



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 024/10

In the matter between:

SIM ROAD INVESTMENTS CC

Appellant

and

MORGAN AIR CARGO (PTY) LIMITED

Respondent

Neutral citation: *Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd*
(024/10) [2010] ZASCA 081 (27 May 2011)

Coram: Harms DP, Lewis, Bosiello, Seriti JJA and Petse AJA

Heard: 05 May 2011

Delivered: 27 May 2011

Summary: Sale of land – induced by fraudulent misrepresentation – effect thereof.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Murphy J sitting as a court of first instance).

The appeal is dismissed with costs.

JUDGMENT

BOSIELO JA (Harms DP, Lewis, Seriti JJA and Petse AJA concurring):

[1] The appellant, Sim Road Investments CC (Sim Road), was the owner of an agricultural holding known as plot (hoeve) 35 Pomona Estates, Pomona, Kempton Park. The respondent, Morgan Air Cargo (Pty) Ltd (Morgan Air), purchased the property at an auction on 17 May 2006 which was conducted by a firm of auctioneers (Venditor). Morgan Air paid at the fall of the hammer R200 000 as a deposit and R182 400 as the auctioneer's commission. Morgan Air subsequently instituted action against Sim Road for cancellation (or for confirmation of a cancellation) of the agreement and for repayment of the amounts paid to Sim Road and to Venditor. Morgan Air based its claim on fraudulent misrepresentation and, in the alternative, on mistake. The court below (Murphy J) gave judgment in favour of Morgan Air for the amounts claimed against the defendants respectively. Aggrieved by the judgment, Sim Road appealed to this court with the leave of the court below. The auctioneer, however, did not appeal.

[2] The facts of this matter have been set out in detail in the judgment of the court below. Consequently this judgment is confined to the evidence germane to this judgment.

[3] Sim Road mandated Venditor to sell the property by auction. Pursuant to this Venditor published advertisements in both the Rapport and Beeld newspapers for the sale of the property. The relevant part of the advertisements reads as follows:

‘KOMMERSIële EIENDOM – POMONA (2.2 HEKTAAR) Ligging: Hoewe 35, Pomona, Kempton Park. Verbeterings: Rondawel/Kantoor met afkortings – onvoltooid. Omhein met beton pallisade met 10 m skuifhek. Hierdie puik 2,2-hektaar-eindom is geleë in ’n baie gesogte gebied – bestem vir ligte industrie. Dienste beskikbaar. Voorwaardes: Deposito 10% + BTW. Koperskommissie 8% (plus BTW).’¹

[4] It is important to note at this early stage that the advertisement was false in two material respects. The property was not a commercial property – it was agricultural and the title deed stated specifically that it could be used for agricultural, horticultural or for breeding or keeping domestic animals, poultry or bees. The property was also not earmarked for light industrial use.

[5] Mr Morgan, who is one of the directors of Morgan Air, testified that Morgan Air carries on the business of chartering aircrafts for reward. In order to provide a better service to its customers it required property close to O R Tambo International Airport where it could build a warehouse. It already owned property near the airport. But as this property was zoned as agricultural land Morgan Air could not build any warehouse on it. When Morgan saw the advertisement in the

¹ The same typing format is not reproduced.

Rapport newspaper, he became interested in it because it was advertised as commercial property destined for light industry. As he knew the owner of Venditor, he telephoned him for confirmation of the auction sale.

[6] On 17 May 2006, Morgan, together with one Van Vuuren, attended the auction. Before the auction took place Morgan spoke to the auctioneer, Mr Koop Steyger. He told him that he intended to buy the property so that he could build a warehouse for his customers. He explained to Steyger that he had another property nearby which was not commercial property. Steyger did not tell Morgan that the property to be auctioned was agricultural and not commercial nor that it was not earmarked for light industrial use.

[7] Morgan Air, being the highest bidder, purchased the property for R2 million, signed a deed of sale and paid the deposit and auctioneer's commission. Morgan subsequently learned that the property was zoned agricultural and not commercial. (He learned also that it was not possible to have the property rezoned, but that is of no consequence to the matter.) As he had not intended to buy a property zoned agricultural, he immediately took steps to have the agreement rescinded and demanded repayment.

[8] Sim Road and the auctioneer did not accept the cancellation of the contract. They relied in this regard on the terms of the contract signed when the property was knocked down to Morgan Air. There was first a voetstoots clause in these terms:²

² We do not use the same typing format as used in the actual contract but the words are verbatim.

‘Die eiendom word voetstoots verkoop, soos dit tans is en die afslaer nog die verkoper gee enige waarborge ten opsigte van groottes, sigbare of verborge gebreke, kwaliteit of wettigheid van verbeterings of aktiwiteite wat daarop befryf word nie. Die eiendom word verder verkoop onderhewig aan al die voorwaardes en serwitute teen die titelakte geregistreer.’

Then there was a clause in which the purchaser acknowledged that he had not been influenced by any representations contained in advertisements and the like:

‘Die afslaer of verkoper is nie verplig om enige grense of bakens uit te wys nie, en enige beskrywing of inligting, hetsy in advertensies, katalogusse, brosiures of mondelings verskaf, word in goedertrou gedoen en die koper erken dat hy nie deur enige uitdruklike of stilswyende voorstellings tot die sluiting van hierdie kontrak beweeg is nie.’

Lastly, there was clause 18:

‘Die bepaling van hierdie document behels die gehele ooreenkoms tussen die partye en geen voorlegging gemaak deur of namens die partye sal bindend wees as dit nie skriftelik tot hierdie document gevoeg en deur die partye onderteken is nie.’

[9] In the light of these provisions, Morgan Air could not base its claim for rescission on an innocent or negligent misrepresentation and instead relied in its particulars of claim on the two alternative causes of action mentioned. First, it said that it was not bound by these clauses because of a fraudulent misrepresentation. In the alternative it relied on a unilateral iustus error brought about by the content of the advertisement. The court below, unwilling to find fraud, upheld the argument that the agreement was void because of a unilateral mistake induced by the advertisement, and made the order for repayment. As will appear in due course, the order was correctly made but for the wrong reasons. This case is not about mistake but about fraud. But in order to come to that conclusion it is necessary to deal with the evidence in more detail. And I intend to deal in conclusion with the conceptual error committed by the court below when dealing with mistake.

[10] Van Vuuren was Morgan Air's general manager at the time of the auction. His evidence accorded with that of Morgan and does not require any elaboration. Mr Johan Moolman (Moolman Jnr) testified for Sim Road. His father was the only member of the close corporation. As his father is visually impaired he assisted him with the auction of this property. Essentially Moolman Jnr said that his father had instructed Venditor to attend to the sale of the property. The person who was instructed is Ms Lehmacher who worked for Venditor Auctioneers as an agent. Moolman Snr had furnished Lehmacher with the particulars and description of the property. Moolman Jnr confirmed that the property was zoned agricultural and not commercial and that they knew this at the time.

[11] When confronted with the advertisements which were placed by Venditor and which described the property as commercial, Moolman Jnr disavowed any knowledge of such instructions. Importantly, he confirmed that he attended the auction where he saw many posters and flyers scattered around describing the property in the same terms.

[12] However, notwithstanding this observation, Moolman Jnr did not instruct Steyger when he met him that morning at the auction to do something to correct this patent misrepresentation. He only shook his hand. Moolman Jnr testified that instead he instructed Lehmacher to correct this error and announce to the prospective bidders that the property was zoned agricultural and not commercial. However, according to Moolman Jnr, it was Steyger, the auctioneer, who announced to the prospective bidders at the auction that the property was agricultural and not commercial. Not surprisingly, Moolman Jnr could not explain

why this crucial evidence was withheld and never put by his counsel to Morgan Air's witnesses for their comments whilst they were still testifying.

[13] Lehmacher, who was responsible for the advertisement, was called as a witness by Sim Road. Contrary to what Moolman Jnr stated, she testified that the information she used in the advertisements, in particular the word 'commercial', emanated from Moolman Snr. In support of this Lehmacher referred to a contemporaneous note of her telephone discussion with Moolman Snr on 17 April 2006 which reads:

'Karel. Erf 35 Pomona. Sim Road Invest CC.

....very popular area. 1-8/2.2 omhein met sementmuur. Soneer landbou / Kommersieel. Geoogmerk ligte industry. Nie water nie – dienste beskikbaar....Water aansluit – Karel Jacobus Moolman volspoed'.

Importantly she confirmed that the advertisements which appeared in the Rapport and Beeld newspapers were in accordance with these instructions from Moolman Snr.

[14] Lehmacher testified that she had discovered soon after they had obtained the title deed that the property was zoned agricultural and not commercial. This was before the auction. She conceded that notwithstanding this crucial discovery, Venditor did not issue another advertisement to correct this patent error. She could not recall that Moolman Jnr told her at the auction to make a public announcement to advise prospective bidders that the property was agricultural and not commercial.

[15] On the contrary, she testified that, during the course of the auction, she scribbled a note to Steyger with a request that he should make an announcement to the prospective bidders that the property was zoned agricultural and not commercial. Again, this evidence was never put to Morgan Air's witnesses. Most importantly, Steyger did not testify. (The significance of this failure will become clear later in the judgment.)

[16] It is clear from the evidence that Sim Road (through Moolman Snr, its sole member) knew that the representation was false and that both Moolman Jnr as well as Venditor knew it to have been false prior to the sale. The next issue was whether Morgan was informed before bidding that the land was not commercial.

[17] Moolman Jnr testified, as already mentioned, that after he discovered that the property was wrongly described as commercial and not agricultural, he instructed Lehmacher at the auction to make an announcement to correct this error. This is contradicted by Lehmacher (who testified rather late in the trial) that, of her own accord she asked Steyger to make an announcement to correct the wrong description of the property. Whilst testifying in chief, Moolman Jnr stated that, in responding to a question by one of the bidders at the auction regarding the zoning of the property, he stated that the property was zoned agricultural. Evidently there is a serious contradiction on this crucial aspect between the two witnesses for Sim Road.

[18] Notwithstanding this serious contradiction on a crucial aspect of the case, Steyger, who had been present in court during the trial, did not testify. This is

despite the fact that it was put to Morgan during cross-examination by counsel for Venditor that Steyger would testify that before the auction started one of the bidders asked a question regarding the zoning of the property and Steyger replied that it was agricultural property. One would have expected him to testify to shed light on whether any public announcement was made at the auction to correct the misrepresentation and if so, by whom. No explanation was tendered for his failure to testify which in itself justifies the inference that Steyger would not have confirmed that such an announcement was made. On the evidence presented on behalf of Sim Road, no such announcement was made. Accordingly, the false misrepresentation was left to stand uncontradicted.

[19] In any event, the probabilities are strongly in favour of Morgan Air that such announcement was not made within earshot of either Morgan or Van Vuuren. Morgan testified that if he knew that the property was agricultural and not commercial, he would not have purchased it. This is understandable as he could not build a warehouse on agricultural land. Furthermore, Morgan Air already owned nearby land which it could not use for commercial purposes. Why then would it buy another property zoned agricultural? The probabilities clearly indicate, and Morgan testified, that Morgan Air would not have bought the property had it known that it was zoned agricultural. It was thus induced by the misrepresentation to enter into the contract.

[20] Murphy J concluded that he could not find that the appellant acted with fraudulent intent. However, he found that Morgan Air was induced to purchase the property by a misrepresentation made negligently by Sim Road. He found that such

a mistake was about an essential attribute of the merx and that it induced the respondent to purchase something fundamentally different to what he intended to buy. He thus concluded that Morgan Air had reasonably made a material error allowing it to avoid the contract.

[21] It is true that any misrepresentation is likely to result in a mistake made by the person induced by it to enter into a contract. But that mistake might not be iustus and therefore actionable. If, however, the mistake is both reasonable and material, the contract might well be void.³ But in this matter mistake was not the primary basis of Morgan Air's claim that it was entitled to claim return of the moneys paid under it. Its claims were made on the basis of fraudulent misrepresentation. And the court below erred in finding that the contract was rendered void by the unilateral mistake of Morgan Air.

[22] It has been settled law for many decades that a material representation renders a contract voidable at the instance of the misrepresentee.⁴ Absent the voetstoots and exclusion clauses cited above, Morgan Air would have been entitled to ask for rescission and restitution even if the misrepresentation had been innocent.

[23] But liability for a misrepresentation made innocently and even negligently may be excluded by parties to a contract – hence the conjecture that Murphy J found that the misrepresentation had been made negligently and that it had resulted in iustus error that rendered the contract, including the exclusion clauses, void. As

³ *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2.

⁴ See R H Christie *The Law of Contract in South Africa* 5 ed (2006) at 286ff.

stated, however, a misrepresentation generally renders a contract voidable. The innocent party may elect to abide by it even where the other party has been fraudulent.⁵ The difference that fraud makes is that one cannot contract out of liability for fraudulent conduct.⁶

[24] And even where a misrepresentee has been foolish or negligent in relying on the fraudulent misrepresentation, that does not in any way affect the liability of the misrepresenter. In *Standard Credit Corporation Ltd v Naicker*⁷ Milne JP said it does not avail one guilty of fraud to say that the victim was negligent in believing the misrepresentation. He quoted from the judgment of Jessel MR in *Redgrave v Hurd*:⁸

‘If a man is induced to enter into a contract by a false misrepresentation, it is not sufficient answer for him to say “if you had used due diligence you would have found out that the statement was untrue”.’

[25] The high court, referring to the *Naicker* case, considered that Morgan Air’s mistake had been made reasonably in the circumstances, and that it was material since it went to an essential attribute of the property. The contract, it held, was thus void. Murphy J stated that since *Trollip v Jordaan*⁹ ‘our law appears to have taken a different turn by allowing perhaps less than fraud to avoid an exemption clause’. But that case dealt with mistake. Hoexter JA (for the majority) held that when an error in corpore renders a contract void, the whole contract, including exemption clauses, is void. Error is not ‘something less’ than fraud. It is something different,

⁵ See, for example, *Trotman v Edwick* 1951 (1) SA 443 (A) and *Ranger v Wykerd* 1977 (2) SA 976 (A).

⁶ *Wells v South African Alumenite Company* 1927 AD 69.

⁷ *Standard Credit Corporation Ltd v Naicker* 1987 (2) SA 49 (N) at 51B-E.

⁸ *Redgrave v Hurd* (1882) 51 LJ Ch 113 at 117.

⁹ *Trollip v Jordaan* 1961 (1) SA 238 (A).

because in the case of fraud the contract is voidable. Where there is a material and iustus error, on the other hand, the contract would be void. The other cases discussed by the high court, which dealt with mistake, have also not introduced any new approach.

[26] There is no doubt that the fraudulent misrepresentation made by the Moolmans and Lehmacher was material and that it directly induced Morgan Air, which was looking for a commercial property, to purchase Sim Road's property. The exclusion clauses in the contract signed by Morgan had no effect given the fraud. It follows that Morgan Air was entitled to rescind the agreement for the purchase of the property and to claim the moneys that it had paid as a deposit and as auctioneer's commission.

[27] The appeal is dismissed with costs.

LO Bosielo
Judge of Appeal

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