REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/10152

DATE:30/06/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

……………………… …………………………
DATE SIGNATURE

In the matter between:

AUCTION ALLIANCE (PTY) LTD
Applicant

and

NETLUK BOERDERY CC First Respondent

PIETERS, MATHEUS JACOBUS Second Respondent

J U D G M E N T

HALGRYN, AJ:

The parties

[1] The Applicant is Auction Alliance (Pty) Ltd, cited herein as a company with limited liability, registered and incorporated as such in terms of the

company laws of South Africa, whose directors and employees, at all times material hereto, were allegedly the holders of a valid Fidelity Fund Certificate issued to them in terms of section 26(a) of the Estate Agency Affairs Act.[1]

[2] The First Respondent is Netluk Boerdery CC, cited herein as a close corporation registered and incorporated as such in terms of the Close Corporations Act of the Republic of South Africa.

[3] The Second Respondent is Matheus Jacobus Pieters, cited herein as the Managing Director of Witbank Abattoir (Pty) Ltd.

The relief sought by the Applicant

[4] The Applicant's claim against the First Respondent is contractual; for payment of the balance of commission earned in respect of a sale of certain immovable property, effected at an auction which was conducted by the Applicant. The Applicant's claim against the Second Respondent is based on a written deed of surety, which the Second Respondent had signed to ensure compliance by the First Respondent of its contractual obligation to pay the aforesaid commission to the Applicant.

[5] The relief sought by the Applicant - by motion proceedings - is the following:-

> "*1. That judgment be granted against the First and Second Respondents, jointly and severally, the one paying the other to be absolved in the sum of R3 700 000,00;*
>
> *2. Interest on the aforesaid amount at the rate of 15,5% per annum from 7 December 2010 to date of final payment;*
>
> *3. Costs of suit on attorney and own client scale;*
>
> 4. *Further and/or alternative relief.*"

[1] No 112 of 1976.

The relief sought by the Respondents

[6] The First and Second Respondents contend that the First Respondent was induced to purchase the aforesaid immovable property as a result of and on the strength of deliberate misrepresentations by the Applicant, entitling the First Respondent to rescission and restitution. They thus seek an Order that the Applicant's application be dismissed with costs, on the attorney and own client scale. The First Respondent also contends that it is entitled to return of the part payment of the commission, it had paid to the Applicant, in the amount of R2 million. It filed a counterclaim in which it seeks the following relief against the Applicant:-

> "*1. That the Applicant be ordered to pay the First Respondent the following:*
>
> *The amount of R2 million;*
>
> *Interest on the aforesaid amount at the rate of 15,5% per annum from 7 December 2010 to date of payment;*
>
> *Costs of suit on the scale as between attorney and own client.*
>
> *2. That such further and alternative relief as this Honourable Court may deem fit be granted to the First Respondent.*"

The factual background to the dispute

[7] The following facts – which lie within a small compass - are largely common cause, or cannot seriously be disputed. Moreover, I adopt the approach - which is by now trite - that the Applicant cannot succeed unless the statements or omissions made by the Respondents together with the undisputed facts would entitle the Applicant to relief.[2]

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[2] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430-431 and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235.

[8] The Applicant is an auction house. It conducted an auction at the Southern Sun Hotel in Sandton on 7 December 2010.

[9] The property which was auctioned off on this day, was a certain immovable property belonging to Hartenbos Landgoed (Pty) Ltd (in liquidation), situated in Hartenbos.

[10] Prior advertisements in the national press – placed by the Applicant – attracted the attention of prospective bidders and enticed them to attend this particular auction, including that of the Respondents.[3] The advertisements in the Sunday Times read as follows:-

> "*71 completed houses and 62 stands, Southern Cape … Hartenbos Landgoed (Pty) Ltd (in liq) (Master's reference: C1172/2009). Hartenbos Landgoed is one of the largest security resorts in the Garden Route coastline. Improvements: 71 luxury units (2 and 3 beds) with full services and ready to go. Stands: 62 serviced stands.*"

[11] It is indisputably so that the purpose of the advertisements was to generate interest in the auction and to induce and persuade prospective bidders to attend the auction; and to bid there, in attempts to purchase the advertised property.

[12] Encouraged and inspired by this advertisement, the Respondents did their homework and decided to bid up to R50 million for the property.

[13] The Second Respondent and his brother – an admitted attorney – attended the auction. At the auction the Applicant made available to all prospective bidders a "*flyer*" or "*auction papers*" which read as follows:-

> "*Hartenbos Landgoed is one of the largest security resorts on the Garden Route, situated between two river mouths at the Little Brak and Hartenbos Rivers. Just 10 minutes drive from Mossel Bay along the N2 highway. The estate includes internal roads, landscaping, boundary walls, security access and facilities. Improvements: 71 completed luxury units (2 and 3 beds) with full services and ready to go. Stands: 62 serviced stands.*"

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[3] The First Respondent being represented by the Second Respondent, at all times material hereto.

[14] The purpose of the flyers/auction papers was unarguably to convey to potential/prospective bidders who attended the auction that the characteristics of the property - which was about to be auctioned off - included, *inter alia*, the following:-

- It was one of the largest security resorts on the Garden Route.
- The estate included boundary walls.
- It contains 71 completed luxury units (2 to 3 bedrooms) fully serviced and which were ready to go.
- It included 62 serviced stands.

[15] The representations contained in the flyers/auction papers, echoed those representations made to the public at large in the advertisements in the Sunday Times. It is thus fair to say that those bidders – including the Respondents – who attended the auction as a result of the advertisements in the Sunday Times, were able to take much comfort from the fact that the contents of the flyers/auction papers reaffirmed the contents of the advertisements.

[16] Shortly upon attending the premises where the auction was about to be held, the Second Respondent completed the Applicant's registration form and signed it.[4] Above the space provided for signature the following appears in print:-

> "*I, the undersigned, acknowledge that I have fully read, understood and acquainted myself with the conditions of sale. Notwithstanding the fact that the auctioneer/s has not read out every clause of the contract, I will legally comply myself with all my obligations, including immediate signing of the conditions of sale on the fall of the hammer.*"

[4] A copy of this registration form appears as Annexure "B" at page 19.

[17] The property was auctioned off and the Second Respondent made the highest offer, resulting in the property being knocked down to him, at a bid price of R50 million.

[18] The Second Respondent, immediately after the bid was knocked down to him, signed a document, which was also a standard document utilised by the Applicant at its auctions, which reads as follows:-

> "*I, the undersigned, as bidder number 2374 acknowledge that at the auction which took place on 7 December 2010 at the Southern Sun, Hotel the property described as PTN10 of the farm Valley No. 219 Mossel Bay Road was knocked down to me at my bid price of R50 mill excluding auctioneer's commission and that I am accordingly required to immediately sign Auction Alliance's Conditions of Sale and confirm that I am aware of all the provisions thereof.*"[5]

[19] I did not distinguish between the handwritten portions and the printed portions on this document.

[20] The Second Respondent thereafter, representing the First Respondent, signed the Applicant's conditions of sale[6] and in his personal capacity, signed the deed of surety.

[21] Significantly the Respondents contend, in paragraphs 9.4 to 9.6 of the answering affidavit that the following occurred during the signing of the conditions of sale:-

> "*9.4 What also took place at the time of signing (and which the Applicant's deponent omitted to state) was that my brother in fact asked the deponent whether what was depicted on the 'auction paper' was indeed what he and I would find if we were to go down to Hartenbos (which we intended doing the next day). The deponent confirmed that everything is as stated save 'perhaps for a loose tile here or there'. He then jokingly stated that Investec Bank would "chip in" a bag or two of tile cement. A representative of Investec Bank, equally jocularly, declined this.*
>
> *9.5 I categorically state that at the signing of the said agreement I was under the firm impression that nothing in the agreement*

[5] A copy of this document appears as Annexure "C" at page 20.

[6] A copy of the conditions of sale is marked "D" and appears at pages 21-32.

would be contrary to what has been depicted in the auction papers and the advertisement (I also add that the auctioneer had a projection of the photograph on the advertisement projected as a background to the auction.) I was fortified in this belief of mine in that the auctioneer who required us to sign the documents stated that it was a 'standard document'.

9.6 Had I at any stage been asked to read through the documents or been explained what the contents thereof was or being told that what was in fact auctioned or described in this document was not what the liquidators and the auctioneers had represented to be sold, I would firstly not have bid at the auction (or at least not up to R50 million) and neither would have signed the conditions of sale."[7]

[22] The allegations in paragraphs 9.5 to 9.6 of the Respondents' answering affidavit were met with only a bald denial, were not dealt with it any amount of detail and thus not seriously denied in the Applicant's replying affidavit; the Applicant electing to brush it off as irrelevant. I view these allegations as material herein and I have no option but to find on the Respondents' version in this respect.

[23] It is unmistakably so that the Applicant had adopted the approach herein that its exclusionary clauses, which I deal with hereunder – would oust all possible defences herein.

[24] The Applicant contended that the following clauses contained in the conditions of sale are the "*most relevant for the purposes of this application*":-

24.1 The First Respondent acknowledged that it had read and understood all of the terms and conditions and agreed that it was bound thereto;[8]

24.2 The First Respondent was liable to pay the Applicant's commission, which was deemed to have been earned and was

[7] At pages 137-138.
[8] Clause 25.1.

payable immediately upon the fall of the hammer or upon the signing of the conditions of sale; whichever happened first;[9]

24.3 The property was sold "*voetstoots*";[10]

24.4 The Applicant furnished no warranties and undertakings relating to the property;[11]

24.5 The First Respondent acknowledged that:-

24.5.1 it had fully acquainted itself with the property;[12]

24.5.2 it was aware that certain portions of the property were undeveloped and incomplete;[13]

24.5.3 it purchased the property on the basis that it was incomplete;[14]

24.5.4 it assumed all risk in this regard;[15]

24.5.5 it waived and abandoned any claim against the Applicant as a result of the property being incomplete;[16]

24.5.6 the conditions of sale constituted the whole agreement;[17]

24.5.7 it had not been induced into entering into the agreement by any express or implied information, statement, advertisement or representation not contained in the agreement;[18]

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[9] Clause 5.1.
[10] Clause 14.
[11] Clause 14.1.1.
[12] Clause 14.4.
[13] Clause 14.1.2.
[14] Clause 14.1.3.
[15] Clause 14.1.2.
[16] Clause 14.1.3.
[17] Clause 25.
[18] Clause 14.3.

24.5.8 no variation, alteration or cancellation of the conditions of sale would be of any force or effect, unless in writing and signed by the parties.[19]

[25] Immediately after the Second Respondent signed the conditions of sale and the deed of surety, the First Respondent paid to the Applicant the amount of R2 million, in part settlement of the deposit. The Applicant allocated the R2 million – as it was allegedly entitled to do in terms of clause 3.6 of the Conditions of Sale, to its commission. This – so the Applicant contends - left an amount of R3,7 million due to the Applicant, by the Respondents, in respect of the Applicant's commission, earned as a result of the aforesaid auction and resultant sale.

[26] After the auction, the Second Respondent had the moment to inspect the property which the First Respondent had purchased at the auction. He found that what he thought the First Respondent had purchased, differed materially from what he found to be the actual case down in Hartenbos. The Respondents contend that the content of the advertisements and the flyers/auction papers were false and stated:-

"*8.11.1* *Twenty of the 71 units were not 'completed' and in some instances needed major building works in order to complete these units.*

8.11.2 *The property was not surrounded by boundary walls.*

8.11.3 *The property was not a 'security resort'.*

8.11.4 *There were no services to the 62 vacant stands as claimed.*

8.11.5 *An environmental contribution equal to 1% of the purchase price of each of the units sold will have to be*

[19] Clause 25.

paid by the environmental trust and the fees for the ROD have not been paid.

8.11.6 *Although the 62 stands were in fact sectional title units as set out in the conditions of sale, neither the 71 units nor the 62 units were 'ready to go'.*"[20]

[27] These material allegations as to how the contents of the advertisement and the flyers/auction papers differed, from what was actually the case, were once again met with a bald denial by the Applicant in its replying affidavit; the Applicant again electing to contend that these allegations are irrelevant.

[28] The Respondents contended further that the Applicant and the liquidators were aware of the true facts and the incorrectness of the advertisements.[21]

[29] Significantly, this was not simply a bald unsubstantiated allegation. To support this allegation the Respondents alleged the following:-

"*8.12 In this regard I firstly refer this Honourable Court respectfully to the affidavit made by one Martha Maria Pretorius annexed hereto as 'MJP3' (together with Annexures 'A' and 'B' thereto). The contents of this affidavit can be translated and summarised as follows:-*

8.12.1 Said Ms Pretorius is an estate agent in the Hartenbos area. She was involved with the Hartenbos Landgoed since 2004.

8.12.2 On 20 September 2010 she wrote to the liquidators making certain suggestions regarding the sale of the units. These suggestions are contained in Annexure 'A' and 'B' of the affidavit.

8.12.3 In the said marketing proposal she stated that 9 units were still incomplete and a lot of construction work still had to be done in respect of other units. She provided the liquidator with details of the units which were not completed together with photographs and quotes.

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[20] In paragraph 8.11 of the answering affidavit at page 130-131.

[21] Paragraph 8.11.7 at page 131.

8.12.4 She also, upon enquiries, personally in her office conveyed the same to Mr Richard Gross of Investec Bank on 2 November 2010.

8.13 I also respectfully refer the Honourable Court to Annexure 'MNJP4' hereto, being an affidavit of a copy of an affidavit (sic) *by one Johanna Francina Mouton. For ease of reference and sake of convenience and with due regard to the importance of the affidavit, I quote the contents thereof here in full:-*

'1. I am the estate manager of the estate known as Hartenbos Landgoed …

2. I have been the estate manager for the past 2½ years whilst the developer of the estate, Hartenbos Landgoed (Pty) Ltd was in the process of going into liquidation.

3. During this period referred to in clause 2 supra various officials of Investec Bank visited the property. They required me during these visits to unlock the various units for inspections as well as the show houses for sale. On occasion Mr Pellow of West Trust, the liquidators, accompanied these officials. I attach hereto a photocopy of the business card which he gave to me on one of his visits as annexure "A".

4. During or about October/November 2010 a Mr Gareth Currie of Auction Alliance paid a visit to the estate. He informed me that the property was going on auction and he was there to take photos for the publication. I attach hereto a copy of his business card as annexure "B".

5. During November 2010 an advertisement by Auction Alliance appeared in the newspaper, Die Burger. At that stage the said Currie from Auction Alliance was in my office and showed me the advertisement in Die Burger as well as the Auction Alliance Board to advertise the sale. I immediately pointed out to him that the advertisement was incorrect in the following respects:-

(a) There were not 122 units for sale and they were not 'ready to go'. There were only 71 units of which 10 units were not completed.

> (b) *There were no boundary walls and this was not a security estate.*
>
> (c) *He immediately phoned his superior in Cape Town. He told me that the staff member responsible for this advertisement would surely lose his job.*
>
> 6. *On various occasions a Mr Zindel of Auction Allowance*[22] *(business card attached as Annexure "C"), Mr Wallace from West Trust as well as a woman claimed to be the advocate of Investec, paid a visit to the property. On all these occasions I had to unlock the houses, including houses not completed for them to inspect. I can categorically say that the officials from Investec Bank, West Trust and Auction Alliance all knew about the houses not fully completed and that there was no security walling.*'

> 8.14 *Both West Trust, Wallace Trust and Mr Gareth Currie are referred to in the advertisement annexed hereto as Annexure 'MJP1'.*
>
> 8.15 *In further confirmation of the correctness of the affidavit of Ms Mouton I respectfully refer the Honourable Court to annexure 'MJP5' hereto, being a copy of an extract of the 'Entry control for visitors or vehicles' at Hartenbos Landgoed for 18 November 2010 indicating a visit by one, 'Gareth' from the Applicant between the hours 08h40 and 09h50.*
>
> 8.16 *At the auction, representatives of the liquidators, Investec Bank and the Applicant were present. At no stage prior to the commencement of the auction were any of the aforesaid false representations pointed out to the bidders.*"

[30] Again, the Applicant brushed off these allegations with bald denials in its replying affidavit, steadfastly contending that they are irrelevant. These allegations are highly relevant and I am left with no option but to accept the Respondents' contentions in this regard and to find that the Applicant knew that the contents of its advertisements and the flyers/auction documents differed materially from the true facts.

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[22] Who is also the deponent to the Applicant's founding affidavit herein.

The legal position and its application to the facts herein

[31] In my view, the Applicant was/is misconceived in its firm belief that its exclusionary clauses could oust any defence, including that of a deliberate misrepresentation herein. On the contrary, a defence of fraud – if proven on the facts – would in my view, trump all exclusionary clauses. Nestadt JA found:

> *" That leaves the question of fraud. No doubt fraud is a special case. In words of Denning LJ in Lazarus Estates Ltd v Beasley [1956] 1 QB 702 at 712, **'fraud unravels everything'.** Professor Baxter, in his Administrative Law at 519, says that **dishonesty is the most tenacious ground of review; it survives the strictest ousters of the Courts' jurisdiction**. The well-known case of Union Government v Fakir 1923 AD 466 is a good illustration of this."*[23] (I added the emphasis.)

[32] Mr Davis on behalf of the Respondents, referred me to a recent – as yet unreported – Judgment,[24] wherein Bosielo JA stated as follows:-

> "*[21] It is true that any misrepresentation is likely to result in a mistake made by the person induced by it to enter into a contract. But that mistake might not be iustus and therefore actionable. If, however, the mistake is both reasonable and material, the contract may well be void. But in this matter mistake was not the primary basis of Morgan Air's claim that it was entitled to claim return of the moneys paid under it. Its claims were made on the basis of fraudulent misrepresentation. And the court below erred in finding that the contract was rendered void by the unilateral mistake of Morgan Air.*
>
> *[22] It has been settled law for many decades that a material representation renders a contract voidable at the instance of the misrepresentee. Absent the voetstoots and exclusion clauses cited above, Morgan Air would have been entitled to ask for rescission and restitution even if the misrepresentation had been innocent.*
>
> *[23] But liability for a misrepresentation made innocently and even negligently can be excluded by parties to a contract – hence the conjecture that Murphy J found that the misrepresentation had been made negligently and that it had resulted in iustus error that rendered*

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[23] In *Gilbey Distillers & Vinters (Pty) Ltd and Others v Morris NO and Another* 1991 (1) SA 648 (A), at p659.

[24] *Sim Road Investments CC v Morgan Air Cargo (Pty) Ltd*, under Case No. 024/10, Harms DP, Lewis JA, Seriti JA and Petse AJA, constituting the remainder of the Bench. It was not clear from the copy which was handed to me if the remainder of the Bench concurred - but I assume so - as I am convinced that Mr Davis would have informed me if this were not so.

the contract, including the exclusion clauses, void. As stated, however, a misrepresentation generally renders a contract voidable. The innocent party may elect to abide by it even where the other party has been fraudulent. ***The difference that fraud makes is that one cannot contract out of liability for fraudulent conduct****.*" (I added the emphasis.)[25]

[33] Bosielo JA continued to state:-

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

[34] It also does not avail a party to a contract, who stands accused of fraud, to contend that the misrepresentee had been foolish or negligent in relying on the misrepresentation. Bosielo JA further stated:-

"*[24] And even where a misrepresentee has been foolish or negligent in relying on the fraudulent misrepresentation, that does not in any way affect the liability of the misrepresentor. In Standard Credit Corporation Ltd v Naicker*[26] *Milne JP said it does not avail one guilty of fraud to say that the victim was negligent in believing the misrepresentation. He quoted from the judgment of Jessel MR in Redgrave v Hurd*[27]*:-*

> *'If a man is induced to enter into a contract by false misrepresentation, it is not sufficient answer for him to say "if you had used due diligence you would have found out the statement was untrue'."*

[35] In *Central Merchant Bank Ltd v Oranje Benefit Society*[28] the Court stated the following:-

"*In order to give a fraudulent person immunity for his statements, it is not enough that a more careful person might not have been deceived. …*

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[25] Bosielo JA relied on the following authorities in support of his *dictum*: *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 2; R H Christie, *The Law of South Africa,* 5th edition (2006) at 286*ff*; *Trotman v Edwick* 1951 (1) SA 443 (A) and *Ranger v Wykerd* 1977 (2) SA 976 (A); *Wells v South African Alumenite Company* 1927 (A) 69.

[26] 1987 (2) SA 49 (N) at 51B-E.

[27] (1882) 51 LJ Ch 113 at 117.

[28] 1975 (4) SA 588 (C) at 594F.

> *The growing trend and tendency of the courts will continue to move towards the doctrine that negligence in trusting in a misrepresentation will not excuse positive wilful fraud or deprive the defrauded person of his remedy.*"

[36] Mr Wickins, on behalf of the Applicant correctly submitted, that the Respondents must allege and prove fraud "*clearly and succinctly*" and in this respect referred me to *Courtney-Clarke v Bassingthwaighte.*[29] I also agree with Mr Wickins that fraud is not easily inferred, proved or established and that the Respondents bear the *onus* to establish the alleged fraud. He also correctly submitted that a factual basis must be laid which proves the fraud and speculative propositions do not suffice.[30]

[37] Mr Wickins also correctly submitted that the following essential allegations had to be made and proved – the standard being no higher than on a balance of probabilities - in order to establish fraud:

37.1 That a representation was made to the Respondents;

37.2 The content of the representation;

37.3 That the representation was untrue;

37.4 That the Applicant knew that the representation was untrue;

37.5 That the Applicant intended the representation should be acted upon by the Respondents;

37.6 That the Respondents were in fact induced to act upon the representation.[31]

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[29] 1991 (1) SA 684 (Nm) 689.

[30] Mr Wickins referred me to *Gilbey Distillers and Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (SE); *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 (W).

[31] He referred me to *Ruto Flour Mills (Pty) Ltd v Moriates* 1957 (3) SA 113 (T); *Smith and Youngson (Pvt) Ltd v Dubie Bros* 1959 (2) SA 130 (FC); *Novick and Others v Comair Holdings Ltd* 1979 (2) SA 116 (W) 149; *LAWSA* Vol 5(1) (paras 148-149); *Harms,* Amler's *Precedence of Pleadings* 7th edition, 215; *Principles of Pleadings and Civil Action,* page 300. There hardly exists a more comprehensive compilation of the authorities relating to the subject under discussion, than the one by Harms, *supra*.

[38] I now turn to deal with, whether – as a fact – the Respondents succeeded in establishing the existence of a deliberate misrepresentation herein.

[39] The advertisements in the Sunday Times and the flyers/auction papers which were handed out to bidders at the auction constituted clear representations by the Applicant to the Respondents. I do not understand this to be in dispute, and it would be foolhardy to contend that it was. In the particular circumstances of this case, these representations were augmented by the verbal assurances, by the deponent to the Applicant's founding affidavit, to the Second Respondent and his brother, that "*save for a loose tile or two*" the property in Hartenbos was exactly as described in the advertisement and in the flyers/auction papers.

[40] The content of the written representations are not in dispute and they are as contained in the advertisements and the flyers/auction papers. In addition, I have to accept the verbal assurances to the Respondents, by the deponent to the Applicant's affidavits filed herein - as they were not earnestly denied.

[41] These representations were unquestionably untrue. I have no option but to find on the Respondents' version that this is so. It must be borne in mind that the best possible defence for the Applicant to the First Respondent's counter-claim herein, would have been to prove – and this assuredly would not have been too difficult, (if it was indeed so), - that there existed no deceptiveness in the representations. This was purely a factual question; but the Applicant elected not to deal with it.

[42] The full extent of the untruth, was fully set out and canvassed in the answering affidavit, and not at all seriously placed in dispute by the Applicant in its replying affidavit. A bald denial about something so material herein, cannot and does not suffice. The same holds true for the remainder of the Applicant's bald and unsubstantiated denials herein.

[43] The Respondents took care to show that the Applicant was aware of the fact that the representations were untruthful and in similar vein, the Applicant did not seriously contest the direct and pertinent allegations, that it was fully aware of the falsehood, of the representations. Again – a bald denial cannot assist the Applicant and I have no option but to find on the Respondents' version in this respect.

[44] I also have to accept the Respondents' contention that the Applicant intended that the representations should be acted upon by the Respondents. It cannot - conceivably - be contended otherwise. That was the designed purpose of the advertisements and the flyers/auction papers.

[45] Lastly - on the topic of whether the Respondents have alleged and proven all the necessary elements/requirements of a deliberate misrepresentation - I have to accept the Respondents' version, when they contend that they were – as a fact – induced to act upon the misrepresentations. This was the very reason they elected to bid for the property at the auction.

[46] In conclusion, by conducting the auction under these circumstances, i.e. well aware of the fact, that that which was about to be auctioned off, differed materially from the advertisements which allured and enticed prospective bidders to attend the auction in the first place, and the contents of

the flyers/auction documents which reverberated - in every respect - the contents of the advertisement, leaves room for one inescapable conclusion; the Applicant deliberately misrepresented the true facts to the bidders who attended the auction as a result of the advertisements and more specifically to the Respondents herein. Significantly, the Applicant never sought to contend that the misrepresentation was either innocent, or negligent.

[47] Mr Wickins also contended that the written and signed conditions of sale which contained the clause that the property was "*incomplete*" leave no room for me to find a deliberate misrepresentation. I disagree. Even if I were to find that the Second Respondent did in fact read the conditions of sale, the recordal - itself - that the property which was being purchased was "*incomplete*" would not have been inconsistent with the contents of the advertisement and the flyers/auction papers. This was clearly a development and the referral to 62 (empty) stands could be understood by any reasonable businessman/developer, as rendering the estate being "*incomplete*", in that respect. This also does not detract from the fact that the advertisements and the flyers/auction papers were false in other material respects. Moreover, the written acknowledgement, that the property was "*incomplete*", also cannot outdo the deliberate misrepresentations, for the reasons I set out hereinabove.

Conclusion

[48] In the premises, the Respondents have successfully alleged and proved a deliberate misrepresentation herein, by the Applicant. The Applicant's application must therefore fail and the First Respondent's counter-application must succeed. All the parties herein claimed costs on the attorney and own

client scale and no submissions were made that – whichever way it went – I should find otherwise. In any event, it would seem the appropriate scale, given the findings herein. In the premises I make the following Order:

1. The Applicant's application is dismissed with costs on the scale as between attorney and own client.
2. The Applicant is hereby ordered to pay to the First Respondent, the amount of R2 million, together with interest on the aforesaid amount, at the rate of 15,5% per annum from 7 December 2010, to date of payment.
3. The Applicant is hereby ordered to pay the First Respondent's costs in respect of the counter-application on the scale as between attorney and own client.

L P HALGRYN
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DATE OF THE HEARING: 8 JUNE 2011

DATE OF THE JUDGMENT: 30 JUNE 2011

COUNSEL ON BEHALF OF THE APPLICANT: ADV GD WICKENS

COUNSEL OF BEHALF OF THE RESPONDENTS: ADV N DAVIS SC