THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 3762/2008

In the matter between:

KENNETH STEVEN RABSON	Plaintiff
and	
LANCE REAL ESTATE CC	1st Defendant
PHINDANA PROPERTIES 143 (PTY) LTD	2nd Defendant

JUDGMENT : 8 JUNE 2011

Koen, AJ

1. On 10 January 2005 the Plaintiff ("Mr Rabson") purchased Unit 703 in a sectional title scheme known as Atlantic Views from the second defendant ("the developer"). The unit

was sold off-plan, which is to say that at the time the agreement was concluded construction work had not yet commenced. The estate agent involved in introducing Mr Rabson to the developer was the first defendant. The first defendant's sole member was Mr Lance Cohen who represented the first defendant at all material times. I shall refer to the first defendant and Mr Cohen interchangeably in what follows as "the agent" unless the context requires me to be specific.

2. Mr Rabson alleges that prior to the conclusion of the sale the defendants represented to him that the price required by the developer was R3.9 million; that the unit had not been sold before and that he would be the first purchaser thereof; and that the unit represented an excellent investment which could be sold within a few months at a significant profit.

3. Mr Rabson alleges, further, that to the knowledge of both the agent and the developer these representations were false. In fact, he claimed, the price required by the developer was R3.1 million, and the property had earlier been sold to one Dr Lazard, a friend of the agent. He was thus not the first buyer.

4. Mr Rabson contends that he relied upon the alleged fraudulent misrepresentations, purchased the unit for a price of R3.9 million and paid transfer costs based on this amount. Had he known the true facts he would not have paid R3.9 million for the property but only R 3.1 million and transfer costs based on this amount.

5. In consequence of the misrepresentations and non-disclosures Mr Rabson alleges he has suffered damages. He claims payment in this action from the agent and the developer of the amount of R 800 000 being the difference between the amount he paid for unit 703 and the amount he would have paid had he known the true facts. He also seeks to recover the increased amount he paid in respect of transfer costs, this being R 3200. Mr Rabson also claimed the increased costs of registering a mortgage bond of R 2400, but this claim was not pursued. Finally, Mr Rabson claims interest on the increased amount of R 800 000 he paid for the unit in respect of a mortgage bond he registered over the unit to finance the purchase. This amounts to R 161 819.69.

6. Mr Rabson is a successful businessman who was interested in purchasing immovable property on the Atlantic seaboard for investment purposes. He considered that the greatest potential for profit lay in purchasing properties off-plan, directly from a developer, and on-selling later. Although he lived in Johannesburg he travelled to the Cape regularly, particularly over the year end holiday period. During the 2004/2005 year end holidays he was in Cape Town, and he purchased more than one Atlantic Seaboard property during this time, spending a considerable amount of money.

7. Around the beginning of October 2004 the scheme known as Atlantic Views came on to the market. The developer appointed the agent as his sole agent for all of the units in the scheme. The mandate given by the developer to the agent was an oral one. The developer prepared a brochure which was made available to the agent for use in

marketing the units. The brochure given by the developer to the agent included a "Price List", dated 1 October 2004, which reflected the price for unit 703 as R 3.1 million.

8. Mr Rabson testified that he met the agent around the beginning of January 2005. He enquired after unit 703, going to some lengths to establish that the unit was being sold by the developer, off-plan, and that he was the first purchaser to buy directly from the developer. The agent gave him the necessary assurances in this respect, and even stated that the fact that the developer would countersign the written agreement of sale would demonstrate that he was the first buyer. The last mentioned aspect of Mr Rabson's evidence was not challenged in cross-examination by counsel for the agent.

9. In truth, however, and this was also common cause, unit 703 had been sold to Dr Lazard by the developer on 2 November 2004, that is, before the sale to Mr Rabson was concluded. What became of this sale was controversial, however. The agent testified that that agreement was cancelled before the sale to Mr Rabson was concluded. Dr Lazard gave evidence to the same effect.

10. I have no hesitation in rejecting both of their evidence in this regard. It is quite apparent from each and every relevant document which came into being after the sale to Mr Rabson was concluded, that the developer, the agent and Dr Lazard considered the sale to Dr Lazard to be extant. Not a shred of the documentary evidence referred to by the parties points the other way. It is unnecessary to go into detail. It is more than clear from the conveyancer's file that during March 2005 Dr Lazard was engaged in obtaining guarantees for payment of the price of the unit, that he furnished his FICA documents to

the conveyancer, and that he had telephone discussions with the conveyancer about the transfer. He would not have acted in this manner had he believed that his agreement was no longer in force. It is also quite clear from the documents that the agent advised the conveyancer that Dr Lazard had "re-sold" the unit to Mr Rabson. Indeed, as late as 7 April 2005 the agent wrote to the conveyancer referring to the purchase of the unit by Mr Rabson from Dr Lazard. Although it was common cause that there had been no re-sale, and that the agent's letter regarding a re-sale to Mr Rabson was wrong, this letter written by the agent controverts the suggestion that the sale to Dr Lazard had been cancelled prior to 10 January 2005.

11. The agent sought to explain much of the documentation which evidenced the existence of a valid agreement of sale between Dr Lazard and the developer as the perpetuation of an innocent mistake on his part. Again, I have no hesitation in rejecting his explanation. That Dr Lazard was in contact with the developer's conveyancer during March 2005 in regard to the transfer to him of unit 703 is evidenced by a number of documents, including notes on the conveyancing file cover. There can be no doubt, in my view, that until the beginning of April 2005 both Dr Lazard and the developer believed that the sale to Dr Lazard was binding and valid. Every probability points that way. This being so, the agent did not make a mistake in producing documentation which evidenced the existence of a valid agreement between Dr Lazard and the developer. Instead, the agent's communications with the conveyancer simply go to reinforce the overwhelming probability that the sale to Dr Lazard of unit 703 was regarded by all to be valid and binding. The was plainly a sale to Dr Lazard, and it was

regarded by Dr Lazard, the agent and the developer to be valid and binding for months after the sale to Mr Rabson had been concluded.

12. No evidence was led on behalf of the developer. How it came about that unit 703 was the subject of parallel valid sales was not explained. For reasons to which I was not made privy Dr Lazard chose not to enforce his rights under the agreement. Fortunately, this is not a matter which has any bearing on the case.

13. It is necessary, at this stage, to observe that both the agent and Dr Lazard were unimpressive witnesses. Both were evasive in regard to anything controversial. Both refused to make concessions were these were plainly called for. Under cross examination both were aggressive, recalcitrant and unhelpful. And in the face of documentary evidence which controverted their versions squarely both clung intractably to untenable positions. The conclusion that they did not take the Court into their confidence is, regrettably, inescapable.

14. On the other hand Mr Rabson gave his evidence clearly, rationally and thoughtfully. He made concessions were these were necessary. He did not attempt to evade questions under cross examination. He impressed me as being a person of high intelligence and honesty. Where his evidence conflicts with the evidence of the agent, or Dr Lazard, I unhesitatingly accept his.

15. Mr Rabson testified that he considered that the greatest potential for realising a profit on the property lay in him purchasing directly from the developer and thus being the "first" purchaser (the financial wisdom of his approach is borne out by the fact that within months

of the developer having sold unit 703 to Dr Lazard for R3.1 million, it was sold to Mr Rabson for R3.9 million). He did not want to hold on to the unit for any length of time but to buy it, and sell it, within a short space for a profit. The fact that unit 703 was almost immediately placed on the market after Mr Rabson took transfer underscores his intentions in this regard.

16. The agent accepted that Mr Rabson wished to be assured that he was buying directly from the developer, indeed the agent said as much in his evidence. What was in dispute was whether Mr Rabson had stated that he wished to be the first buyer.

17. Mr Rabson testified that he explained to the agent that he wished to be the first buyer. I accept his evidence in this respect as it is coherent with his objective in purchasing investment property, and it is coherent with the notion of purchasing an off-plan sectional title unit directly from the developer with a view to turning a quick profit. But even if I were to accept only the evidence of the agent in this regard the result would not differ. The agent's case was that because the sale to Dr Lazard had been cancelled, Mr Rabson did buy directly from the developer. This approach puts an artificial gloss on the events. The agent accepted that Mr Rabson wished to be assured that he was buying directly from the developer. The agent could not for a moment have thought that it was this fact, without more, which was important to Mr Rabson. The agent must have known that Mr Rabson meant only one thing, namely that he wished to buy from the developer, off-plan, which by definition would make him the first purchaser.

18. In my view Mr Rabson has established on the probabilities that he conveyed to the agent that he wished to buy directly from the developer, and that he wished to be the first purchaser. It is common cause that he was not the first purchaser - Dr Lazard was. And it is common cause that this fact was concealed from him by the agent, notwithstanding the obvious relevance and import of the question.

19. There is no dispute about the fact that the developer required a price of R 3.1 million for the unit. This is what his price list stated and this is the amount he actually received. The balance of R 800 000 landed up in the hands of the agent. This unusual state of affairs came about, according to the agent, as a result of an agreement he concluded with the developer shortly after the sale to Dr Lazard had been cancelled, and shortly before the sale to Mr Rabson was concluded.

20. The agent testified that Mr Rabson wanted to know what the "asking price" for unit 703 was. Only one person could have been asking a price, namely the developer. I must accept that the developer knew that Mr Rabson offered R 3.9 million for unit 703. I must also accept that he had agreed that the agent could retain the amount of R 800 000. Unusual as it may be I do not think that there is any legal impropriety in concluding such an agreement. But I do not think that the terms of this agreement this have any bearing on the matter. The fact that the developer agreed to permit the agent to exact an additional amount which he could keep does not change the fact that the asking price or price required by the developer was R 3.1 million. When Mr Rabson enquired after the asking price it is obvious, in my view, that he wanted to know what price the developer was asking for the unit, and not what

price the agent was asking. A straight question deserves a straight answer. The straight and truthful answer to this question was R 3.1 million. Had the agent not removed the price list from the brochure given to him by the developer this would have been immediately apparent. But this is not what the agent told him. The agent added an additional sum, the extent of which was then unknown to the developer, to the price in order to create the false impression that the developer's asking price was R 3.9 million.

21. I am satisfied that the agent understood the import of the assurances Mr Rabson requested prior to making his offer in respect of unit 703. I am similarly satisfied that the agent did not honestly believe, when he advised Mr Rabson that he was buying directly from the developer (the clear implication being that there had been no prior purchasers), and when he advised Mr Rabson that the "asking price" was R 3.9 million, that those statements were true. But even if I am wrong it seems to me that the latent ambiguity in those statements gave rise to a duty to make a full and honest disclosure to Mr Rabson of the sale to Dr Lazard for R3.1 million, at the very least, and of the special arrangement he had made with the developer in terms of which he was entitled to retain any amount in excess of R 3.1 million. It is clear from the evidence that he chose to remain silent, and to conceal from Mr Rabson the full answer to the questions he had asked.

22. There is no doubt that both misrepresentations were material and that Mr Rabson was induced by them into contracting. On this score neither defendant contended otherwise. It follows that I find that the agent induced Mr Rabson to contract by the fraudulent

misrepresentations adverted to above, and that it is liable in delict to Mr Rabson for damages.

23. Mr Rabson could tender no evidence of any complicity on the part of the developer in the fraudulent misrepresentations made by the agent to him. The question which thus arises is whether the developer can be held vicariously liable for the delict of the agent.

24. Mr Du Toit, for the developer, contended that an estate agent is not really an agent, at least in the sense that he or she is not authorised to perform a juristic act on behalf of his or her principal[1]. Relying on *Eksteen v Van Schalkwyk*[2] counsel submitted that the agent was at best a mandatary, and that vicarious liability does not find application in the relationship of mandate.

25. *Eksteen* was a case involving the liability of a client for the delict of his attorney. In that case the court, after reviewing the authorities, concluded that the client had not instructed the attorney to address the offending defamatory letter to the Plaintiff, and could thus not be held liable.

26. *Eksteen* is entirely different to the case before me. This court, per Marais AJ (as he then was), held in *Davidson v Bonafede*[3] that a seller is liable for damages flowing from the misrepresentations of an estate agent. In that case it was not held that the

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[1] Counsel referred to *LAWSA* (2nd ed) Vol 1 paras 175 to 176; Van Der Merwe et al: *Contract General Principles* (3rd ed) p 253 – 254; *Eksteen v Van Schalkwyk* 1991 (2) SA 39 (T) at 45 C-D; *Gluckman v Landau & Co* 1944 TPD 261; *Bird v Sumerville* 1960 (4) SA 395 (N) at 410 C-D.

[2] 1991 (2) SA 39 (T) at 410 C-D.

[3] 1981 (2) SA 501 (C) at 504 B-C

misrepresentations were fraudulently made, but that they were made *"recklessly, careless as to whether they were true or false"*[4]. I do not think that anything turns on this. Our law treats deliberately made untrue misrepresentations and misrepresentations made recklessly without care as to whether they are true or false in the same manner[5].

27. *Davidson* was approved of by the Supreme Court of Appeal in *Odendaal v Ferraris*.[6] That case concerned (allegedly) fraudulent misrepresentations. In Odendaal the following was said: *"..an estate agent's misrepresentation in the course of executing her mandate binds a seller, whether or not the seller is aware that it was made."*[7]

28. In my view it is therefore our law that the developer is liable for damages flowing from the fraudulent misrepresentations of the agent.

29. What remains for consideration is the determination of the amount of the damages proved by Mr Rabson. Mr Rabson claims the difference between the amount he was induced to pay by virtue of the fraudulent misrepresentation, and the price he would have paid had the fraud not been perpetrated upon him. In the circumstances of this case I have little doubt that this is an appropriate measure of damages.

30. Mr Rabson also claims the additional transfer costs he was obliged to pay in terms of the sale agreement. Transfer costs are based on the purchase price. Because this was R 800

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[4] At 503 E
[5] Du Bois, *Wille's Principles of South African Law*, 9th ed at 776 – 777.
[6] [2008] 4 All SA 529 (SCA)
[7] Paragraph 30

000 more he was thus obliged to pay an additional amount of R 3200. In my view this amount forms part of his damages and he is entitled to recover it.

31. I take a different view, however, when it comes to the additional interest Mr Rabson paid, because he chose to finance the purchase by way of a mortgage bond. This amount was calculated to be R 161 899.69. The agreement of sale did not provide for the financing of the purchase price by way of a mortgage bond and there was no evidence led by Mr Rabson to suggest that the defendants could reasonably have foreseen that the purchase price was to be financed by way of a mortgage loan. I do not consider, therefore, that Mr Rabson is entitled to recover the amount of additional mortgage interest he paid.

32. Two further matters require attention. Firstly, Mr Rabson claims payment of interest on the damages claimed by him from date of demand, namely, 7 December 2007, alternatively, from the date of service of the summons. In my view the damages are sufficiently liquidated for the general rule to be applicable. The general rule is that interest is payable on an amount owed by a debtor from the moment he or she is in *mora*. The demand addressed to both defendants required payment of, inter alia, the amounts owed by the defendants to Mr Rabson from 31 December 2007. It seems to me that this is the date from which interest ought to run. Secondly, there is no good reason in my view why costs should not follow the result. In this regard Mr Rabson is declared a necessary witness. Mr Rabson also sought an order that any costs should include the qualifying expenses of Mr Margolius, a witness in respect of whom a notice in terms of

Rule 36 (9) was filed. I do not think that opinion evidence given by Mr Margolius, such as it was, contributed to the resolution of the issues in this case, and I do not think that it would be fair to order the defendants to pay the qualifying expenses of Mr Margolius.

33. In the circumstances I make the following order:

1. Judgment is granted in favour of the Plaintiff against the Defendants, jointly and severally, for:
    a. payment of the sum of R 803 200;
    b. interest at the prescribed legal rate on this amount from 31 December 2007 to date of payment;
    c. costs of suit;
2. the Plaintiff is declared to be a necessary witness.

S. J. Koen AJ