THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 53/2001

In the matter between:

JOHANNES ABRAHAM DE CLERK Appellant

and

MAG SPARES CC Respondent

Coram: Marais, Streicher and Farlam, JJA

Heard: 9 May 2002
Delivered: 21 May 2002

Reduction in purchase price as a result of fraudulent misrepresentations.

J U D G M E N T

STREICHER, JA/

STREICHER JA:

[1] The respondent instituted action against the appellant for the payment of R120 000 being the balance of a purchase price payable by the appellant to the respondent in terms of a written agreement of sale in respect of a petrol filling station ('the Total Filling Station'). The action was instituted in the magistrate's court for the district of Hlabisa. The appellant, in a counterclaim, alleged that he entered into the contract as a result of fraudulent misrepresentations by the respondent and that he was, as a result thereof, entitled to a reduction in the purchase price alternatively to damages in an amount of R120 000. The magistrate granted judgment in favour of the respondent for payment of an amount of R60 000 and ordered that each party should pay its own costs. An appeal by the appellant to the Natal Provincial Division ('the court *a quo'*) was unsuccessful while a cross-appeal by the respondent against the costs order succeeded with the result that the magistrate's costs order was replaced with an order that the respondent's costs be paid by the appellant. With the necessary leave the appellant now appeals against the judgment by the court *a quo.* The respondent filed a notice indicating that there would be no appearance on its behalf and that it acquiesces in the judgment of this court.

[2] The respondent, represented by a Mr Cooper, sold the Total Filling Station to the appellant on 13 December 1993 for a purchase consideration of R270 000. Cooper and his wife were the members of the respondent. According

to Cooper the average monthly petrol sales for the previous year were 270 000 litres. The appellant paid R150 000 of the purchase price but refused to pay the balance of R120 000. He alleged that he was induced to enter into the agreement of sale by the following fraudulent misrepresentations by Cooper:

1 That the monthly turnover of the business in the twelve months preceding the effective date was R275 000 litres of petrol;

2 That he (Cooper) expected that the turnover would increase in the next twelve (12) months;

3 That taxi clientele would probably increase in the future;

[3] The Total Filling Station was situated in Mtubatuba. There used to be a taxi rank ('the old taxi rank') across the street from the filling station. Before the sale on 13 December 1993 60% to 70% of all petrol sales at the filling station were made to taxis.

[4] During 1993 a complex known as Taxi City was being constructed at the other end of the town ('the lower end of town'). It consisted of a taxi rank ('the new taxi rank') in the centre, a bus depot and shops. Building operations started during about February/March 1993. Businessmen who traded in the vicinity of the old taxi rank were worried that the new taxi rank would draw business away from their part of town. As a result the Small Business Development Corporation ('the SBDC') became involved in about June/July 1993 and made proposals to the Mtubatuba Health Committee ('the Health Committee') as to how to upgrade the old taxi rank. The Health Committee appointed a steering

committee in respect of the upgrading which was supposed to take place in tandem with the development of the new taxi rank. However, the planned upgrading never really materialised and was apparently discontinued halfway.

[5] On 18 August 1993 the Health Committee granted special consent for the erection of a petrol filling station at Taxi City. The next day the Mtubatuba Taxi Owners Association ('the Taxi Association') issued a statement to the following effect:

> 'We hereby certify that we are the only taxi association in Mtubatuba.
>
> We are presently using the existing bus rank and taxi rank in Mtubatuba but because of the limitations thereof we will be moving to the new bus and taxi rank which is presently being erected on Lot 47 and Lot 44 Mtubatuba. This new rank was planned in co-operation with our association and comply with all our needs and requirements.
>
> The result will be that the old taxi rank will not be in use.
>
> We intend moving to the new rank towards the middle of October,1993. Not only will all the taxis in Mtubabtuba move to the rank but all the busses as well.'

[6] The taxis moved to the new taxi rank during November 1993. However they still used to fill up at the Total Filling Station as no filling station had by that time been erected at Taxi City and the route from the new taxi rank to the north went past the Total Filling Station.

[7] On 24 November 1993 the Taxi Association entered into an agreement with the developer of Taxi City in terms of which the Taxi Association was

granted certain rights in respect of the new taxi rank. Clause 3 of the agreement provided as follows:

> 'This right shall continue for an indefinite period provided, however, that:
>
> 3.1 All the Association's members make use of the facilities herein mentioned.
>
> 3.2 No member of the Association shall use the facilities of any other bus or similar rank within the jurisdiction area of the Mtubatuba Health Committee.
>
> 3.3 No less than 90% of all taxis operating in the jurisdiction area of the Mtubatuba Health Committee shall be members of the Association.'

[8] The appellant took occupation of the Total Filling Station in March 1994. In August 1994 a new filling station ('the Caltex Filling Station') was opened at the new taxi rank. There was an immediate substantial decrease in petrol sales at the Total Filling Station. By February 1995 the monthly sales had decreased to 153 845 litres from 281 000 litres in November 1993. The appellant then, after having tried for a few months to find a purchaser, sold the Total Filling Station for a purchase consideration of R150 000.

[9] At the time when the sale by the respondent to the appellant was negotiated and concluded, Cooper was aware of the agreement between the developer and the Taxi Association. Furthermore, Cooper was a member of the Health Committee and was not only present when the resolution granting

consent for the erection of a filling station at Taxi City was granted, but also objected to the granting of such consent. He stated that he objected to such consent because ‘it would be detrimental to the sale of (the) business that I’m selling, or had sold’. The appellant, on the other hand, was not aware of these facts. He testified that Cooper told him that petrol sales had decreased from 380 000 litres per month to 270 000 litres per month but that the taxis would return as soon as the upgrading of the old taxi rank had been completed and that sales would increase when that happened.

[10] It was only under cross-examination that Cooper conceded his aforesaid knowledge. He did so after having been confronted with the minutes of the meeting of the Health Committee at which consent for the erection of a filling station at Taxi City was granted and with the agreement between the developer of Taxi City and the Taxi Association. Before that he had, in answer to a question whether he told the appellant that he expected turnover to increase during the next 12 months, testified that: ‘All the indications as far as I am concerned were there for this business to increase. I could have and most probably did indicate that it is on the up, on the take off’; and ‘I most probably indicated with the proposed upliftment of the old rank, the rank opposite Mag, at that stage Mag, with the injection of SBDC would increase the taxi business in the area.’ He even said that he only heard that there was going to be a filling station at Taxi City after the take over of the Total Filling Station by the appellant and that he did not think that Taxi City constituted a threat to the commercial viability of the business that he was selling.

[11] When Cooper was confronted with the minutes of the meeting of the Health Committee and the agreement between the developer of Taxi City and the Taxi Association he did an about turn and conceded that he knew that consent had been granted for the erection of a filling station at Taxi City and that he had seen the agreement when he negotiated the sale to the appellant. He then also became sure that he told the appellant that such consent had been granted.

[12] In the light of this evidence there can be no doubt that Cooper represented to the appellant that he was of the opinion that the taxis would return to the old taxi rank and that petrol sales would increase. There can, furthermore, be no doubt that he did not believe that the taxis would return to the old taxi rank and that petrol sales would increase. He knew that a filling station at Taxi City

would have a dramatic adverse impact on business at the Total Filling Station. That is why he opposed the granting of consent by the Health Committee for the erection of a filling station at Taxi City.

[13] The magistrate stated in regard to the alleged misrepresentations: 'This is not in dispute as Advocate Roberts on behalf of the Plaintiff, conceded that there was a misrepresentation and that there had to be a reduction in the purchase price.' Referring to that statement the court *a quo* said:

> 'The Plaintiff, having made no such concession, it was incumbent upon the Court *a quo* to make a finding whether there was a misrepresentation or not – which it did not do. That would involve a finding on credibility as well as a finding on the probabilities whether the Defendant had discharged the onus of proving fraudulent misrepresentation. That the Defendant/Appellant failed to do. There is however, no cross-appeal by the Respondent and the amount of R60 000,00 to the Plaintiff/Respondent must stand.'

The court *a quo's* conclusion that the appellant failed to prove a fraudulent misrepresentation was based on the following reasoning:

> 'The witness Cooper expressed an opinion that petrol sales were likely to increase with the development of Taxi City. At that stage he did not know of the establishment of a Caltex outlet at Taxi City. Indeed he was against the establishment of another petrol outlet as it would have the effect of him having a less than fair price for his business. He stated that is was an honestly held view that turnover was likely to increase.'

[14] The court *a quo* erred. As I have already indicated Cooper conceded that he knew of the proposed establishment of a petrol outlet at Taxi City, he knew that such an outlet would have a detrimental effect on his business and he nevertheless told the appellant that the thought sales would increase. In doing so he fraudulently misrepresented his opinion as to the future prospects of the Total Filling Station.

[15] The court *a quo* stated that it had a difficulty as a court of appeal in that the magistrate did not, 'obviously because of the course he adopted in deciding the matter, make any findings on facts he found to be proved'. Because of this difficulty it held:

> 'Faced with the dilemma of not ourselves having heard the evidence so as to make an evaluation thereof we are left with the choice of deciding the appeal as best we can, either on the undisputed evidence (if such can be found) or remitting the matter to the Magistrate for further information in terms of Section 87(b) of the Magistrate's Court Act No 32 of 1949. However, there can be no point in remitting the matter because of the concession made by the Defendant/Appellant that the establishment of Taxi City was not causally linked to the damages which he says he suffered.'

[16] This statement is not correct. Firstly, the court was not faced with a choice of deciding the matter on the undisputed evidence or of remitting the matter to the magistrate. Section 87(b) provides that the court of appeal may 'if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal

is brought, with instructions in regard to the taking of further evidence or the setting out of further information'. In this case the court *a quo* had before it a verbatim transcript of the proceedings in the magistrate's court and required no further information to decide the matter. The court *a quo's* position was no different from what it would have been if the magistrate had made incorrect findings of fact. In such a case the court *a quo* would have had to do the best it could on the material before it. In this case the court *a quo* similarly had to do its best on such material as it had before it.[1] Secondly, the appellant did not complain about the establishment of Taxi City. He was aware of the establishment of Taxi City when he purchased the Total Filling Station. The appellant's evidence was that he believed Cooper when he said that he believed that the taxis would return to the old taxi rank and that, had he known about the agreement between the developer of Taxi City and the Taxi Association and of the fact that the Health Committee had granted consent for the erection of a filling station at Taxi City i.e. had he known that it was unlikely that the taxi trade would increase, he would not have purchased the Total Filling Station on the terms agreed to. There is no reason not to accept this evidence.

[17] It follows that the appellant proved that he had been induced by Cooper's fraudulent misrepresentations to enter into the agreement of sale. He, therefore, became entitled to a reduction in the purchase price alternatively to damages equal to the difference between the agreed purchase price and the value of the business purchased.[2] The magistrate held that 'the fairest judgment is to rule for a reduction in the purchase price in the amount of R60 000' but gave no reasons

[1] *Van Aswegen v De Clercq* 1960 (4) SA 875 (A) 882B-C.

[2] *S. A. Oil and Fat Industries Ltd. v Park Rynie Whaling Co. Ltd.* 1916 AD 400 at 413; *Ranger v Wykerd and Another* 1977 (2) SA 976 (A) at 991B-992B.

for his finding. The court *a quo,* on the other hand, because of its finding that no misrepresentation had been proved, did not consider the question of a reduction in the purchase price or damages.

[18] After having tried for several months to sell the Total Filling Station the appellant eventually succeeded in doing so on 2 February 1995 for a purchase price of R150 000. He received other offers but they were all lower than the one eventually accepted by him. This evidence justifies the *prima facie* inference that, at the beginning of 1995, the market value of the Total Filling Station was R150 000. There was no contrary evidence to disturb such *prima facie* inference. It can therefore be taken that it was proved that the value of the business in February 1995 was R150 000.[3] The appellant contended that R150 000 should also be taken as the value on 13 December 1993 when he concluded the agreement of sale with the respondent.

[19] In my view it is unlikely that, had it been known to a purchaser in December 1993 that the taxis were unlikely to return to the old taxi rank and that a filling station was about to be constructed at Taxi City, such purchaser would have been prepared to pay a higher price than the price which was paid in February 1995. In terms of the agreement between the Taxi Association and the developer of Taxi City at least 90% of the taxis in Mtubatuba had undertaken to relocate to the new taxi rank. Furthermore, consent had already been granted for the erection of a filling station at Taxi City. A purchaser would, therefore, have realised that the filling station at Taxi City could come into operation shortly after March 1994, the occupation date in terms of the agreement of sale. On Cooper's own evidence 60% to 70% of petrol sold at the Total Filling Station were sold to taxis. A purchaser would in the circumstances have realised that his sales would drastically decrease when the filling station at Taxi City started doing business, possibly as much as 54% (90% of 60%) to 63% (90% of 70%). It follows that a purchaser would have realised that sales could, potentially, drop

[3] Compare *Ranger v Wykerd supra* at 994D-E.

from 270 000 litres per month to between 99 900 to 124 200 litres per month.

[20] In the event petrol sales dropped from 288 851 litres in January 1992 to 157 940 litres in January 1995. There was some evidence suggesting that petrol sales decreased because of mismanagement but it is in my view clear that the opening of the Caltex Filling Station caused the bulk of the loss. In July 1994, i.e. four months after the appellant had taken over the Total Filling Station only 9 litres less petrol was sold than during the corresponding period of the previous year. In Augustus 1994, the month when the Caltex Filling Station started doing business, the figure was 69 881 and by December it was 120 000.

[21] The appellant's evidence was that, when he purchased the Total Filling Station, as well as when he sold it, the purchase price was determined on the basis of R1 per litre of petrol sold per month. Cooper agreed that the purchase price of a petrol filling station is usually determined at a rate per litre of petrol sold. In these circumstances it seems to me highly unlikely that had it not been for the fraudulent misrepresentations by Cooper the respondent would have been able to sell the Total Filling Station for more than R150 000. I have not lost sight of the fact that a purchaser would, in December 1993, have expected to maintain the then average level of petrol sales for a while. That fact would, in my view, not have influenced him to pay a higher price than R150 000. That is so because the construction of a filling station at Taxi City and the potential loss of 60% - 70% of customers i.e. the potential drop of the average monthly petrol sales to between 99 900 and 124 200 litres was imminent. I consider it to be commercially unrealistic to entertain the notion that such a purchaser would have made any material allowance for so limited a period of trading without the competition of the new filling station. The imminent competition was likely to have an enormous adverse impact upon the turnover of the business for as long as the two businesses co-existed and they were likely to co-exist for many years to come. The probability is strong that the volume of petrol upon which the price would have been calculated would have been the volume of petrol that was likely to be sold after the competition had begun and that no material additional consideration would be paid for what, in the overall scheme of things, would be a short period of trading without competition from the new filling station.

[22] For these reasons it has in my view been proved on a balance of probabilities that the value of the Total Filling Station did not exceed R150 000 on 13 December 1993. It follows that the appeal should succeed. The purchase price should be reduced by R120 000 with the result that no amount is payable by either party to the other. Having been successful the appellant is entitled to

costs in this appeal, in the appeal to the court *a quo* and in the magistrate's court.

The following order is made:

1 The appeal is upheld with costs.

2 The order made by the Natal Provincial Division is set aside and replaced with the following order:

'1 The appeal is upheld with costs and the order by the magistrate is replaced with the following order:

(a) 'The purchase price payable in terms of the agreement of sale between the plaintiff and the defendant, dated 13 December 1993, is reduced by R120 000.

(b) The plaintiff is ordered to pay the costs in respect of both the claim and the counterclaim.'

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P E Streicher
Judge of Appeal

Marais, JA)
Farlam, JA) concur