IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
	DATE: 14 March 2016
	SIGNATURE: .....

APPEAL CASE NO.: A459/2015

CASE NO.: 42515/2011

In the matter between:

15/3/2016

DANIEL JOHANNES LOURENS Appellant

(Plaintiff *a quo*)

and

HUURKOR KOMMERSIEëL (PTY) LTD Respondent

(Defendant *a quo*)

JUDGMENT

JANSEN J

[1] This appeal came before us from the Pretoria Magistrate's Court. The appeal relates to a civil trial which was heard by magistrate D. Nair on 27 March 2015. The appellant appealed to this court. The appeal record was filed late but condonation was granted by the court based on the affidavits filed by the appellant's attorney of record. The application for condonation was not opposed.

The facts:

[2] A certain Mr Muller entered into a purchase agreement with an entity called Top Letting (Pty) Ltd ("**Top Letting**"), on behalf of the company Huurkor Kommersieël (Edms) Bpk ("**Huurkor**").

[3] The purchase agreement (in Afrikaans) described the assets of the business, Top Letting, as consisting of rental agreements and mandates as well as deposits and the rights and obligations thereto. (These were listed as part of Top Letting's business in an annex marked "A" to the lease agreement.) I pause to mention that this agreement was entered into whilst Top Letting was deregistered but that the court sanctioned this transaction on 18 December 2013. However, what was sanctioned was the following: —

> ***"Entering into and concluding an agreement with Daniel Johannes Lourens on 1 July 2010 ceding all outstanding debts due and payable to itself to Daniel Johannes Lourens as at the date of agreement as***

attached to the founding affidavit and marked as Annexure "A", and/or;

The decision made to ratify the last mentioned cession agreement by the only director of Top Letting (Pty) Ltd, namely Janene Desire Potgieter, attached to the founding affidavit and marked as Annexure "D" on 9 July 2012."

[4] Initially, Huurkor pleaded in a special plea that the plaintiff had no *locus standi* because the purchase agreement was entered into whilst Top Letting was deregistered. Given the court order referred to, this special plea was abandoned.

[5] The plaintiff, a certain Daniel Johannes Lourens, pleaded in his particulars of claim that Top Letting ceded all its rights arising from the purchase agreement to him, in terms of another agreement dated 1 July 2010. Although this allegation is admitted by the defendant, the admission is nonsensical.

[6] The only entity which could cede the outstanding debts in terms of the purchase agreement was Huurkor, the purchaser of the debts and not Top Letting, which had sold the debts to Huurkor. The right which Top Letting had retained was the payment of the amount of R20 000 to it by Huurkor. How Top Letting could have "resold" its rights in terms of the purchase agreement without the permission of Huurkor is wholly unclear. The so-called "cession

agreement" is also termed a "sale" and not a cession. The amount paid for the alleged "cession" by Mr Lourens, the plaintiff, was R100 00.

[7] What was "sold" to the plaintiff, Mr Lourens, was allegedly: "***...Die reg om alle uitstaande skulde van die verkoper in te vorder tot voordeel van die rekening van die Koper. Eindendomsreg in die riskio en voordele verbonde aan die uitstaande skulde gaan oor op die Koper op die datum waarop hierdie ooreenkoms deur die laaste party onderteken word.***"

[8] Given that Top Letting had already sold these rights to Huurkor, there was nothing for Mr Lourens to purchase. Furthermore, given the fact that this sale agreement dated 1 July 2010, does not state what all the outstanding "debts" of Top Letting are, it is wholly unclear what Mr Lourens allegedly purchased. There is no reference in this sale agreement to the agreement between Top Letting and Huurkor.

[9] Once this is so, no cause of action has been established by the appellant. On this basis alone, the appeal should fail.

[10] Should the above reasoning be inaccurate, an analysis of the facts demonstrates the following: —

[11] In terms of the purchase agreement between Top Letting and Huurkor the amount of R20 000 would be payable to Top Letting as follows, in terms of the agreement.

"R10 000 (Tien Duisend Rand) van die koopprys op die effektiewe datum by wyse van bankgewaarborgde tjek of elektroniese oordrag na die Verkoper se genomineerde rekening; en

R10 000.00 (Tien Duisend Rand) van die koopprys voor of op 30 September 2009 by wyse van bankgewaarborgde tjek of elektroniese oordrag na die Verkoper se genomineerde rekening.

Die partye kom ooreenkom dat die Koper geregtig sal wees om op 30 September 2009 sodanige bedrae af te trek van alle huurkontrakte wat uitgeloop het en wat die Koper nie meer adminstreer nie. Die formule wat gebruik sal word is die koopprys gedeel deur die aantal eenhede soos vermeld in Aanhangsel "A" hiertoe, beperk egter tot die maksimum bedrag van R10 000.00 (Tien Duisend Rand).

[12] The said agreement also contained the following clauses regarding "Guarantees" ("Waarborge").

Die Verkoper is die eienaar van die besigheid en bates soos uiteengesit in Aanhangsel "A" en geen ander en/of derde person het enige reg, titel en belang in die besigheid, bates van die besigheid nie en sal die Koper geen ander annspreeklikhede opdoen bo en behalwe die annspreeklikhede wat opgedoen word in die normale gang van die bedryf van die besigheid nie;

Daar geen sivielregtelike en/of strafregtelike litigasie hangende, dreigend en/of voorsienbaar teen die besigheid is nie;

Alle materiële informasie met betrekking tot die verkoop van die besigheid is aan die Koper geopenbaar en is die Verkoper onbewus van enige ander aangeleenthede en/of beperkings wat die normale bestuur van die besigheid kan beïnvloed;

Behalwe dié waarborge en voorstellings wat uitdruklik in hierdie ooreenkoms gegee of gemaak word, word geen waarborge of voorstellings gegee of gemaak, hetsy uitdruklik of geïmpliseer nie en word die besigheid dus voetstoots verkoop.

[13] Annex "A" to the agreement between Top Letting and Huurkor consisted of seven leases (or rather mandates to lease) of immovable property with deposits and one without a deposit, which were administered by Top Letting.

[14] What Lourens sought in the court *a quo* was specific performance of the agreement between Top Letting and Huurkor apparently on behalf of Top Letting. Huurkor's defence was that when the agreement was entered into, four of the mandates set out in annex "A" had already been cancelled and that Top Letting knew that four of the rental agreements had been cancelled. Huurkor did not specifically plead a misrepresentation – merely the facts stated and that it cancelled the agreement and did not owe Lourens anything.

[15] The court *a quo* held that Top Letting was guilty of a non-disclosure and misrepresentation and held that Huurkor was entitled to cancel the agreement. It bears mention that Huurkor made no payments whatsoever to Top Letting or Lourens. The court *a quo* held that the misrepresentation made by Top Letting was that the seven properties and lease agreements referred to in annex "A" had valid mandates in favour of Top Letting when the agreement was entered into. Huurkor's defence was that four of the mandates in respect of annex "A" properties had been cancelled. These properties were Parktown Mews; 764 French Drive, Moreleta Park; 753 Kromdraai, Faerie Glen and 64 President Street, Silverton.

[16] It was submitted that fraudulent misrepresentation was not a prerequisite. It was submitted that the misrepresentation had to be material. It was further submitted that if even only one mandate had been cancelled, such misrepresentation would be material.

[17] Reliance was placed on the matter of ***Pretorius v Natal South Sea Investment Trust Ltd*** **1965 (3) SA 410 (W)** at 418D–E which finds application: —

> ***"... involuntary reliance of the one party on the frank disclosure of certain facts necessarily lying within the exclusive knowledge of the other such that, in fair dealing, the former's right to have such information communicated to him would be mutually recognised by honest men in the circumstances."***

[18] The principle set out in the matter of ***McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C)** at 726A similarly finds application. Van Zyl J held that: —

> ***"... A negligent misrepresentation by way of an omission may occur in the form of non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.***
>
> ***Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act aforesaid.***
>
> ***Examples of a duty of this nature include the following:***
>
> ***A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of community."***

[19] Mr Lourens in the trial in the court *a quo,* relied heavily on clause 3.3 of the purchase agreement between Top Letting and Huurkor which provides as follows —

> ***"Die partye kom ooreen dat die koper geregtig sal wees op die 30ste September 2009 om sodanige bedrae af te trek van alle huurkontrakte wat uitgeloop het en wat die koper nie meer***

administreer nie. Die formulier wat gebruik sal word is die koopprys gedeel deur die anntal eenhede soos vermeld in Aanhangsel "A" hiertoe, beperk egter tot die maksimum bedrag van R10 000.00."

[20] Huurkor emphasised the phrase "huurkontrakte wat uitgeloop het", in other words, rental agreements which had expired through the effluxion of time and not rental agreements in respect of which mandates had been prematurely terminated. The evidence demonstrated that four rental agreements or mandates had not come to an end due to the effluxion of time by the 30th of September 2009.

[21] A further important issue raised during the trial was that it is important to keep in mind that it was the mandates to administer the rental agreements which were the assets of Top Letting, not the rental agreements. It should be borne in mind that what the agreement actually referred to was mandates to rent and deposits as the assets of the business.

[22] The status of the mandates as at 19 June 2009 was as follows: —

- 14 Parktown Mews, Mayville – mandate terminated on 17 June 2009; (a fact conceded by Mr Lourens);
- 764 French Drive, Moreleta Park –the mandate cancelled on 2 August 2009;
- 953 Kromdraai, Faerie Glen –the mandate cancelled on 23 June 2009 (from a letter it is clear that the administrator had already been informed two weeks before that no letting agent would be used in future);

- 641 President Street, Soweto, in respect of which evidence was led that the owner instructed attorneys to obtain a rental interdict against the tenant prior to 25 June 2009 (with other difficulties preceding this instruction).

[23] The status of the mandates was clearly unknown to Huurkor. The business of Top Letting had in any event already closed down on 28 May 2009, with the result that on 19 June 2009, when Top Letting sold the mandates to Huurkor, it had not taken any steps to ascertain which mandates were still in effect.

[24] From the above, it is clear that Huurkor would never have entered into the agreement had it been informed of the true state of affairs, which Top Letting had failed to do.

[25] Mr Lourens's argument was sophistic. He contended that the agreement contained a formula in paragraph 3.3 (as set out above) providing for a re-adjustment of the purchase prior in respect of rental agreements which had expired and were not administered by Top Letting on 30 September 2009. He emphasis the word "re-adjustment" in respect of the purchase price. In other words, these leases had to exist and be administered by Top Letting on 19 June 2009.

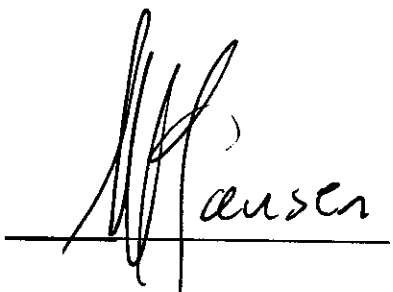
[26] That this is the case is emphasised by the fact that the formula that had to be used referred to the purchase price being divided by the property mandates set out in annex "A". The use of the term *"huurkontrakte wat uitgeloop het en wat die koper nie meer adminstreer nie"* has been referred to above. All these factors militate against Mr Lourens's interpretation of the argument.

CONCLUSION:

In the premises, the following order is proposed: -

Order

The appeal is dismissed, with costs.



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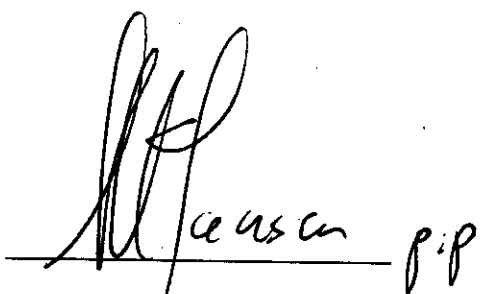
JUDGE OF THE HIGH COURT

I agree



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