REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 19749/12

In the matter between:

WILLEM MOTTEL	**First Applicant**
BETTA MOTTEL	**Second Applicant**
CALVIN APRIL	**Third Applicant**
JULIANA APRIL	**Fourth Applicant**

and

ALTMARR PROPERTIES	**First Respondent**
MARSHALL SKEI	**Second Respondent**
JAMES JACOBUS HAGAN	**Third Respondent**
LEVONA THERESA HAGAN	**Fourth Respondent**

STANDARD BANK LIMITED	**Fifth Respondent**
ABSA BANK LIMITED	**Sixth Respondent**
THE REGISTRAR OF DEEDS	**Seventh Respondent**

Heard: 9 May 2013

JUDGMENT

DELIVERED: 20 JUNE 2013

SAVAGE AJ:

Introduction

[1] In this application the applicants seek to have two deeds of sale entered into with the third and fourth respondents, the subsequent transfer of their immovable properties to the third and fourth respondents and the lease agreements entered into in respect of such properties declared null and void *ab initio*. Pending the outcome of the current application, eviction proceedings instituted by the third and fourth respondents against the applicants were stayed by order of this Court.

[2] At the outset of the matter the applicants argued that certain disputes of fact existed on the papers which warranted the referral of the matter to oral evidence. I was not satisfied that a referral to oral evidence was required in the matter and the application was refused. The matter was accordingly considered with due regard to the decision of Corbett JA in *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635D.

Material facts

[3] The material facts are as follows. The applicants, Willem and Betta Mottel ("the Mottels") and Calvin and Juliana April ("the Aprils"), responded to the following advertisement that had been placed in the *Son* newspaper:

> **SKULD-KONSOLIDERINGS PLAN**
> Gee skuld u slapelose nagte?
> Besit u eie huis?
> - Tweede Verbande
> - Agterstallig met u verband?
> - Gaan huis op veiling?
> - Naam op swartlys?
> - Agterstallig met kredietkaarte?
>
> Skakel Marshall
> Tel: 021-903 7999/8999
> Fax: 021 903 9998 Cell: 082743 4688

[4] Both couples were in financial difficulty and had fallen into arrears in respect to their debts. The Mottels were unable to repay their debts after the retirement of the first applicant. They owned the house in which they lived for many years at 23 Cupido Cloete East Street, Eersterivier in respect of which they had an outstanding loan of R145 000 with Standard Bank and other debts of R66 000. The Aprils had a bond registered over their property at 19 Swawel Street, Macassar in favour of First National Bank for a loan amount of R80 000. During January 2009 the Aprilshad debts of R68 000, with R6500 outstanding on their bond.

[5] In response to the advertisement, the Mottels and the Aprils met separately withthe second respondent, Mr Marshall Skei ("Skei"), the sole proprietor of Altmarr Properties, whose name and contact details appeared in

the advertisement. Skei has since 1999 been registered as an estate agent but is not a registered debt counsellor.

[6] After theirmeeting with Skei, the Mottels followed him to the offices of Kruger Slabber Esterhuyse ("KSE") attorneys where on 2 May 2009 they signed a sale agreement in favour of James and Levona Hagan ("the Hagans") in terms of which they agreed to sell their property to the Hagans for R418 000. The Hagans had signed this sale agreement on 1 May 2009. In terms of clause 7 of this agreement all transfer costs were to be paid by the purchaser. After signature, the Mottels accompanied Skei to Nedbank where he provided them with R20 000, being the only monies they received from him in respect of the transaction.

[7] On 6 May 2009, after signature of the offer to purchase bythe Mottels they signed the following document in favour of Skei:

> **ALTMARR PROPERTIES**
>
> **REHABILITATION OF FINANCIAL CREDIBILITY**
>
> MANDATE
>
> PLEASE NOTE THE FOLLOWING:
>
> 1. The loan amount approved in principle is based on information supplied by yourself-the valuation by the financial institution will confirm the value of your property and will be accepted as the true and correct value.
> 2. Costs as set out below is NOT payable upfront. This is deducted from the proceeds secured in the selling of the property to an investor (hereinafter referred to as "the nominee").
> 3. The seller must repurchase the property from the nominee within eight months once their financial credibility has been restored. If the seller does not qualify for a bond to repurchase the property (because the seller made more debt after signing this agreement or for any other reason), then Altmarr Properties and the nominee will give the seller 2 (TWO) months written notice of the intention to sell the property privately to the open market and also when the seller must vacate the property. If

the property is not sold after the 2 (TWO) months period and the seller is still in the property then the seller will pay occupational interest (monthly in advance) in the amount of R3750 directly to Altmarr. This will be on a month to month basis until the property is sold.

4. Altmarr Properties has requested the nominee to purchase the property and obtain a mortgage bond from the bank the amount of R 275 000
5. Altmarr Properties will arrange for the seller to repurchase the property from the nominee at the agreed price of R296 000
6. The seller agrees that they will sign a Deed of Sale and sign all necessary documents when so requested by Altmarr Properties in order to affect the repurchase of the property from the nominee.
7. The Seller will sign a 8 month's lease agreement with the nominee.
8. The rent is R 3750 for the period paid in advance to cover the bond of the nominee.
9. The seller authorises the attorneys as appointed by Altmarr Properties to attend to the transfers, to make payments of all accounts as discussed with seller to consolidate and settle debt to clear our names with the Credit Bureaus (defaults and judgments) as well as all fees commission and cost to Altmarr Properties. Also the full balance of the purchase price must be paid to Altmarr Properties by the attorney. We hereby authorise the attorney to make such payments and indemnify the attorney against any claims that may arise from making these payments.
10. No costs will be payable should the loan be declined for any reason whatsoever.
11. This irrevocable Sole Mandate shall be binding from date of signature.

UNDERTAKING:

I/We, the undersigned accept the aforementioned transaction and confer a sole mandate on Altmarr Properties to proceed with the rehabilitation of my/our financial credibility.
I/We the undersigned owners, hereby grant Altmarr Properties permission to obtain outstanding balances on our accounts with the Bank regarding our mortgage bond, personal Bank and Credit Bureaus to render this information to Altmarr Properties forthwith.
I/We hereby agree to pay Altmarr Properties the aforementioned fees on signing of documents R58900
I/We herewith grant Altmarr Properties permission to apply at my existing Bank any other bank or financial institution willing to grant a bond to me/us after our financial credibility has been restored.

[8] Power of attorney to pass transfer was granted in favour of KSE Attorneys by the Mottels apparently on 28 May 2009 at Tyger Valley with the instruction to pass transfer signed on the same date.

[9] The Aprils signed similar agreements. Following their meeting with Skei in February 2009, they followed Skei to KSE attorneys and signed asale agreement in respect of their house in favour of the Hagans in the amount of R394 000 before Skei took them to Nedbank where he handed them R25 000 as an ‘advance’.

[10] On 19 February 2009 the Aprilssigned the same ‘Rehabilitation of Financial Credibility Mandate’ that had been signed by the Mottels on 6 May 2009. Also on 19 February 2009, a lease agreement with the Hagans was signed by the Aprils in terms of which the lease period commenced on 1 June 2009 for a period of eight months terminating on 28 February 2010, with a rental amount agreed with R3750.

[11] On 1 August 2009 a similar lease agreement was entered into between the Hagans and the Mottels for the period until 31 May 2010 with rental of R4534 for the period paid in advance. Both the Mottels and April stated that they paid monthly amounts of R3900 and R3200 respectively, understanding that these payments were to settle their debts.

[12] Repeated attempts by the Mottels to contact Skei after eight months were unsuccessful. By September/October 2010 the Mottels realised that their monthly payments had exceeded their outstanding debts. The Aprils found Skei to be evasive after the eight-month period had elapsed. In September 2010 the Aprils found their municipal account in their post-box addressed to Mr Hagan at the Mottels address. They visited the Mottels, who they previously did not know,

and after discussion with them concluded that they had been victims of a fraudulent scheme.

[13] Mr Francois Kruger, an attorney, previously of KSE attorneys met with the Mottels on 28 May 2009 and the Aprils on 13 March 2009 to sign the necessary documents to effect transfer of the properties. He was led "*to believe that Altmarr Properties would consolidate the Applicants debts and pay same with the proceeds from the sale*". Both applicants asked for an advance of their profit and bridging forms were signed by the applicants. He confirmed that the Mottels took an advance of R20 000 and the Aprils took in advance of R 25 000. The Aprils were later contacted and asked to sign a consent form accepting liability for the cost of the bond and transfer of registration. It was not clear whether the same occurred in respect of the Mottels. The amount of agents' commission payable was not recorded in the document put up by Mr Kruger.

[14] In a *pro forma* statement from KSE attorneys dated 17 July 2009 in respect of the Mottels' transfer, the sale price of R418 000 was recorded against which the following amounts were debited:

Cancellation costs	R	1384.00
Cancellation amount	R	145477.65
Agents commission	R	54 900.00
Rates	R	8452.00
Interest on rates	R	709.80
Deposit ito Addendum	R	62 700.00
Advance plus interest	R	21 960.00
Transfer costs	R	9894.00
Bond costs	R	8532.00
Administration fee	R	912.00
Cheque to yourself	R	103 078.55

[15] The “cheque to yourself” of R103 078.55 was paid to Altmarr Roofing. Skei states that payment was made to him in terms of the agreement between the Mottels and himself to settle their debts.

[16] A similar *pro forma* invoice was prepared by KSE attorneys in respect of the April transfer. The Aprils’ house was sold for R394 000. Their debts at the outset amounted to R59 569.00 before inclusion of eight monthly rent instalments of R4535.00 per month totalling R36 272.00; and they were charged for seven debt clearances at R2600 each totalling R18 200. The cheque paid to Skei was in the amount of R173 680.60 apparently to settle debts of R122 204.21. It was accordingly recorded that they received payment of R173 680.60 less an advance of R 29 500. The balance of R3276.39 was to be paid to the Aprils on registration of transfer of the property.

[17] Ownership of both properties was transferred to the Hagans.

[18] In his affidavit Skei indicated that the Mottels and the Aprils agreed that a loan amount would be approved in principle and that their property would be sold to an investor for a rehabilitation period of eight months, following which they could repurchase their property in eight months once their financial credibility had been restored. Skei would then assist them in applyingfor a mortgage bond on their behalf. A mandate was given to Altmarr Properties to proceed with the rehabilitation of their financial credibility, taking control of their debts in a financial rehabilitation process. After the eight-month period had elapsed, bond applications were submitted by Skei on behalf of the Aprils to

Nedbank and Capitec without success. No similar applications were made by Skei on behalf of the Mottels.

[19] In their answering affidavits the Hagans stated that they met Skei at church between 1998 and 2000. He informed them that he operated a business as an estate agent and helped individuals who had fallen on hard times to deal with debt by selling their houses. Skei indicated that his clients were all government employees and that they were provided with a period of eight months to raise funds to buy their houses back once their debts had been discharged.The Hagans were compensated R10 000 or R15 000 by Skei per transaction for the “trouble” so as to make it attractive for them to investin the scheme. The Hagans purchased the homes belonging to the Mottels and Aprils, with funds loaned from Standard Bank and ABSA to do so and with mortgage bonds then registered over both properties. In addition, they purchased three other properties in this manner through Skei.

[20] The fifth respondent, Standard Bank was joined in these proceedings by reason of its interest in the Mottels’ property, given the mortgage bond in its favour registered over the property as security for the loan amount advanced of R418 000.00.

Applicants’ case

[21] The applicants contendedthat the agreements in terms of which they sold their properties to the Hagans were unlawful in that these agreements constituted an impermissible *lex commissoria* and a breach of the National Credit Act 34 of 2005 (“NCA”), alternatively were induced by false

misrepresentations made by Skei: namely, that he was a debt counsellor and that their properties would not be sold. It was argued further that given that the price of immovable property is a material term of a contract of sale in terms of section 6(1)(e) of the Alienation of Land Act 68 of 1981,the sale agreement is voidas a result of the re-purchase price not being recorded in the agreement.The applicants contended that given the illegality of the scheme it follows that the agreements fall to be declared void and the applicantsare therefore entitled to restitution.

Respondents' case

[22] The first and second respondents opposed the application and argued that the contradiction in the applicants' pleadings in the current proceedings and those in the eviction proceedings was material and determinative of the matter. This contradiction related to the version that the applicants did not intend to sell their properties at all in the current proceedings and the version that they did so but only for eight months in the eviction proceedings. It was argued further that the applicants signed the sale and other agreements, that no misrepresentations were made by Skei and that the agreements must accordingly be upheld.

[23] The Hagans denied that the agreements were unlawful. They argued that the applicants were free to contract on any basis and were aware that they were selling their properties to the Hagans. No misrepresentations were proved and the Hagans were unaware of any allegedmisrepresentations. Fraud by a third party does not permit a sale to be set aside unless the Hagans acted with

Skei. *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (O).The possibility of abuse is not sufficient to hold that an agreement is against public policy (*Juglalv Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (C) at 258) and the agreements have not been shown to be *contra bonos mores*. The payment of commission to Skei was permissible in that he acted as estate agent and paid expenses on behalf of the applicants. Given that the transfers were not prohibited in law, they do not fall to be set aside and in the event that they are, the Hagans stand to be compensated.

[24] It was argued for Standard Bankthat it holds a mortgage bond over the property previously owned by the Mottels as security for its loan of R418 000 to the Hagans, which amount would not have been advanced in the absence of this security.It is inconceivable that the applicants could have signed the cancellation of their bond and transfer of their property without appreciating what they were doing. However, the Bank has no objection to the transfer of the properties to the applicants provided that the bond currently registered in its favour is cancelled against payment of the full amount of R380 912.58 secured by such bond.

Discussion

Contrary to public policy

[25] The principle of *pacta sunt servanda* has been held by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 87 to be a "*profoundly moral principle, on which the coherence of any society relies*", but that the "*general rule that agreements must be honouredcannot apply to*

immoral agreements that violate public policy". In *Brisley v Drosky* 2002 (4) SA 1 (SCA) Cameron JA stated at para 93 that –

'*neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith*".

[26] In *Eastwood v Shepstone* 1902 TS 294 at 302 it was stated that:

'*(T)his Court has the power to treat as void and to refuse in anyway to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but once it is clear that any arrangement is against public policy, the court would be wanting in its duty if it hesitated to declare such an arrangement void. What we have to look at is the tendency of the proposed transaction, not its actually proved result*.'

[27] The effect of the judgments in *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) and *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) is that public policy generally favours the utmost freedom of contract; public policy properly takes into account the necessity of doing simple justice between persons; the power to declare a contract or term in a contract contrary to public policy and therefore unenforceable should be exercised sparingly and only in the clearest of cases; and a contract or term may be declared contrary to public policy if it is clearly inimical to the interests of the community, or is contrary to

law or morality, or runs counter to social or economic expedience, or is plainly improper and unconscionable, or unduly harsh or oppressive.

[28] Heher JA stated in *Juglal NO v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) at 258 that –

'*Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect… it follows that the tendency of a proposed transaction towards such a conflict… can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency)…An attempt to identify the tendency of contractual provisions may require consideration of the purpose of the contract, discernible from its terms and from the objective circumstances of its conclusion*'.

[29] In advertising a debt consolidation plan, Skei on his own version, drew the applicants into a scheme aimed atresolving their debt through the sale of their homeson an interim basis to "an investor". Both the Mottels and the Aprils signed the sale agreement with the Hagans as investorprior to their signature of the mandate to Skei to rehabilitate their "financial credibility". This mandate recorded the nature of the scheme that had been agreed: that the applicants' homes would be sold to the investor, the applicants debts settledby Skei, with agreed fees paid to Skei,and that after eight months the applicants would re-purchase the properties, by then debt-free, subject to their obtaining a bond

which if not obtained would lead to the sale of the properties on the open market. Skei confirmed thisto be the nature of the scheme agreed in these proceedings. The sale agreements with the Hagans were thereforesigned, even on Skei's version, on the basis of the underlying agreement recorded in the mandates signed later. The receipt by the Hagans of payments of R10 000 to R15 000 from Skei as an incentive for their "trouble" and so as to make it attractive for them to invest in the scheme confirms their role as investor recorded in the mandate. These payments and the number of properties purchased by them through Skei on the same basis, illustrates that they were knowing and willing participants in the scheme.

[30] The applicants responded to Skei's advertisement in order to resolve their debt, yet the scheme came at a cost with large fees and commissions paidoff the proceeds of the sale by the applicants to Skei. The applicants therefore lost ownership of their homes in order to settle debts in a substantially lesser amount than the sale price of the properties at great additional cost to themselves. The result was that they found themselves lessees in their homes having to stave off eviction proceedings instituted against them by the Hagans. The conclusion that the scheme preyed on economically vulnerable people, capitalising on their naivety and leaving them worse off than they had been before in having been stripped of their one major asset and source of physical security in the form of their home, is accordingly justified.

[31] Section 26 of the Constitution guarantees the right to have access to adequate housing, requiring the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation

of this right.The importance of this right is evidenced in its entrenchment in the Bill of Rights. It follows therefore that contractual schemes that serve to remove, undermine or diminish this right are clearly inimical to the interests of the community, and are plainly improper and unconscionable. This is more so in a society in which numbers of people find themselves caught in a spiral of debt, often causing them to expose themselves to undue risk in financial arrangements that are immoral, unjust or unduly harsh in their consequences. While the power to declare a contract or term in a contract contrary to public policy and therefore unenforceable should be exercised sparingly and only in the clearest of cases, I am satisfied that this is such a case. Were this Court not to conclude in the circumstances of a case such as this that public policy provided a basis upon which to refuse to sanction such schemes, the protection provided by law to the vulnerable would be unduly limited in circumstances that it should not.

[32] It follows therefore that the sale agreements, the mandates and the lease agreements are found to be contrary to public policy. In such circumstances it follows that the two deeds of sale entered into with the third and fourth respondents, the subsequent transfer of their immovable properties to the third and fourth respondents and the lease agreements entered into in respect of such properties fall to be declared null and void *ab initio*.

Misrepresentation

[33] The principle of *caveat subscriptor* expressed in *Burger v Central South African Railways* 1903 TS 571 at 578 and *George v Fairmead (Pty) Ltd*

1958 (2) SA 465 (AD) at 472A that "(w)*hen a man is asked to put his signature to a document he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature*"is subject to the important qualification that a person seeking to hold another bound by contract must have held a reasonable belief that the signatory intended to be bound by such contract.This is more so when signing a complex document with drastic consequences. It is for this reason that the rule has been held not to apply where a contract was signed without being read when it contained terms which no reasonable person would expect to find in it. *Keens Group (Pty) Ltd v Lötter* 1989 (1) SA 585 (C); *Aetiology Today CC v Van Aswegen* 1992 (1) SA 807 (W) at 810G; *Dlovo v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) at 525A–D; and *Fourie v Hansen and another* [2000] 1 All SA 510 (W).

[34] In *Brink v Humphries & Jewell (Pty) Ltd* [2005] 2 All SA 343 (SCA) Cloete JA stated that -

'*The law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not. Where such a misrepresentation is material, the signatory canrescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth. Where the misrepresentation results in a fundamental mistake, the "contract" is void ab initio. 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/her signature, while at the same time protecting such a person if he/she is under a justifiable misapprehension,*

caused by the other party who requires such signature, as to the effect of the document.'

[35] Even if I am wrong that the contracts are contrary to public policy, I am satisfied that the scheme wassold to the applicants as a debt consolidation plan, who signed the sale agreements on the basis of an interim sale to an investor. The applicants were not informed by Skei of the payments to the Hagans, the fact that there existed no obligation on the Hagans to sell the properties back to the applicants after eight months or at all and that the sale agreements amounted to a binding and permanent sale of their respective properties.

[36] The general rule remains that expressed in *Karabus Motors* (*1959*) *LPD vVan Eck* 1962 (1) SA 451 (C) at 453D by Watermeyer J that:

'*...if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties (see Wessels, Law of Contract, para 1122)*."

[37] However, an independent third person's misrepresentation may render a contract void *ab initio* if it induces the representee to enter into the contract in ignorance of its true nature and effect. *Standard Credit Corporation Ltd v Naicker 1987 (2) SA 49 (N) 52–53*. This was echoed in *Saambou-Nasionale Bouvereniging v Friedman* 1979 (3) SA 978 (A) at 999H-1000D in which it was

held that in certain circumstances a contracting party may rely upon the fraud of a third party.

[38] To the extent that Skei acted as estate agent in a contract to provide a special service to the applicants (*Gluckman v Landau & Co* 1944 TPD 261 at 267), he owed a duty to the applicants as his principals to act in good faith towards them in their conclusion of the sale agreements.Given Skei's representations regarding the basis of the debt consolidation scheme as recorded later in the mandate signed by the applicants, it is clear to me that Skei was obliged to draw to the applicants attention the terms of the sale agreements that could not reasonably have been expected in light of previous representations he had made to the applicants, namely that the properties were to be sold permanently without reference to an eight month sale period*(See in this regard Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 36*)*.This was so particularly given that the applicants had responded to an advertisement to consolidate their debt and not to sell their homes, yet on the same day were taken to Skei's attorney to sign agreements permanently selling their properties to the Hagans, who they had never met and who Skei failed to disclose he had paid to engage in the scheme.

[39] The non-disclosure of a fact is fraudulent if the guilty party foresees the possibility that failure to disclose the fact will cause harm to the other party, for instance, by inducing such to enter into a prejudicial transaction (*LAWSA 393*). I am satisfied that this is such a case in that had Skei disclosed these facts to the applicants, it is highly improbable that they would have signed the sale agreements. I accept in the circumstances the dictum of Jessel MR in *Redgrave*

v *Hurd* 1882 51 LJ Ch. 113 at page 117 referred to by Milne JP in *Standard Credit(supra)* Milne JP at 51 and*Sampson* v. *Union and Rhodesia Wholesale Ltd* (*in liquidation*) 1929 AD468 at 479 - 480that:

'If a man is induced to enter into a contract by a false representation, 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".'

[40] In *Du Toit v Atkinson's Motors Bpk* [1985] 2 All SA 149 (A) Van Heerden JA referred to Denning, LJ, in *Curtis* v *Chemical Cleaning and Dyeing Co Ltd* (1951) 1 All ER 631, 634, in the context of an exemption clause:

'*In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. It was held in R. V. Kylsant (Lord) (3) that a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation*.'

[41] Skei's representations during his respective meetings with the applicants, the content of which was echoed in the mandates later signed, illustrates prior conduct that caused or contributed to the false impression.

See*Dibley v Furter* 1951 4 SA 73 (C); and *Cloete v Smithfield Hotel* (*Pty*) *Ltd* 1955 2 SA 622 (O).

[42] On the facts before this Court it follows that a false impression was created knowingly by Skei and that this constituteda fraudulent misrepresentation which induced the applicants to enter into the sale agreement on the terms that they did in ignorance of the true nature and effect of the agreements.As a consequence of this misrepresentation a fundamental mistake arose on the part of the applicants regarding the nature, terms and effect of the agreements. It would therefore be unconscionable to enforce the terms of the sale agreements in the circumstances and such contracts fall to be declared void *ab initio* on the basis of fraudulent misrepresentation.

[43] The Hagans are not insulated as innocent purchasers in these transactions. On their own version they were paid by Skei in order to participate in the scheme and signed sale agreements which did not record the true nature of the entire transaction agreed. Accordingly, while they were under no misapprehensions as to the basis of the scheme, they failed to ensure that the sale agreements recorded that the intended re-purchase after eight months of the properties by the applicants in spite of this having been the intention of the parties. It is material that in the absence of such an agreement, the scheme was not capable of implementation in that the applicants were unable to rely on any rights between themselves and the Hagans.

[44] In *Maize Board v Jackson* 2005 (6) SA 592(SCA) at 596 Ponnan JA stated that:

'*The true enquiry in a matter such as this is to establish whether the real nature and the implementation of these particular contracts is consistent with their ostensible form. In pursuit of that enquiry one must strive to ascertain, from all the relevant circumstances, the actual meaning of the contracting parties. It therefore becomes necessary to examine in greater detail the agreements in question and the manner in which they were implemented."*

[45] It follows that sale and lease agreements signed did not give effect to the true nature of the agreement between the parties.

[46] I was referred by the applicants to the case of*Ditshego and others v Brusson Finance (Pty) Ltd* 5144/09 [2010] ZAFSHC 68 (22 July 2010) in which Jordaan J held that there existed a simulated transaction with funds lent to the applicants with the assistance of investors and that the agreement was unlawful and void to the extent provided in section 89 of the NCA given that the credit provider was unregistered. While the applicants sought a similar conclusion in the current matter, the facts of this matter are distinct insofar as there occurred an outright sale of immovable property with debts extinguished from the applicants' own proceeds of such sale. I am not persuaded therefore that there has been the provision of "*credit*" defined in the NCA to mean *"(a) a deferral of payment of money owed to a person, or a promise to defer such a payment; or (b) a promise to advance or pay money to or at the direction of another person*", or that the provisions of the NCA apply in this matter.

[47] The conduct of Skei's attorney, Kruger, requires mention. As an officer of this Court, it was incumbent upon to Kruger not only to satisfy himself that the

applicants were aware of the contracts they were signing but also to satisfy himself as the nature and lawfulness of the entire underlying transaction and to place before this Court all relevant documents justifying deductions made from the proceeds of the sale. Transfer costs were deducted from the applicants when the sale agreement specified differently and no other document was put up to justify the unusual payment of such costs by the applicants as sellers. Furthermore, the fact that the net proceeds of the sale were then paid to a related company, Altmarr Roofing, with very little of the funds finding their way to the applicants should reasonably have raised alarm, which it appears it did not.

Relief

[48] With regards to appropriate relief, I was referred by counsel for the Hagans to the case of *Legator McKenna Inc and another v Shea* 2010(1) SA 35 (SCA) in which the effect of invalidity of an agreement of sale in respect of immovable property that had been transferred to a third party was considered with reference to therule expressed in *Wilken v Kohler* at para 26:

'*Succinctly stated, the rule provides that, if both parties to an invalid agreement had performed in full, neither party can recover his or her performance purely on the basis that the agreement was invalid. The "rule" has its origin in an obiter dictum by Innes JA in Wilken v Kohler 1913 AD 135. In context, Innes JA was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. In the course of his judgment he then stated (at 144) obiter, as it turned out, that:*

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an…[oral] agreement of sale of fixed property… a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere granted that… it was in reality an agreement to sell, invalid and unenforceable law, at which both seller and purchaser proposed to carry out.'

(at para 28) '…*In the light of this explanation, which I find persuasive, I believe the time has come for this Court to express its unequivocal approval of the Wilken v Kohler rule. Moreover, although on the facts of Wilken v Kohler, Innes JA was dealing with statutory formalities, I can see no reason why the rule should not apply in a case where, despite the non-existence of any agreement, the parties' intention has been achieved. In both cases the condictio indebitii would normally be available because the transfer was motivated by a mistaken belief relating to the validity or the existence of the underlying agreement. And in both cases Wilken v Kohler would constitute an exception to the condictio indebitii for the same reason, i.e. that the purpose of the transaction had been achieved.*'

[49] McCall AJ in *Joosub v JI Case SA (Pty) Ltd (now known as Construction and Special Equipment Co (Pty) Ltd and others 1992(2) SA 665 (N) at 674G* found that "*where there was no sale-in-execution or where the sale-*

in-execution which purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor-in-title into whose name the property was subsequently transferred: "the plaintiff [the judgment debtor], as owner of the property, would be entitled to recover the [property] by way of a rei vindicatio."

[50] In *Menqa and another v Markom and others* [2008] 2 All SA 235 (SCA) at para 17 Van Heerden JA stated in relation to a sale in execution that "(a)*n applicant wishing to impeach a sale must prove bad faith or knowledge of the defect on the part of the purchaser at the time of purchase*". At para 24 the learned judge stated that "(i)*fthe sale-in-execution is null and void because it violates the principle of legality, as in the present case, then the sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name*."

[51] Cloete JA concurred with Van Heerden JA in *Menqa (supra)*and stated at para 49:

'*It is not necessary to consider the position at common law any further because to require Markom to pay Menqa the price paid by the latter for the property, or to pay the execution creditor the full debt owed together with accrued interest, as a prerequisite to his being allowed to recover the property, might altogether preclude him from obtaining the property and thereby possibly affect his and his family's constitutional right to access to adequate housing. That would be unconstitutional and therefore impermissible*.'

[52] Given my findings with regards to public policy and misrepresentation above, I am not persuaded that the conduct of the applicants has been negligent insofar as they failed to act where their immovable property was transferred in the name of the Hagans, or that this negligent misrepresentation allowed another to rely on it to its detriment, as was held in *Oriental Products (Pty) Ltd Limited v Pegma 178 Investments Trading CC and others* 2011 (2) SA 508 (SCA) at para 21 and 22. In such circumstances I am unable to conclude that the applicants stand to be estopped from attacking the validity of the sale of their properties to the Hagans.

[53] I am satisfied that the contracts formed part of a scheme constructed by Skei in which the Hagans participated and that, for the reasons set out above, the agreements are void *ab initio*. It follows therefore that the *status quo ante* must be restored and the applicants are entitled to restitution of their properties. However, simply to direct the Registrar of Deeds to re-register the property in their name would not properly take into account the fact that the Hagans paid for the properties and that, by virtue of the extinction of the applicants' bond and other debts, the applicants may have been unjustifiably enriched at the Hagans' expense.At the same time, the Hagans appear too to have been enriched in the amount of monthly payments made to them by the applicants. The interests of justice therefore require that the respective claims of the applicants and the Hagans be dealt with, preferably simultaneously, on the same papers, duly amplified in due course.

[54] With regard to the loan advanced to the Hagans by Standard Bank, secured by a mortgage bond over the property previously owned by the Mottels,

I accept that real rights are created in favour of the mortgagee by the registration of the mortgage bond and that in *Standard Bank of South Africa Limited v Saunderson and others* 2006 (2) SA 264 (SCA) at paras 1-3 the Court emphasised that the mortgage bond is an indispensible tool for spreading home ownership and that the value of a mortgage bond as an instrument of security lies in the confidence that the law will give effect to its terms.

[55] I am satisfied however that given the circumstances, the Bank's remedy is not against the applicants but against the Hagans who entered into the loan agreement with the Bank and who on their own version own a number of other properties, some of which obtained through the same scheme constructed by Skei. The interests of justice dictate that the risk to which the Bank is exposed in this regard does not bar the applicants from being granted their relief.

Costs

[56] There exists no reason as to why costs should not be orderedin favour of the applicants against the first four respondents, jointly and severally. I am satisfied that these costs be granted on the scale as between attorney and client given the circumstances of this matter and the conduct of the first to fourth respondents.In addition, there is no reason as to why the third and fourth respondents should be not be held liable for the fifth respondent's costs.

Order

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

1. The sale agreement entered into between the first and second applicants and the third and fourth respondents in respect of erf 4180 Kleinvlei, situate at 23 Cupido Cloete East Street, Eersterivier,is declared to be void *ab initio*and is set aside.

2. The sale agreemententered into between the third and fourth applicants and the third and fourth respondents in respect of erf 2329 Macassar, situate at 19 Swawel Road, Macassar, is declared to be void *ab initio*and is set aside.

3. The third and fourth respondents are directed to transfer erf 4180 Kleinvlei, situate at 23 Cupido Cloete East Street, Eersterivier, to the first and second applicants, unencumbered and without charge, within two months of date of this Order.

4. The third and fourth respondents are directed to transfer erf 2329 Macassar, situate at 19 Swawel Road, Macassar, to the third and fourth applicants, unencumbered and without charge, within two months of date of this Order.

5. The third and fourth respondents are directed to sign all documents and take all necessary steps and pay all necessary transfer, bond cancellation and all other reasonable costs without delay to effect thetransfer and registration of the immovable properties referred to in paragraphs 4 and 5 above, failing which the sheriff is authorised and directed to do so in the name and stead and at their cost.

6. The lease agreements entered into between the applicants and the third and fourth respondents are declared void *ab initio* and are set aside.

7. The applicants and the third and fourth respondents are granted leave to approach this Court on the same papers, duly amplified, for judgment in the amount representing the sum to which the other has been unjustly enriched.

8. The first, second, third and fourth respondents are directed jointly and severally, the one paying the other to be absolved, to pay the costs of the applicants and the fifth respondent on the scale between attorney and client.

KM SAVAGE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicants:	J A Nortje
	Instructed by Chantal Nicholas Attorneys
For first and second respondent:	J P van Niekerk
	Smit Kruger Inc.
For third and fourth respondent:	D van Reenen
	Instructed by BM Attorneys
For fifth respondent:	F Sievers
	Instructed by William Inglis Attorneys