IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 3535/2013

Heard on: 26 March 2015
Delivered on: 4 March 2016

In the matter between:

TRYZONE FOURTEEN (PTY) LTD	**Applicant**

And

PETER GEORGE BATCHELOR N.O.	**First Respondent**
ANDREW JOHN BATCHELOR N.O.	**Second Respondent**
ROBIN OWEN JEFFERSON N.O.	**Third Respondent**
ROSEMARY ANN BATCHELOR N.O.	**Fourth Respondent**
MICHAEL JAMES ORGANISATION	**Fifth Respondent**
ARTHUR J MARRINER	**Sixth Respondent**
ALSAK (PTY) LTD	**Seventh Respondent**

JUDGMENT

MAKAULA J:

A. *Introduction:*

[1] The source of this application is an advertisement which reads:

> "**PRIME COMMERCIAL PROPERTY**
>
> A rare opportunity to acquire an excellent income-producing investment in a sought after area. The property, which is fully let, has great exposure, loads of parking and easy access to airport, freeways, beachfront and all other amenities. Tenants are a blue-chip global telecom company, and a popular restaurant geared to cater for large functions." (Sic.)

PARTIES:

[2] The applicant bought the prime commercial property *(the property)* referred to in a public auction.

[3] The first to fourth respondents are the Trustees of Unit 1, Manor Hastings Trust hereinafter referred to as the Trust. The fifth respondent is an organisation of auctioneers (auctioneers). The sixth respondent served as a representative of the Trust in selling the property. The sixth respondent is the Director of the seventh respondent. The seventh respondent is a vehicle through which the sixth respondent operated.

[4] The applicant became interested in the property and made enquiries from the auctioneers about the property from the fifth respondent. On 3 March 2013, pursuant to the enquiries made by the applicant, the auctioneers sent to the applicant a two page document which confirmed that the property was a commercial property with two lease agreements, namely, (a) a lease with admirals starting from 1 September 2012 to 31 August 2017 at a monthly rental of R45 000.00 and (b) a lease with ZTE starting from 1 November 2012 to 31 October 2013. On 5 March 2013, the applicant went to view the property. The applicant met a certain Mr Galpin who represented the fifth respondent. Mr Galpin showed the applicant the property. Apart from the structure, Mr Galpin showed the applicant parking bays, a 400m² veranda and informed him about undercover parking bays which form part of the property. The significance of the areas pointed out by Mr Galpin shall appear below.

[5] On 12 March 2013, the applicant attended the public auction. Prior to the commencement of the auction, the applicant signed the respondents' standard *'rules of auction'* by writing his name and his phone numbers. It is now settled between the parties that Galpin read out the rules of auction before the commencement of the auction. The applicant paid a deposit of R864 630.00 made up as follows, R835 740.00 as a deposit and R28 890.00 to the Trust's attorneys for transfer costs.

[6] The amount of R835 740.00 was distributed as follows:

6.1 A deposit of R390 000.00 to the Trust;

6.2 An amount of R222 300.00 to Mr Marriner, an agent of the Trust as commission;

6.3 An amount of R223 440.00 to the auctioneers, as agents of the respondents as commission.

[7] After the payment of the deposit and the signing of the Deed of Sale, various problems cropped up between the applicant and the respondents which led to the Trust cancelling the agreement on 17 September 2013 before payment of the balance and the transfer of the property.

[8] Further correspondence was exchanged between the parties pursuant to the cancellation of the agreement by the Trust which led to the applicant also cancelling the agreement citing numerous fraudulent misrepresentations on the part of the respondents' cancellation. That culminated in the applicant launching the current proceedings seeking the following relief:

8.1 That the respondents, on behalf of the trust, and also personally jointly and severally, be ordered to pay the sum of R864 630.00 to applicant, together with interest thereon at the legal rate from 14 March 2013;

8.2 Alternatively, that respondents, on behalf of the trust and also personally jointly and severally, be ordered to pay the sum R390 000.00 and fifth respondent the sum of R445 740.00 to applicant, together with interest thereon at the legal rate from 14 March 2013;

8.3 Ancillary relief.

[9] The applicant insisted on the date of hearing that the matter proceed and be resolved on the basis of fraudulent misrepresentations perpetrated by the fifth, sixth and seventh respondents who at all material times were acting as agents of the Trust.

***The applicant's case*:**

[10] The applicant relies mainly on misrepresentations made in respect of:

10.1 the advertisements; and

10.2 the lease agreement.

***The advertisements and the lease agreement*:**

[11] The applicant alleges that the respondents misrepresented to it in their advertisement that the property was a rare opportunity to acquire an excellent income-producing investment in sort after area.

[12] The applicant alleges that the respondents with intent to defraud him, failed to disclose the following about the property:

12.1 that the Admirals did not consider to be bound by the lease agreement because of a suspensive clause;

12.2 that the Admirals were under business rescue;

12.3 that the Admirals did not pay deposits towards the rental of the property; and

12.4 that the Admirals were in arrears totalling R159 000.00.

12.5 that there was an arbitration award against the Trust that had not yet been complied with and which had substantial repercussions;

12.6 that there were substantial hidden costs;

12.7 the applicant further refers to the fact that the fifth, sixth and seventh respondents misrepresented that a veranda of 400m² was part of the exclusive use area of the part of the property and that there were 63 parking bays and fourteen undercover bays allocated to the property;

12.8 that the fifth respondent and/or Mr Mariner misrepresented that the Trust held deposits from the leases which would be paid to the successful bidder on the date of the occupation.

[13] The applicant argues that the three facts about the status of the Admirals is contrary to what is postulated in the advertisement. Furthermore, the above facts were known to the sixth respondent based on the letter sent by the latter to the second respondent on 12 March 2013, immediately after the sale, which contains the following facts:

> "Had Admirals closed down last week I don't think we would have had the same interest. No sign of De Costa or Gutsche.

> . . . At the end of the day the purchaser is facing an outlay of about R5 million.
>
> A lot of money when you have a 'dicey' tenant with a long lease and a blue-chip tenant with a short lease. Not a situation conducive to peaceful sleep." (Sic)

[14] The applicant contends that the information about the lease agreement as referred to above misrepresents what has been contained in the written advertisement.

[15] The applicant submits that the fifth, sixth and seventh respondents, as agents of the Trust, were guilty of fraudulent misrepresentation entitling the applicant to cancel the agreement and claim restitution.

***Trust's case*:**

[16] The Trust submits that the applicant should have foreseen the insurmountable factual dispute of fact especially immediately after the answering affidavit was filed and not persist with the application.

[17] Mr Huisamen, for the Trust, submitted that the applicant knew about the misrepresentations long before the Deed of sale was signed. Despite that, the applicant proceeded with the sale agreement seeking a reduction of the purchase price instead of cancelling the sale agreement. In support of this contention, Mr Huisamen referred to a letter dated 20 May 2013 written by the applicant's attorneys to Trust's attorneys where the following appears:

> "The law is clear the terms of the agreement will not assist your clients if they made a deliberate misrepresentation. If it eventually transpires that the lease is unenforceable, that the deposit was not paid or that the lease defaulted and your

> clients failed to disclose this to our client, the only reasonable inference is that your clients deliberately failed to do so. In this regard we hereby formally notify you that our client intends to enforce his aedilitian remedies. More especially our client intends to institute action for the reduction of the purchase price.
>
> The fact that a commercial agreement of lease maybe unenforceable or that the lessee is defaulting on his obligations clearly a material issue. Your clients were obliged to disclose any such information to our client." (Emphasis added)

[18] The Trust submits further that, in spite of the knowledge of the misrepresentations and in particular, that there were problems with the Admirals' lease agreement, the applicant's attorneys wrote to the Trust's attorneys on 29 May 2013 demanding payment of the deposits by the Admirals. The relevant letter reads:

> "The agreement of sale furthermore provides that our client received occupation of the property subject to the existing tenancies and occupancies from 1 April 2013. It follows that the deposits must be paid over to our client forthwith, as well as the rents received since then after accounting for the rates, taxes, levies etc. We reiterate our client intends to proceed with the agreement of sale but also intend to enforce their aedilitian remedies." (Emphasis added)

[19] The Trust argues that even on 13 August 2013 the applicant refused to pay over the guarantees, demanding the reduction of the purchase price. The letter referred to reads:

> ". . . The guarantees cannot be provided before the reduced purchase price as agreed upon. As soon as the price as agreed upon, the guarantees will be provided forthwith . . .
>
> 4. It is further patently clear that your client has deliberately concealed material facts and defects from our client – this is not a ferraries – case. The property was further advertised and sold with existing lease agreements in place. There can be

> no doubt that our client is entitled to a reduction in the purchase price or even to cancel the agreement. . . . Our client was and remains prepared to attempt to resolve this matter, but that comes from two sides."

[20] The above should be viewed in the backdrop of the fact that as far back as 15 April 2013, the applicant knew of Shamley's attitude that Admirals' lease might not be binding and that the Admirals did not pay a deposit, so argues the Trust. The Trust further submits that on or about 20 May 2013, the applicant knew that the Admirals were defaulting in its obligations to pay rental. The Trust states that on 29 May 2013 the applicant it did not take occupation of the property on 1 April 2013 but rather elected to enforce the agreement. At that time, the applicant was aware of all the fraudulent misrepresentations relied upon by it, so argues the Trust.

[21] The Trust contends that the lease agreement between it and the Admirals is enforceable despite the Admirals believing otherwise. Therefore, the Trust's contention is that there is a dispute as regards whether the applicant was misled in respect of the lease agreement. Mr Huisamen argued that there is also a dispute of fact about whether there were fraudulent misrepresentations made by the respondents.

[22] The Trust argues that there is a massive dispute of facts on the entitlement of either party to have cancelled the agreement which cannot be resolved on the papers. In substantiation, the Trust argues that the applicant elected to abide by the agreement and enforce it, therefore the applicant had a duty to comply with the obligations in terms of the agreement which included

the obligation to supply guarantees and yet the applicant refused to supply same. The Trust further argues that if the Trust validly cancelled the agreement, clause 9.1.2 of the agreement applies and therefore the applicant would not be entitled to any restitution. Of importance, so notes the Trust is that the applicant cannot resile from a cancelled agreement and claim restitution. This, the Trust bases on the fact it was the first to cancel the agreement. If the cancellation by the Trust was lawful and in terms of the agreement therefore the consequences of such cancellation would flow from the agreement itself, so argues the Trust.

***Fifth respondent's case*:**

[23] Mr Williams, on behalf of the fifth respondent, submitted that the Trust validly cancelled the agreement based on the fact that the applicant failed to provide guarantees and was aware of the problems which the lease agreement had even prior to the signing of the Deed of sale. The fifth respondent argues that the applicant became aware of all the problems the lease had and all the misrepresentations which the applicant now complains about but did not elect within a reasonable time to opt out of the agreement. For that reason, therefore, the fifth respondent joins issue with the Trust in submitting that the agreement of sale and the rules of auction are applicable in this matter. The fifth respondent submits that he is entitled to keep its commission due to clause 9 of the rules of auction.

[24] Furthermore the fifth respondent relies on clause 8.5 of the agreement which reads as follows:

> "The auctioneer shall not be personally liable in consequence of any representation made by him or before the sale nor shall he be personally liable for breach of any warranty given by him, whether in regard to his authority to sell the property in question or in regard to the quantity, quality or condition of the property in question."

[25] The fifth respondent submits that clause 8.5 is an exclusionary clause necessitating the applicant to allege and to prove fraud on the part of the fifth respondent.

[26] The fifth respondent further argues that the applicant has failed to establish the requirements of fraud and referred to quite a number of decisions in that regard. In amplification of the argument the fifth respondent states that firstly, the applicant failed to establish that the representation was made to the applicant by the fifth respondent, secondly the content of that representation, thirdly that representation was untrue, fourthly that the fifth respondent knew that the representation was untrue and lastly, that the respondent intended for the applicant to act on that representation and that the respondent was in fact induced to act upon that representation which was made by the fifth respondent. The argument proffered by the fifth respondent is that there are disputes of fact that are insurmountable regarding the enforceability of the lease agreement but the applicant chose to proceed by way of application instead of action proceedings. The fifth respondent submits that even if it maybe assumed that the lease agreement was unenforceable, there is absolutely no way that the fifth respondent could have

known about the misrepresentation. That much, so argues the fifth respondent is confirmed by the deponent on behalf of the applicant in reply when he said:

> "I do not know whether the fifth respondent was aware that these representations were false. I would be surprised if the fifth respondent was not aware, specifically since Mr Shamley told Mr Galpin that Admirals did not believe that they are bound to the lease. I would also have expected the fifth respondent to ensure that their advertisements are in fact factually correct. I submit however that this does not matter. It is not necessary for the applicant to prove that both the trustees of the trust and the fifth respondent were aware of the falseness of the representations before the applicant can resile from the agreement and claim restitution." (Emphasis added)

[27] The fifth respondent further relies on the evidence of Mr Shamley whose affidavit reads in this regard:

> "It is indeed so that I did not inform the fifth respondent or its representatives that the Admirals may not continue with the lease. Mr Coutsourides must have misunderstood me."

[28] The fifth respondent argues that the applicant has failed to establish that the respondents acted fraudulently. Similarly, the applicant failed to prove that the fifth respondent knew about the falsity of the representations made in respect of the veranda, parking bays and undercover parking.

***The sixth and seventh respondents' case*:**

[29] Mr Van Rooyen on behalf of the sixth and seventh respondents in his supplementary heads of argument and in court argued that the matter should be referred to oral evidence due to the fact that there are material disputes of fact regarding the alleged fraudulent misrepresentations made by the sixth and the seventh respondents. He argued that one material fact the applicant must prove which remains in dispute is the alleged fraudulent intent with which certain facts were made or not disclosed. He argued that it is difficult on the papers as they stand to know whether the applicant has discharged the onus on which rest upon it. It would not be easy to establish, on the balance of probabilities, whether there is a dispute of fact without subjecting the parties to cross-examination. He submitted that in the present matter this court will only benefit from hearing *viva voce* evidence to determine the central issue of whether there was a non-disclosure whilst under a duty to speak and also whether such non-disclosure was calculated to mislead the applicant with fraudulent intent. Without going to the facts therefore the sixth and seventh respondents submitted that the matter should be referred to oral evidence.

***Fraud*:**

[30] In *Standard Bank vs Duplooy & Another; Standard Bank vs Coetzee & Another*[1] as referred to in *Courtney-Clarke vs Bassingthwaightee*[2] De Villiers CJ said the following about fraud:

> "There is no principle more clearly established in the administration of justice than that fraud must not only be alleged, but that it must be clearly and distinctly proved."

The principle as enunciated in the preceding quotation was cited, with approval, by the Supreme Court of Appeal in *AMI Forwarding (Pty) Ltd v Government of the Republic of South Africa (Department of Customs and Excise) and Another*.[3]

[31] The onus of proving fraud is on the applicant. Although the onus is the ordinary civil one, i.e. one that must be discharged on a balance of probabilities, one must bear in mind that fraud will not likely be inferred.[4] The essential requirements or allegations for a claim or defence based on fraud[5] are the following:

31.1 there must be a representation made by one party or his agent;

31.2 knowledge by the representor or the principal that representation is false;

31.3 that the representation induced the representee so to act;

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[1] 1899 (16) SC 161 at 166.
[2] 1991 [3] All SA 625 (Nm), 1991 (1) SA 684 (Nm) 689.
[3] [2010] 4 All SA 347 (SCA) at para [33].
[4] *Gilbey Distillers & Vintners Pty Ltd vs Morris NO* 1990 (2) SA 217 at 225J-226A.
[5] See also Harms LTC, *Amler's Precedents of Pleadings* 7 ed. LexisNexis, Durban .

31.4 the representee suffered damages as a result of the fraud.[6]

[32] Furthermore if reliance is placed on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It is essential to set out that the duty to disclose was deliberately breached in order to deceive.[7]

[33] The dispute of facts in this matter is massive and spreads across to all the issues raised. The issues are further clouded by the actions taken by the applicant pursuant to its discovery of the misrepresentations. The applicant, having discovered the fraudulent misrepresentations made by the Trust and the fifth to seventh respondents, at the initial stages of the agreement, decided to ignore them and elected to enforce the agreement. Even after the Trust had cancelled the agreement, whether correctly or incorrectly so, the applicant rejected the cancellation and elected to enforce the agreement intimating that it shall move for the reduction of the purchase price. As reflected in the facts above and the argument, the applicant was aware that the misrepresentations relied upon were vehemently disputed by the respondents even before launching these proceedings.

[34] The misrepresentation alleged by the applicant about the advertisement cannot be taken in isolation. It should be assessed in the light of the correspondence that was exchanged after the sale of the property. The respondents deny that they negligently or with intent misrepresented to the applicant that the property was anything other than what appears on the

[6] *Ibid* at 215.
[7] *Ibid* at 215-6.

adverts. The Trust argues that the property was indeed sold with lease agreements in place especially that which is between it and the Admirals. This should be viewed in the light of the insistence by the Trust that the lease agreement between it and Admirals is enforceable. The misrepresentation alleged by the applicant is a subject of factual dispute between the parties which cannot be resolved on the papers as appearing on the facts of this matter.

[35] There is also a massive dispute of fact as to whether the respondents made false representations to the applicant which induced it to act to its detriment. This find support from the argument of the respondents that immediately after the payment of the deposit the applicant knew about the problem of the lease agreement with the Admirals, that the Admirals were behind with their rental and never paid a deposit. But in spite of such knowledge, the applicant signed the deed of sale *(relative to such knowledge)* and elected to enforce the agreement. It cannot be readily ascertained that the applicant was induced by the representations made by the respondents in buying the property. This issue and others can only be resolved if oral evidence is heard.

[36] The alleged misrepresentation made and the circumstances under which they were made in respect of the advertisement and the lease agreement with the Admirals are intertwined. Mr Huisamen's supplementary heads of argument correctly and succinctly summarise the dispute of fact in respect of these issues as follows:

36.1 Whether or not the rules of auction were read out aloud by the auctioneers prior to the auction;

36.2 whether or not the applicant's representative read the rules of auction and conditions of sale prior to the auction;

36.3 whether or not the applicant knew what the status was of the Admirals' lease prior to the auction;

36.4 whether or not the cancellation of the agreement by the trust on 17 September 2013 was valid and enforceable;

36.5 whether or not the Trust's said cancellation of sale on 17 September 2013 constituted a repudiation of the agreement, as contended for by the applicant,

36.6 whether or not the applicant's cancellation of the agreement on 20 September 2013 was valid and enforceable;

36.7 whether or not the voetstoets clause contained in clause 8 of the agreement was valid and enforceable;

36.8 whether or not the trust is entitled to rely on the provisions of clause 9.1.2 of the agreement;

36.9 whether or not the trust has disputed the applicant's allegations of misrepresentation on the part of its representatives prior to the launching of the application;

36.10 whether or not the trust or any of its representatives committed fraud towards the applicant;

36.11 whether or not the trust endeavoured to hand over the occupation of the property to the applicant in terms of the agreement;

36.12 whether or not the Admirals' lease was binding and enforceable;

36.13 whether or not the applicant was in material breach of the agreement at the time of its purported cancellation thereof.

[37] In *Saoffiantim v Mould*[8] Prince JP correctly stated that:

> "It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the court can be harm strong and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavit."

[38] Dismissing the application instead of referring it to oral evidence shall not be a solution. That shall necessitate the applicant pursuing action proceedings. In terms of rule 6(5)(*g*) of the Uniform Rules, a court has a wide discretion with regard to referring matters to oral evidence where application proceedings cannot be properly decided by way of affidavit. An application to refer a matter to evidence should be made at the outset and not after argument on the merits. However, in certain circumstances (and exceptional cases), the court may decide that a matter should be referred to oral evidence even where no application for such referral had been made in the court below.[9] The Supreme Court of Appeal, in *Pahad*, held that:

> "it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits. As was stated by Corbett JA the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the

[8] 1956 (4) SA 150E at 154F.
[9] *Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA).

> general rule. But Corbett JA also stated that the rule is not inflexible. In *Du Plessis and another NNO v Rolfes Ltd* 1997 (2) SA 354 (SCA) this Court dealt with an application which was made for the first time during argument in this Court. The application was dismissed but it is implicit in the judgment that, in appropriate circumstances, this Court may decide that a matter should be referred to evidence even where no application for such referral had been made in the court below. It would naturally be in exceptional cases only that a court will depart from the general rule." (Cases cited omitted.)

[39] I am satisfied that this is an appropriate case for this Court to refer the matter for hearing. The dispute is massive and insurmountable to be resolved on the papers. The dispute of facts goes to the heart of the issues between the parties. I am further of the view that the applicant has not established the allegations of fraud on the papers and the matter should be referred to oral evidence.

Consequently, the following order shall issue:

1. The application is postponed to a date to be arranged between the parties and the Registrar for the hearing of oral evidence in terms of Rule 6(5)(g) of the Uniform Rules of Court (Rules of Court) for the determination of the relief claimed in the amended notice of motion;

2. If any of the parties wish to call a witness who has not filed an affidavit herein, a statement summarising the evidence to be given by such witness shall be filed by not later than 15 (fifteen) days before the hearing;

3. **Discovery of documents not forming part of the application papers shall take place in accordance with the provisions of the Rules of Court;**

4. **If either party wishes to call an expert witness, expert notices and summaries shall be filed in accordance with the provisions of the Rules of Court;**

5. **The costs of the application shall stand over for determination by the Court hearing the oral evidence;**

6. **The first, second and fourth respondents, on behalf of the Trust, will retain the amount of R390 000.00 in the interest bearing trust account of their attorneys, pending the outcome of the proceedings.**

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M MAKAULA

JUDGE OF THE HIGH COURT

***Appearances*:**

Applicant:	Adv Pienaar SC *instructed by* Schoeman Oosthuizen Inc 167 Cape Road **PORT ELIZABETH**
1ST, 2ND, 3RD & 4TH Respondents:	Adv Huisamen SC *instructed by* Rushmere Noach Inc 5 Ascot Office Park, Conyngham Street Greenacres **PORT ELIZABETH**
5TH Respondent:	Adv Williams *instructed by* P G Prinsloo Attorneys 157 Cape Road Mill Park **PORT ELIZABETH**
6TH & 7TH Respondents:	Adv Van Rooyen *instructed by* Jankelowitz & Schärges 41 Bird Street Central **PORT ELIZABETH**