows:

"And the effect of the allegation, Mr. Evans, is that you represented at that meeting that the defendant had the right to take cession from Townsview under the restrictive condition, what do you say to that allegation? --- It's not correct.

And it's also alleged that you said, at the same time, that you had in your possession a letter to that effect. Now, did you make such a representation, Mr. Evans? --- No, I did not, I would never have told a deliberate lie.

Mr. Evans, do you recollect whether anything was said about the servitude area at that meeting? -

Yes...../42

Yes, I had mentioned, during the meeting, that I had had discussions with Mr. Moross regarding the possibility of acquiring the rights on the servitude.

Did you say anything at all at that meeting about your relationship with Mr. Moross? --- Yes. BY THE COURT: What was said? --- I told them that I had a very good relationship with the township owners and Mr. Moross in particular and that they had undertaken to not grant them any permission to proceed with the construction of their proposed building until I indicated that the requirements that I had discussed with him were in some way settled.

MR. CHASKALSON: (Cont.) Did you mention anything about your request to Mr. Moross to be allowed to purchase the servitude area? --- Yes, it was discussed at the meeting that I had had discussions with Mr. Moross regarding the possibility of, I won't say the word 'purchase' was used, but, in general terms, that I would acquire their rights."

It must also be borne in mind that Levy said that if Evans were to have referred to a letter evidencing his right to acquire the servitude, he (Levy) would have required production thereof. In the circumstances, I am of the opinion that the trial Court did not err in its evaluation of the worth of Levy's evidence.

I revert to the question of improbabilities inherent in plaintiff's version. It must be borne in mind

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that Evans was under no misapprehension as to Townsview's rights in respect of the servitude in question. He knew that the possibility of acquiring those rights had been raised with Moross, who had undertaken to go into the matter. By the time of the meeting the matter had not proceeded beyond the stage of preliminary negotiation. Moreover, Evans knew that Simler was fully aware of the true position. In my opinion, it is improbable to a high degree that, in the circumstances set out above, Evans could even have contemplated committing the fraud imputed to him. I have already referred to the fact that he was bargaining from a position of strength, being assured of Moross's support. Evans would have realised that his chances of successfully perpetrating the fraud imputed to him were indeed slender. He would have appreciated that Simler would realise that he was being untruthful. Moreover, if he were to be asked to produce the letter, his fraud would be summarily exposed.

On plaintiff's version, it is to be concluded

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that Simler had dishonestly associated himself with his client's fraudulent conduct. The possibility that Simler might have decided at the meeting to remain silent, when it was his clear duty to speak, is so far-fetched as not to merit consideration. Indeed, his subsequent conduct refutes the possibility of dishonest conduct on his part. A further improbability which arises on plaintiff's version is the failure on the part of any of its representatives to call for the production of the letter. Lerner and Basserabie sought to explain this omission by stating that they believed Evans, whom they regarded as a man of standing and integrity. It is, however, clear from Levy's evidence that if the letter were to have been referred to in the context of the mis-representation relied upon, he would have required its production. Since he was to draft the agreement, it was a matter of importance to him to know precisely what defendant's rights in regard to the servitude were. It is, therefore, improbable that Evans represented that he was in possession of a letter

defining...../45

defining his rights in regard to the acquisition of the servitude in question. This improbability explains why plaintiff's counsel thought it wise to submit that the Court a quo erred in not regarding the two portions of the misrepresentation as being severable.

On plaintiff's version, the formulation of clause 3(f) gives rise to a further improbability. If Evans were in fact to have made the representation relied upon, Levy would probably have incorporated a clause warranting that defendant possessed the rights to Townsview's rights in respect of the servitude, including the right to purchase the strip of land in question for R50. Clause 3(f), though couched in the form of a warranty, is in essence an undertaking by defendant to "take all steps necessary to acquire all the Township owner's rights" in respect of the strip of land in question. On plaintiff's version, it is even more remarkable that Basserabie without demur consented to the deletion of clause 3(f) from the agreement which was signed by him on 13 October 1972 on plaintiff's behalf. The reason for

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the deletion appears from the evidence given by Evans and Simler, namely, that defendant considered it unwise to give an undertaking which it might not be in a position to implement. Basserabie's evidence that Evans had stated that defendant could not give the undertaking because the transfer of an area of less than 5 000 square feet in extent was prohibited, was rightly rejected by the Court a quo. On plaintiff's version, Evans was guilty of a further fraudulent misrepresentation which was intended to cover up the one allegedly made on 4 August 1972. In any event, when the agreement was finally executed on 13 October 1972, it was on terms which did not impose any obligation on defendant to do anything whatsoever in regard to the servitude area in question. In fact, it appears that plaintiff was content to proceed with its building programme in the knowledge that the rights in regard to the servitude area would remain vested in Townsview. In passing I would observe that this casts doubt on plaintiff's averment in the pleadings that

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the misrepresentation "induced" it to enter into the agreement. On plaintiff's version, Basserabie would have known before signing the agreement on 13 October 1972 that, notwithstanding the representation made on 4 August 1972, defendant was not in a position to "take all steps necessary to acquire all the Township owner's" rights in respect of the strip of land in question.

As appears from the correspondence referred to above, the existence of the servitude created a problem because plaintiff intended disposing of individual flats by granting sectional title thereto to purchasers. It is to be noted that plaintiff did not initially approach defendant or Evans personally for assistance in regard to securing the cancellation of the servitude; it addressed itself to Townsview, and requested it to consent to the cancellation of the servitude.

This leads me to consider what may be regarded as the high water mark of plaintiff's case, i.e., the contents

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of the above-quoted letter dated 18 December 1974 which Evans wrote to Moross, and in which he purports to recall "the essence" of an agreement entered into between himself and Townsview regarding the cession to defendant of Townsview's rights to the servitude. On the face of it, the letter is consistent with plaintiff's version and inconsistent with that of defendant as to what was discussed at the meeting on 4 August 1972. It is apparent from the judgment that the learned Judge a quo was fully aware of the importance of this letter and its bearing on the question concerning Evans' credibility. The learned Judge stated that the letter "creates the greatest problem in this case". He carefully considered the weight to be given to the contents of this letter and decided that, having regard to his impression of Evans' character and the probabilities referred to by him in his judgment, it could not be regarded as being of decisive importance either on the issue of credibility or on the ultimate question whether plaintiff had proved its case by a preponderance of probabilities. Counsel's argument has not satisfied me that the learned Judge

a quo ..../49

a quo erred in his evaluation of the importance of this letter in the context of the evidence as a whole. Evans was evidently casting his mind back to discussions he had had with representatives of Townsview during the middle of 1972. He could not have refreshed his memory with reference to correspondence with Townsview at the time, because it is apparent therefrom that no agreement had been concluded prior to 4 August 1972 with Townsview regarding the cession to defendant of the former's rights in respect of the servitude. It may well be that as at the date of the meeting Evans entertained hopes that such an agreement might eventually be concluded - Moross had promised to go into the matter and appeared to favour the conclusion of an agreement if it were possible to do so. It is possible, if indeed not probable, that Evans might have communicated his feeling of optimism to plaintiff's representatives, and that that led to the inclusion of clause 3(f) in Levy's draft agreement. It appears, further, that during the latter part of 1974 Evans

had...../50

had to contend with numerous problems, both of a financial and matrimonial nature. He may well have been confused as to precisely what had been arranged with Townsview in regard to the latter's rights in respect of the servitude. It must be borne in mind that Evans's discussions with Townsview's representatives took place more than two years before he wrote the letter in question. The suggestion that Evans, having been reminded of the representation he allegedly made on 4 August 1972, sought to extricate himself from an embarrassing position by once more resorting to misrepresentation, is so far-fetched as not to merit serious consideration.

The learned Judge a quo drew an inference adverse to plaintiff from its failure to call Gerson as a witness, notwithstanding the fact that he was available and in a position to testify on the crucial issue in the case, i.e., what was discussed at the meeting which took place on 4 August 1972. Before this Court, it was submitted on plaintiff's behalf that he had erred in doing so. We were referred to a number

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of authorities which set out the principles governing the question in issue. See, e.g., Elgin Fireclays Limited v. Webb, 1947(4) SA 744 (A.D.) in which WATERMEYER, C.J., stated (at p.749/50):

> "It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See Wigmore (Secs. 285 and 286).) But the inference is only a proper one if the evidence is available and if it would elucidate the facts."

In my opinion, however, it is to be doubted whether WATERMEYER, C.J., intended laying down a general and inflexible rule to be applied without more in every case where a party fails to call as his witness one "who is available and able to elucidate the facts." Whether the inference, that the party failed to call such a person as a witness because he "fears that such evidence will expose facts unfavourable to him", should be drawn could depend upon the facts peculiar to the case where the question arises. It was pointed out

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in Webranchek v. L.K.Jacobs and Co. Ltd., (1948(4) SA 671 (A.D.) at p.682 that it might appear that the person concerned was equally available to both parties, and that the inference could then be drawn against both parties. VAN DEN HEEVER, J.A., also stated: "After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the onus which lay upon him." See, also, the remarks of MARAIS, J., in Rand Cold Storage and Supply Company v. Alligianes, 1968(2) SA 122(T) at p. 123/4. The learned Judge a quo carefully considered the circumstances present in this case before concluding that the inference contended for on defendant's behalf was the proper one to be drawn. I am in respectful agreement with his approach and with his conclusion that in this case an inference adverse to plaintiff should be drawn from its failure to call Gerson. I refer briefly to some of the circumstances which satisfy me that ~~it has not been shown that the Court a quo erred in its~~ conclusion.

1. Gerson...../53

1. Gerson was available to be called as a witness. In fact, it was indicated during the course of plaintiff's case that it was intended to call him. In a technical sense, he was available to defendant. But to say that he was "equally" available to both parties, ignores the realities of the situation, particularly if it is borne in mind that he was at all material times closely associated with Lerner, Basserabie and Oved in their business venture. Moreover, in indicating that he would be called to testify, it was impliedly suggested that he could give evidence favourable to plaintiff.

2. Gerson was clearly "able to elucidate the facts". During the presentation of the case on behalf of plaintiff, it was on more than one occasion emphasised that Lerner, Oved and Basserabie were inexperienced in the field of property development, but that Gerson was acquainted with all the facets thereof. He alone had studied plaintiff's title deeds, and had sought information in regard thereto from Levy. Moreover, on a date between 28 July and 4 August 1972 he had had

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an interview with Townsview's representatives, during which Townsview's attitude towards the encroachment on the servitude area must have been canvassed.

3. Gerson must have been the most knowledgeable of all of plaintiff's representatives who attended the meeting on 4 August 1972, and the one likely to have appreciated the nature of the problems facing plaintiff in regard to its contemplated building programme.

4. Since Gerson did not testify at the trial, it is not known what was discussed at his meeting with Townsview's representatives. It is, nevertheless, improbable that he was brought under the impression that Townsview had in any way divested itself of its right in respect of the servitude in question in favour of defendant.

5. During the course of plaintiff's case, contradictory evidence had been led regarding the crucial issue as to who made the representation and as to the contents thereof. (Cf. the evidence of Lerner and Basserabie with that of Oved).

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In my opinion, on this ground alone, it was hardly the type of case where plaintiff "was entitled to rest (its) case upon evidence which (it) considered adequate to discharge the onus which lay upon (it)". See Webranchek judgment (supra).

In my opinion, therefore, it is understandable that plaintiff found itself in a quandary regarding the advisability of calling Gerson as a witness. If it were to be assumed in plaintiff's favour that Gerson's evidence would have tended to corroborate that of Lerner and Basserabie, he would have experienced the greatest difficulty in explaining why, with his background information, he did not question the correctness of Evans's representation or call for the production of the letter allegedly referred to by Evans in support thereof. If it were to be assumed that Gerson's evidence would have been in line with that given by Oved, this would have highlighted the contradictory versions appearing from the evidence led on plaintiff's behalf. Furthermore, if

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it were to be assumed that Gerson would have testified, like Levy, that he had no clear recollection of what was said by Evans at the meeting, this would have cast further doubt on the version deposed to by Lerner and Basserabie. In my opinion, therefore, the learned Judge a quo cannot be faulted for concluding that the probable reason why plaintiff decided not to call Gerson as a witness was the fact that it feared that his evidence would expose facts unfavourable to its case.

Notwithstanding the detailed argument addressed to this Court by plaintiff's counsel, I remain unpersuaded that the Court a quo erred in dismissing the claim with costs.

In the result, the appeal is dismissed with costs, including those occasioned by the employment of two counsel.

P. J. WESSELS, J.A.

Corbett, J.A.
Hofmeyr, J.A.
Kotzé, J.A.
Trengove, A.J.A.
} Concur.

MUNSTER ESTATES (PTY) LIMITED

and

KILLARNEY HILLS (PTY) LIMITED