IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO.: 14337/2007

In the matter between

NADARAJ NARAINSAMY PERUMAL **APPLICANT**

and

J G BAYETT **FIRST RESPONDENT**

AUCTION ALLIANCE KZN (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

MOKGOHLOA J

1. The applicant brought an application seeking the following order:

> "1. That the agreement between the Applicant and First Respondent signed on the 18th September 2007, is hereby declared void and of no force and effect.
>
> 2. Directing the Second Respondent to pay to the Applicant the sum of R303 400.00;
>
> 3. Directing the First and Second Respondents to pay the cost of this application jointly and severally."

Background

2. On 16 September 2007, the applicant read an advertisement in a Sunday newspaper regarding a residential development site at Ramsgate which would be auctioned on 18 September 2007. The advertisement gave a phone number of Mr Andrew Miller of the second applicant (the auctioneers), from whom enquiries could be made. The advertisement included an aerial photograph of the property to be sold.

3. The applicant wanted to view the property and, on 17 September 2007, he telephoned Mr Miller enquiring about the exact location of the property who advised the applicant to look out for a sign board on the N2 freeway at Ramsgate which would indicate where the same was situated. The applicant found the sign board which referred to: "This 26 000m² residential development site going on auction…"

4. On 18 September 2007 the applicant attended the auction and paid an initial deposit of R25 000.00 to be registered as a bidder. Upon registering for the auction, a brochure containing the general auction information; the two colour aerial photographs of the area where the property is located, with the boundaries of the property itself superimposed in red on such photographs; general information on the property; the title deed information on the property; municipal information on the property; a description and a copy of the title deed of the property; survey – general diagrams of the property which show boundaries and beacons; and a draft conditions of sale were handed to the applicant. In addition, a copy of the aerial photograph of the property was projected onto the screen at the auction.

5. In the belief that the sign board was in fact on the property to be sold, the applicant bid R1. 85 million, therefore and the property was knocked down to him. Thereafter the applicant signed an agreement of sale and paid a further amount of R278 400.00 making a total payment of R303 400.00. The sale agreement contained the following clause:

"**VOETSTOOTS, EXTENT AND REPRESENTATIONS**

12.1 The **PROPERTY** is sold *"voetstoots*" and subject to the terms and conditions and servitudes mentioned or referred to in the current and/ or prior Title Deeds and to the conditions of establishment of the Township in which it is situated and to the zoning applied to it under the Town Planning Scheme. The **SELLER** shall not profit by any excess nor shall it be answerable for any deficiency in the extent thereof. Neither the **SELLER** nor the **AUCTIONEER** shall be responsible for pointing out to the **PURCHASER** any surveyor's pegs or beacons in respect of the **PROPERTY**.

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

12.3 The **PURCHASER** acknowledges that he has fully acquainted himself with the **PROPERTY** he has purchased."

6. The applicant later discovered that the sign board was not erected on the properly to be sold but on an adjacent property, the fact which was never drawn to the attention of potential bidders at the auction.

7. The applicant contended that the fact that the sign board was not on the property which formed the subject matter of the sale, resulted in there being no consensus *ad idem* between the parties as a result of a *iustus* error *in corpore* and therefore no agreement came about.

8. The respondents, on the other hand, argued that the documents made available to the applicant before the auction ought to have enabled him to have ascertained the exact location of the property. They further argued that the applicant is precluded from relying on the unilateral mistake by reason of clause 12 of the Agreement of Sale, as stated on paragraph 5 supra.

9. The onus is on the applicant to prove that there existed a unilateral error necessary to avoid the sale agreement. *In casu*, it is clear that the applicant intended to purchase a property on which the sign board was situated and not another property. This error was brought about by the fact that the sign board referred to "this property" being sold on auction, whereas the property to be sold on auction was an adjacent property. Therefore the sign board contained a misrepresentation.

10. It is settled law that a unilateral error does not serve to avoid a contract unless it is *iustus*. (***Allen v Sixteen Stirling Investment (Pty) Ltd 1974 (4) SA 164 (DCLD)****)*. An error is said to be *iustus* if it was caused by the misrepresentation of the other party. ***Fagan CJ*** stated the following in ***George v Fairmead (Pty) Ltd 1958 (2) SA 465(A)at 471 a-d:***

> *"When can an error be said to be iustus for the purpose of entitling a man to repudiate his apparent consent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have*

considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself?. . . If his mistake is due to a representation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound"

11. Mr Pammenter SC, for the applicant, referred to various cases wherein the error was found to be *iustus*. In ***Mareskey v Morkel 1994 (1) SA 249***, the appellant appealed against the magistrate's finding that the respondent's mistake was *iustus*. The facts were briefly as follows: A property stated to be situated "next to No 11 on Ottery Varkensvlei Road" was advertised as being up for auction. In fact the property was some 200 to 300 metres away from 11 Ottery VarkensVlei Road. This fact was brought to the attention of prospective bidders at the commencement of the auction. The respondent was, however, not present when the announcement was made. The respondent's bid was not accepted at the auction and, on the following day, the respondent called the auctioneer and made a higher offer which was accepted by the appellant. On the day the purported agreement was signed, the auctioneer showed the respondent a street map which reflected the correct position of the property and a site diagram. The respondent argued that this did not alert him to the fact that the property was not next to No 11 Ottery VarkensVlei Road. The court dismissed the appeal and confirmed that the respondent's mistake was *iustus*.

12. In ***Allen v Sixteen Stirling Investment (Pty) Ltd 1974 (4) SA 164 (DCLD),*** the plaintiff brought an action seeking an order declaring a written agreement of sale of an immovable property null and void, averring that he entered into the agreement in the *bona fide* belief that

he was buying an immovable property pointed out to him by the defendant's agents, whereas in fact the property pointed out was not the property described in the sale agreement. The court found that the plaintiff's mistake was *iustus*.

13. In ***Sheperd v Farell's Estate Agency 1921 TPD 62***, the estate agency advertised that it handled the sale of businesses and that their motto was "*no sale no charge*". Shepherd instructed them to sell his business, and signed a mandate without reading it. In terms thereof, he bound himself to pay a commission to the agency if a sale took place, whether or not it was a result of their efforts. The Court found that he was not bound by this provision. He mistakenly thought that the contract was substantially in terms of the advertisement and this mistake was caused by the advertisement itself and the agency's failure to draw attention to the conflict between the advertisement and the contract.

14. It is therefore clear that a party induced to enter into a contract by misrepresentation is only bound by such contract if the misrepresentation was brought to his attention by the representor. *In casu*, it is not sufficient for the respondent to argue that the applicant should have ascertained the true position of the property from the brochure and on the aerial map handed to him immediately prior to the auction. In **Shepherd's** case supra, had Shepherd read the document which he signed, he would have realised that, notwithstanding the estate agency's motto as contained in the advertisement, he could still be held liable for commission on a sale of the property which did not result from the agency's efforts. Irrespective of this, Shepherd was entitled to rely on the mistake induced by the advertisement.

15. Similarly in ***Maresky's*** case *supra*, the appeals court confirmed the magistrate's finding that Mr Radowski, the auctioneer, by giving the respondent the street map and site diagram, did not do enough to rectify the mistake in the advertisement. The respondent's error was deemed *iustus*.

16. *In casu*, the applicant saw an advertisement on the newspaper with Mr Miller's telephone numbers. Mr Miller referred the appellant to the sign board which referred to: "This 26 000m² residential development site going on auction…" Relying on the sign board and its location, the appellant attended the auction on the scheduled date. He bid for the "This 26 000m² residential development site…" and the property was knocked down to him. Given the decisions in ***Maresky***; ***Allen***; and ***Shepherd cases, supra***, it follows that the fact that the applicant may have been able to deduce from the brochures and aerial map given to him immediately prior to the auction, but did not appreciate that the sign was on the wrong property, did not mean that his error was not *iustus*. In my view the applicant's error is in fact *iustus*.

17. The next issue to be decided is whether the applicant is precluded from relying on the unilateral mistake by reason of Clauses 12 and 13 of the Sale Agreement. The respondent argued that the applicant, having acknowledged that he had fully acquainted himself with the property he purchased, has expressly waived any rights as a result of the representation or advertisement. The respondent relied on the case of **Trollip v Jordaan 1961 (1) SA 238 (A)** where it was held that an exemption clause precluded the mistaken party from rescinding on the ground of a unilateral mistake induced by the other party's innocent misrepresentation. It should, however, be noted that in **Trollip's** case the buyer's mistake was not regarded as an error *in corpore.* The court

held that if the buyer's mistake was an error *in corpore*, then the sale may well have been void.

18. The sale agreement in ***Allen's*** case *supra,* contained clause 16 (similar to clause 12 *in casu*). **Faram AJ** in ***Maresky*** referred to the decision of **Howard J** in ***Allen's*** *case* and stated the following:

> *"…where there was an error in corpore, which vitiated consent to the whole contract, a clause such as clause 16 in the purported agreement in this case does not avail the party who seeks to contend that the purported agreement must be enforced, even where the error in corpore relied on was induced by a misrepresentation."*

I am in full agreement with Faram AJ.

19. The above having been stated, I am satisfied that:

19.1 The applicant was under a unilateral error that induced him to conclude the sale agreement of the property belonging to the second respondent.

19.2 The error was *iustus.*

19.3 No consensus ad idem was reached between the parties.

19.4 The sale agreement is *void ab initio* and the appellant is entitled to a refund of the moneys he has paid.

In the circumstances I make the following order:

1. **The agreement between the applicant and the first respondent signed on 18 September 2007 is declared void and of no force and effect.**

2. **The second respondent is directed to pay to the applicant the sum of R303 400.00.**

3. **The first and second respondents pay the costs of this application jointly and severally.**

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JUDGE MOKGOHLOA

COUNSEL

Counsel for the Applicant:	C.J. Pammenter SC & D. Woodhaymal
Instructing Attorneys:	A. Soodyall & Associates
Counsel for the First Respondent:	S.M. Alberts
Counsel for the Second Respondent:	A. J. Troskie SC
Instructing Attorneys:	Geyser Du Toit Louw & Kitching Inc
Date of hearing:	30 January 2009
Date of Judgment:	31 August 2009