THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 216/2013

In the matter between:

SPENMAC (PTY) LTD (Formerly BOBCART (PTY) LTD **APPELLANT**

and

TATRIM CC **RESPONDENT**

Neutral citation: *Spenmac v Tatrim CC* (216/2013) [2014] ZASCA 48 (1 April 2014)

Coram: Mthiyane DP, Lewis, Shongwe, Petse JJA and Mocumie AJA

Heard: **28 February 2014**
Delivered: **1 April 2014**

Summary: Agreement of purchase and sale of unit in sectional title scheme ─ purchase made in the mistaken belief that sale included right of veto in respect of sub-division of other unit─ mistake induced by seller's misrepresentation ─ mistake precluding parties from reaching consensus ─ exemption clause not availing seller ─ purchaser entitled to avoid the contract ─ Entire contract vitiated by the mistake.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Goosen J sitting as court of first instance):

The appeal is dismissed with costs

JUDGMENT

Mthiyane DP (Lewis, Shongwe, Petse JJA and Mocumie AJA concurring):

[1] This is an appeal against a judgment and order of the Eastern Cape High Court, Port Elizabeth (Goosen J), setting aside an agreement of sale concluded between the appellant, Spenmac (Pty) Ltd, and the respondent, Tatrim CC, in respect of a sectional title property, Park Towers on 8 October 2010 and declaring it void for lack of consensus. The appellant (the defendant) was ordered to pay the respondent (the plaintiff) the sum of R788 157,89 together with interest at the rate of 15 per cent per annum a *tempore morae* to date of payment and costs of suit.

[2] The appeal to this court is with the leave of the high court. At the heart of the dispute between the parties is whether a misrepresentation on the part of the plaintiff's representative, Mr Spendley, at the time of the conclusion of the agreement, resulted in a fundamental mistake. If it did, the question is then whether the plaintiff purchaser was entitled to rely on the mistake to avoid the sale agreement, given the exemption clause in the contract which provided that the property was sold 'voetstoots' and that the purchaser had acknowledged that he

had not been induced to enter into the agreement by any express or implied information, statement, advertisement or representations made by any other person on behalf of the seller.

[3] The relevant clause reads as follows:

'14 VOETSTOOTS, EXTENT AND REPRESENTATIONS

14.1 The PROPERTY is sold "voetstoots" and subject to the terms and conditions and servitudes mentioned or referred to in the current and/or prior Title Deeds and to the conditions of establishment of the Township in which it is situated and to the zoning applied to it under the Town Planning Scheme. . . .

14.2 The PURCHASER hereby acknowledges that he has not been induced into entering into this agreement by any express or implied information, statement, advertisement or representation made by the AUCTIONEER or any other person, or by or on behalf of the SELLER. The PURCHASER hereby waives any rights whatsoever which he may otherwise have obtained against the SELLER as a result of such information, statement, advertisement or representation made by or on behalf of the SELLER.

14.3 The PURCHASER acknowledges that he has fully acquainted himself with the PROPERTY he has purchased.'

[4] The background facts are the following. During the latter half of 2010 a unit in a multi-storey building was offered for sale by the defendant. The unit (the property) comprised commercial premises, while the remainder of the scheme was residential. The plaintiff, represented by a Mr Joseph Thompson, made enquiries and submitted an offer to purchase. But his offer was rejected. Thereafter, on 30 September 2010, the defendant offered the property for sale by public auction. The plaintiff entered a bid at the auction but its bid was not accepted. Immediately after the auction the plaintiff made a further offer increasing the price offered to R10,5 million. On 8 October 2010 the plaintiff and the defendant entered into an agreement of sale in terms of which the plaintiff agreed to pay the sum of R10,5

million for the property. In terms of the agreement the plaintiff undertook to pay a deposit of five per cent of the purchase price (which it did) and would also be liable to pay the sum of R300 000 including Vat in respect of the auctioneer's commission at a later stage.

[5] The plaintiff alleged that the defendant's representative made certain representations which he knew to be false, and that these representations induced the plaintiff to enter into a contract. The plaintiff therefore sought cancellation of the agreement. In its plea the defendant denied that it made any representations at all. It, too, pleaded cancellation of the agreement by reason of the plaintiff's failure to effect payment and claimed retention of the deposit as unliquidated damages.

[6] The misconception upon which the plaintiff relies was pleaded in the following terms. It alleged that Spendley expressly represented, partly orally and partly in writing, that the remainder of the scheme (the residential parts of the building) consisted of only one unit, namely unit 2, and that in terms of Rule 27 of the Scheme Rules, it would not be possible for the owner of unit 2 to sub-divide it without the consent of the owner of unit 1. The plaintiff alleged that the written representation was contained in a brochure prepared and distributed by the auctioneers on behalf of the defendant. According to the brochure the scheme consisted of only two units. The plaintiff further alleged that the representations 'both oral and written' were false in that (a) during 2007 the defendant had, by resolution of the Trustees of the Body Corporate, granted permission to the owners of unit 2, Southern Palace Investment (Pty) Ltd to sub-divide the unit into 110 units, and (b) unit 2 had in fact been sub-divided into 110 units which sub-division was registered on 2 July 2010. Accordingly, the plaintiff alleged that the owner of

unit 1 did not enjoy the alleged right of veto contained in Rule 27 of the Scheme Rules as had been represented by the defendant.

[7] Rule 27 of the Scheme Rules provided as follows:

'No instrument signed on behalf of the Body Corporate shall be valid and binding unless it is signed by at least two trustees whereof one shall be a nominee of the owner or owners from time to time of section 1 (or any other sub-division thereof) of the Scheme.'

[8] It was common cause that Rule 27 conferred upon the owner of unit 1 an effective right of veto in respect of the sub-division of unit 2. The essential issue between the parties was whether it had been represented to the plaintiff that such right was extant or not: if not then the plaintiff would have bought something completely different from what it in fact was. In the alternative to its reliance on the alleged fraudulent misrepresentation, the plaintiff alleged that at all relevant times it was the continuing common intention of the parties that unit 1 be sold together with the right of veto to prevent any sub-division of unit 2. The plaintiff contended that at the time of the conclusion of the agreement it was, or should reasonably have been known to the defendant, that it had previously granted its consent to the sub-division of unit 2 and that accordingly the right of veto had been rendered nugatory. In these circumstances, so it was alleged, the defendant's representative, Spendley, was under a duty to speak and a failure to do so induced in the mind of the plaintiff a reasonable but mistaken belief that it purchased unit 1 together with the right of veto. There was accordingly no consensus between the parties, which entitled the plaintiff to avoid the agreement.

[9] The correspondence between the parties and the defendant's attorney revealed that in October 2007 the defendant (represented by Spendley) had

authorised the then owners of unit 2, Southern Palace Investments, to sub-divide it into 110 units and that unit 2 had, as a matter of fact, been sub-divided into 110 units by its present owner. What was in dispute was whether Spendley made any representation at all in respect of the sub-division of unit 2 and what effect the defendant's failure to disclose the sub-division had, given the defendant's assertion that Spendley had no knowledge of the fact of sub-division and no recollection of the October 2007 approval of the sub-division given by the defendant to Southern Palace Investments.

[10] Thompson, the sole member of the plaintiff, testified that in early 2010 the plaintiff wished to acquire commercial property for investment purposes. At the time he dealt with Mr Roger Venter who was a property agent. He was introduced to the Park Towers property and informed that it comprised two units. At the time he was given a set of the Scheme Rules as well as copies of several leases in respect of unit 2. After taking advice from certain of these associates he decided he was not interested in purchasing the property. He was particularly concerned about acquiring a building in which there were many units: having to deal with multiple owners did not make sound business sense. According to him, however, he was then contacted by Spendley, at some stage later in the year. When he informed Spendley that he was concerned about the sub-division of unit 2 Spendley informed him that he need not be concerned since the owner of unit 2 could not sub-divide without the consent of the owner of unit 1. He could accordingly veto any sub-division that the owner of unit 2 wished to make. Thompson stated that having satisfied himself with regard to the rental returns he could earn and having spoken to the financial director of the owner of unit 2 regarding the plans for the building he then, on 12 August 2010, submitted an offer which included a suspensive condition relating to a due diligent assessment.

[11] The price offered was R10,5 million of which R3 million was payable in cash and the balance of R7,5 million was to be secured by way of a mortgage bond This offer was, however, not accepted. The property was then placed on auction. The defendant published a brochure advertising the property for sale at the auction. At the auction the plaintiff made a bid of R9 million which was also not accepted. Following the auction the plaintiff and the defendant entered into further negotiations and arising from those, the agreement in question was concluded.

[12] The deed of sale records that the property was purchased as a rental enterprise and as a going concern. It included a clause in which the purchaser acknowledged that the property was subject to the rules and regulations of the Body Corporate which had been established in terms of the sectional title scheme and that the purchaser had read and familiarised himself with such rules and regulations. Thompson stated in his evidence that the plaintiff intended to finance the balance of the purchase price and to this end approached various banking institutions for loan finance, which was approved. The conveyancing documents were prepared by the defendant's attorney, Ms Tracy Watson. According to Thompson, after he had signed the documents necessary to take transfer of the property, he was informed by Watson that it had been discovered that unit 2 had in fact been sub-divided into 110 separate units, apparently in July 2010. Spendley, he was told, was not aware as to how this could have occurred. This disclosure resulted in an exchange of correspondence between Thompson and Watson. The upshot of this exchange was that the plaintiff indicated that it was resiling from the agreement.

[13] Spendley testified that in early 2010 Thompson had contacted him in response to an advertisement regarding the property to ask him for information

about it. As a result of this he dropped off certain documents in respect of tenants and the costs associated with the building at Thompson's office. On this occasion he had no discussion with Thompson regarding the property. Later that year in July, contrary to Thompson's evidence that Spendley had contacted him, he said Thompson had telephoned him indicating that the property had been introduced to him by an agent, Roger Venter. At that time Thompson inquired whether the property that was being offered was still the same property, and whether it comprised the same deal. Spendley confirmed that it was and further explained to Thompson why he considered it to be a good bargain. In this regard he explained that all tenancies in respect of unit 1 were secured, that the property was 100 per cent let and that the income stream was good. He also indicated that the Rules favoured the owner of unit 1. This, he said, related to the fact that in terms of the Rules, the levy payable by unit 1 was less than that payable by unit 2. Spendley testified that he had received this telephone call when he was at the Spar Supermarket and that there was no discussion about the sub-division of unit 2. Thereafter, Spendley said he had no further contact with Thompson directly. He also denied that Thompson had brought to his attention any concern about the division and therefore ownership of unit 2.

[14] Spendley testified further that during August 2010 the plaintiff submitted a written offer on the property. This offer was presented to him by Roger Venter. The offer was immediately rejected because it contained unacceptable suspensive conditions, in particular the due diligence investigation, relating to the property. Spendley's evidence was that he was not aware of the fact that unit 2 had been sub-divided and that he only became aware after the sale had been concluded and when Watson established that unit 2 had been so sub-divided. Upon enquiries being

made as to how this occurred he remembered that he had granted approval in October 2007 to the erstwhile owners of unit 2 to sub-divide that unit.

[15] Spendley explained that the previous owners, Southern Palace Investments (Pty) Ltd, had proposed the sub-division for purpose of selling off residential units as luxury apartments. The defendant had, on the strength of this, granted its consent to the sub-division. Southern Palace Investments, however, was thereafter liquidated in 2008 and unit 2 was sold to its present owners by public auction on 10 December 2008 (without reference to the defendant). It was established that the sub-division had proceeded during the course of 2010 without further reference to the defendant or the Body Corporate. Spendley stated that at the time of concluding the sale with the plaintiff he had completely forgotten about the approval that had been given in 2007.

[16] Spendley denied that there had ever been a discussion between himself and Thompson relating to the sub-division of unit 2. According to him the matter was not raised at all. However, the high court found that the correspondence relating to the discovery that unit 2 had in fact been sub-divided suggested that the issue had been raised prior to the plaintiff submitting its offer to purchase the property.

[17] Although the high court found that Thompson was not a particularly good witness it accepted his evidence. It found that much of his evidence was supported by the content of the correspondence which passed between him and Watson upon the discovery that unit 2 had already been sub-divided. Not only does the correspondence record his shock at this discovery (and indeed that of Spendley) it contains the clear assertion made at that time that the issue of the sub-division was particularly discussed, an assertion which was not placed in dispute by the

defendant in correspondence subsequent to that. The finding of the court in this regard cannot be faulted.

[18] The representation alleged by the plaintiff is not denied. It is also not denied that the question of sub-division of unit 2 formed part of the discussion between the parties. The brochures handed to the plaintiff reflected the scheme as comprising only two units. It was not in dispute that the defendant had, prior to the conclusion of the agreement of sale, represented that the scheme comprised two units.

[19] Having regard to the plaintiff's evidence and the exchange of correspondence once it was discovered that unit 2 had been subdivided into 110 units, the court below came to the conclusion that the plaintiff had, as contended, raised the possibility of sub-division as a concern prior to the conclusion of the sale. It also accepted that it was represented that the owner of unit 1 enjoyed a right of veto in respect of any future sub-division of unit 2, as provided in the Rules of the Scheme. The court rejected the evidence of Spendley where it differed from that of the plaintiff.

[20] The high court accepted, however, that Spendley had forgotten that he had signed the approval for the sub-division of unit 2. That is why he was shocked by the correspondence found by Watson which revealed that he had done so. Accordingly the court accepted that the fact of the sub-division was unknown to him at the time of concluding the agreement of sale with the plaintiff. The court accepted that since it had occurred in 2007 and had related to a proposal by Southern Palace Investments, prior to its liquidation, he had considered that the

intervening liquidation would have brought that to an end. Since Spendley had heard nothing further about the matter he had simply forgotten about it thereafter.

[21] The high court accordingly found that the defendant's misrepresentation in regard to the two units comprising the scheme, and the existence of an effective right of veto in respect of the proposed sub-division, had not been made intentionally. In the circumstances the court found that there was no scope for a finding that the plaintiff had established the requisites of fraudulent misrepresentation upon which its case, in the main, was based.

[22] The high court found, however, in favour of the plaintiff on the alternative basis upon which it sought to avoid the agreement of sale: that Thompson, as a result of the misrepresentation, had made a fundamental mistake as to the nature of the property that he was buying.

[23] For purposes of this appeal it is not necessary to enquire into whether the high court was correct in concluding that fraudulent misrepresentation on the part of Spendley had not been established. We are required to consider the effect of an innocent misrepresentation by Spendley on the agreement between the parties. Relying on *Trollip v Jordaan,*[1] counsel for the defendant submitted that the agreement of sale between the parties was not void because the misrepresentation by Spendley had been made innocently. In the *Jordaan* case the majority held that a contract of sale was not void as a result of an innocent misrepresentation that did not give rise to an error in corpore, and therefore that a non-misrepresentation clause contained therein applied, and precluded reliance on the misrepresentation.[2]

[1] *Trollip v Jordaan* 1961 (1) SA 238 (A) at 252G-H.
[2] At 254B.

In *Jordaan* the dispute turned on the effect of the misrepresentation: the majority said:[3]

'It is obvious that any actionable misrepresentation must have as its effect a mistaken belief on the part of the representee. If [the contract's 'no-representation' clauses] prevent the appellant from relying on any innocent misrepresentation, then they are equally effective in preventing him from relying on a mistake induced solely by that very misrepresentation.'

[24] A different approach was adopted by Howard J in *Allen v Sixteen Sterling Investments (Pty) Ltd*[4] where it was stated that an error *in corpore* caused by a misrepresentation, and which vitiated the consent to the contract concerned, rendered that contract void ab initio and therefore the representor could not rely on an exemption clause.[5]

[25] *Jordaan* did not consider that the mistake that had resulted from the misrepresentation was material. In *Allen*, on the other hand, the mistake clearly was material. Accordingly, a clause that excludes liability for misrepresentation will fall with the contract where the fundamental mistake that precludes consensus was induced by a misrepresentation, whether made innocently or not.[6]

[26] This court recently affirmed the principle enunciated by Howard J in the *Allen* case that where the misrepresentation results in a fundamental mistake, the 'contract is void ab initio'.[7] Cloete JA, writing for the majority, explained the rationale for the approach as follows:

'In this way, the law gives effect to the sound principle that a person, in signing a document, is taken to be bound by the ordinary meaning and effect of the words which appear over his or her

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[3] At 254D-E.
[4] *Allen v 16 Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D).
[5] *Allen* at 171B-F.
[6] D Hutchison & CJ Pretorius (eds) *et al The Law of Contract in South Africa* (2010) at 121.
[7] *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2.

signature, while at the same time, protecting such a person if he or she is under a justifiable misapprehension, caused by the other party who requires such signature, as to the effect of the document.'

[27] In the present matter the correct enquiry is whether the error has precluded the parties from reaching consensus ad idem and secondly, whether it is reasonable for the resiling party to labour under a misapprehension.[8] See *Morgan Air Cargo v Sim Road Investments & another*,[9] Murphy J noted in relation to the enquiry into whether an exemption clause is enforceable, that '. . . the emphasis has shifted from the nature of the fault element attending the misrepresentation to the nature and quality of the consensus vitiating error caused by the misrepresentation.'

[28] Academic writers[10] appear to be at one that a contract, including an exemption clause may fail for lack of consensus between the parties. In the *Allen* case[11] Howard J referred with approval to a comment by P M A Hunt on *Trollip v Jordaan*, which appeared in the *Annual Survey of South African Law*,[12] where the writer said the following in regard to the effect of an exemption clause:

'*Prima facie* it would seem that the vice taints consent to the whole contract, including the exemption clause. All the terms of the contract together regulate the contract's object, and it is difficult to see how the consent can but stand or fall as a whole. It seems impermissible to find a separate untainted consent to the exemption clause.'

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[8] *Goldberg & another v Carstens* 1997 (2) SA 854 (C) at 859B; R H Christie & G B Bradfield *Christie's The law of Contract in South Africa* (6 ed 2011) at 335.
[9] [2009] 4 All SA 249 (GNP) para 83.
[10] AJ Kerr *The Principles of the Law of Contract* (6 ed 2002) at 253; D Hutchison & C J Pretorius (eds) *et al The Law of Contract in South Africa* (2010) at 121; S W J van der Merwe, L F van Huyssteen, M F B Reinecke & G F Lubbe *Contract: General Principles* (4 ed 2012) at 258.
[11] At 171A.
[12] 1961 at 95.

Like Howard J, I can find no fault with the reasoning and understand the 'vice' referred to in the above passage to mean 'something in the nature of an essential error which vitiates consent and renders the contract void ab initio.'[13]

[29] It is against these principles that I turn to consider whether the exemption clause, quoted above, can avail the defendant. In the present matter the plaintiff's mistake, induced by the defendant's representative, Spendley, was as to the true nature of the merx and as such no consensus was established in concluding the contract. Both parties laboured under the mistaken belief that the unit in the building was one of only two. The plaintiff's mistake was, as the high court accepted, induced by the misrepresentation that there were only two units in the building and that the owner of unit 1 could veto the right of unit 2 to subdivide it. In these circumstances the parties were mutually mistaken as to the true nature of the merx and accordingly it cannot be said that the parties achieved consensus as to the subject matter of the sale.

[30] The fact that Spendley had forgotten about the resolution signed in 2007 approving the sub-division of unit 2 and that the misrepresentation was therefore not fraudulent makes no difference in the greater scheme of things. Regardless of the nature of the misrepresentation, the plaintiff concluded the agreement on the basis of a *justus* error and is accordingly bound on the basis of the principles set out in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as SONAREP (SA) (Pty) Ltd v Pappadogianis*.[14] Harms AJA explained the legal position as follows:

'In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a

[13] *Allen* at 171B.
[14] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239I-240B.

reasonable man, to believe that his declared intention represented his actual intention? Compare Corbin on *Contracts* (1 volume edition) (1952) at 157. To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby?

See also *Du Toit v Atkinson's Motors BPK* 1985 (2) SA 893 (A) at 906C-G; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316I-317B.

The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'

[31] In the present matter there can be no question that the plaintiff's representative, Thompson, was misled by Spendley's misrepresentation that the sectional title scheme comprised only two units, and the non-disclosure of the fact that the approval to the sub-division of unit 2 had been granted prior to the conclusion of the agreement of sale between the plaintiff and the defendant. The misrepresentation resulted in a reasonable and material mistake as to what the merx was. The contract was thus void from the outset. In the circumstances the appeal must fail.

[32] In the result, the following order is made:

The appeal is dismissed with costs.

K K Mthiyane
Deputy President

Appearances

For the Appellant:	A Beyleveld SC
	Instructed by:
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